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THE
FEDERAL REPORTER.

VOLUME 134.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

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FEDERAL REPORTER, VOLUME 134.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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² Appointed February 23, 1905.

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* Appointed March 17, 1905.

* Resigned March 11, 1905.

* Appointed March 14, 1905.

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⁶ Resigned February, 1905.

⁷ Appointed to succeed Francis J. Wing.

⁸ Died December 17, 1904.

⁹ Appointed January 17, 1905.

¹⁰ Resigned February 23, 1905.

¹¹ Appointed Circuit Judge March 13, 1905.

¹² Became Circuit Judge.

¹³ Appointed March 18, 1905.

¹⁴ Appointed March 17, 1905.

¹⁵ Appointed March 6, 1905.

¹⁶ Resigned January 9, 1905.

¹⁷ Appointed to succeed Romanzo Bunn.

NINTH CIRCUIT.

| | |
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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

WILLIAMS et al. v. NEELY et al.*

(Circuit Court of Appeals, Eighth Circuit. November 18, 1904.,

No. 2,046.

1. EQUITY—JURISDICTION TO ENJOIN ACTION AT LAW.

Any fact which renders it against conscience to enter or execute a judgment at law, and which was not available to the defendant at law, confers jurisdiction upon a court of equity to enjoin the proposed entry or execution.

2. SAME—PROMISSORY NOTE—EQUITABLE DEFENSE THOUGH NEITHER OFFSET NOR COUNTERCLAIM.

A sound reason, inhering in the same transaction from which a promissory note springs, why the holder ought not, in equity and good conscience, to recover its face value, is a good equitable defense to it, although this defense constitutes neither an offset, a counterclaim, nor an affirmative cause of action against the holder of the note.

3. PROMISSORY NOTE—PURCHASE PRICE—DEFECT OF TITLE.

A partial failure of consideration which results from a defect of title is a good defense pro tanto to an action by the vendor upon a promissory note given for the purchase price of land which the vendor has conveyed with covenants of warranty and against incumbrances.

4. JURISDICTION IN EQUITY—ACTION AT LAW—INJUNCTION.

An injunction should issue to stay an action at law upon a promissory note for the purchase price of land until this equitable defense of reduction is allowed whenever the remedy at law is less certain, prompt, and efficient to attain the ends of justice, either because the interests of the parties require that the title to the land should be perfected, that their rights should be adjudicated, and that the litigation should be closed—a result which no remedy at law is adequate to accomplish—or because it entails circuity of action, or because there is imminent danger of unjustifiable loss or injury to the payee of the note, which a court of equity may, and a court of law cannot, prevent.

5. SAME—WHAT ADEQUATE REMEDY AT LAW IS.

The adequate remedy at law which will deprive a court of equity of jurisdiction must be a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity.

* Rehearing denied February 10, 1905.

6. ASSIGNEE OF CHOSE IN ACTION—DEFENSES AGAINST ASSIGNOR.

The assignee of a chose in action takes it subject to all the defenses which could have been set up against it in the hands of the assignor at the time of the assignment.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, § 177.]

7. SAME—NOTE OF DEBTOR—DEFENSES AGAINST ASSIGNOR.

One who purchases for value of a creditor the obligation of his debtor, and obtains the latter's promissory note, payable to himself, as evidence of his obligation, with full knowledge of the consideration thereof, and of the facts which condition the inception of the original obligation, takes the note subject to all the defenses which existed against it in the hands of the original creditor.

8. WAIVER—EQUIVALENT OF ESTOPPEL.

The basis of waiver is estoppel, and where there is no estoppel there is no waiver.

9. STATUTE OF LIMITATIONS—DEFENSE OF REDUCTION OR RECOUPMENT SURVIVES AS LONG AS CLAIM SURVIVES.

The defense of reduction or recoupment, which arises out of the same transaction as the promissory note or claim, survives as long as a cause of action upon the promissory note or claim exists, although an affirmative action upon the subject of the defense may be barred by the statute of limitations.

10. EQUITY—LACHES—DEFINITION.

The doctrine of laches is that courts of equity are not bound by, but usually act in analogy to, the statute of limitations governing actions at law of like character.

Under ordinary circumstances a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.

11. SAME—DELAY IN INTERPOSING EQUITABLE DEFENSE—CULPABLE LACHES.

It is not culpable laches for one who has an equitable defense of reduction to a promissory note, which has been and is the subject of pending litigation in another court, and which, if available at law, would survive as long as the cause of action upon the note existed, to wait until an affirmative action at law upon the subject of the defense is barred, and until the equitable defense is rejected in an action at law upon the note, before invoking the aid of a court of equity to enjoin the prosecution of the latter action until his equitable defense is allowed.

12. CO-ORDINATE JURISDICTION—COURT WHICH FIRST ACQUIRES, RETAINS.

The court which first acquires jurisdiction of specific property by the issue and service of process in a suit to enforce a lien upon it, in which it may be necessary to take possession or control of it, retains jurisdiction until the end, free from the interference of any court of co-ordinate jurisdiction.

13. SAME—SUBSEQUENT SUIT SHOULD NOT BE DISMISSED, BUT STAYED.

A subsequent suit involving rights in the same property in a court of co-ordinate jurisdiction should not be dismissed, but, before a seizure of the property under it, should be stayed until the proceedings in the earlier suit are terminated, or ample time for their termination has elapsed.

Hook, Circuit Judge, dissenting.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

This is an appeal from a decree which dismissed a bill in equity exhibited by the complainants below, Joseph A. Williams and Annie Williams, to enjoin

the prosecution of an action at law which the defendant Richard M. Neely had brought against them in the court below to enforce the payment of their promissory note for \$3,500, dated March 1, 1893, and due March 1, 1898, and to obtain a decree adjudicating the claims of the defendants in this suit to three quarter sections of land in the state of Nebraska. The material facts disclosed at the final hearing were these: Under the will of Richard S. Malony, Sr., Richard S. Malony, Jr., and Annie H. Neely owned three quarter sections of land, subject to the liens of two legacies which were charged upon the lands by the will—one of \$200 per year payable to the defendant Hannah Blake, and one of \$100 per year payable to the defendant Sarah Foss. They sold one of these tracts to the defendant Stanley B. Wilson, another to the defendant Wenzel Herdlichtka, and the third to the complainant Joseph A. Williams. Before the sale of the third tract, Richard S. Malony had conveyed his share in it to Annie H. Neely, who made the contract of sale and the deed to the complainants. Each sale was made for \$6,000, the full value of a title to each tract free from all incumbrances, and Wilson and Herdlichtka have paid for their quarters in full. The facts and conclusions which have been recited are res adjudicata between the parties to this suit by virtue of a decree of the district court of Richardson county, in the state of Nebraska, in a suit to which they were parties, and that suit is still pending under an order of the Supreme Court of that state to the district court to ascertain the amount owing by the complainant Joseph A. Williams herein on account of the purchase of his tract, to take control thereof, and, in case the law and the facts should be found to justify that course, to apply that amount in payment of the amounts due to the annuitants, Hannah Blake and Sarah Foss.

On February 6, 1902, Annie H. Neely and Richard S. Malony, Jr., as principals, and the defendant Richard M. Neely and others as sureties, executed a bond in the penal sum of \$1,000 to the county judge of Richardson county, conditioned, among other things, that they should pay and discharge all legacies chargeable upon the estate of Richard S. Malony, Sr., or such dividends thereon as should be decreed by the county court. The defendant Richard M. Neely was the agent of his mother, Annie H. Neely, to sell the quarter section of land which was purchased by the complainant Joseph A. Williams. In October, 1892, he made and signed a written contract, as the agent of his mother, to sell and convey this land to Williams for \$6,000, \$500 of which was then paid, and the remainder was to be paid \$2,000 on March 1, 1893, and \$3,500 on March 1, 1898. About March 1, 1893, in performance of this contract, Williams paid this \$2,000, and he and his wife made a note and a mortgage upon the property for \$3,500, and Annie H. Neely executed a warranty deed of it to him. These instruments were prepared by Annie H. Neely, or by one of her agents, and the note and mortgage were made payable to Richard M. Neely, but the only consideration for them was the land the complainants purchased. Richard M. Neely never paid them anything for the note or mortgage. What amount, if anything, he paid his mother for them, is left in grave doubt by the evidence, and, in our view of the case, is not material.

On April 18, 1902, Richard M. Neely brought an action at law against the complainants on the note, and they answered the facts which have been recited. The court held at the trial of that action that these facts constituted no defense to the note at law, and this suit was instituted, and the action at law was stayed to abide its determination. The same court has now held that these facts present no reason for relief in equity, and this conclusion is challenged by the appeal.

J. H. Broady, for appellants.

William Baird (John C. Wharton, Edgar A. Baird, and Clair J. Baird, on the brief), for appellees.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This is a suit in chancery. The theory upon which counsel for the complainants seeks to maintain it is this: In equity and good conscience, Richard M. Neely ought not to be permitted to recover upon the complainants' note the full amount of the unpaid purchase price of the land which they bought of his mother, Mrs. Annie H. Neely, through him as her agent, but the amount of his recovery should be reduced by the diminution of the value of the title which resulted from the liens upon the land which they bought. The purchase price which the complainants agreed to pay was the full value of a perfect title to the property, free from all incumbrances. The vendor agreed to give them such a title. They have not received it, but have obtained one of much less value, since the incumbrances upon it are about equal to the unpaid purchase price evidenced by their note. Neely, the payee of this note, knew of these incumbrances before he took or paid for the note. He knew that his mother, in performance of her agreement of sale, gave to the complainants a covenant against incumbrances upon the title to the land, and that the note evidenced the unpaid part of the purchase price. He knew—for he cannot escape knowledge of the law—that against his mother, and against all who took the note with knowledge of its consideration and of the facts and circumstances under which it was made, the obligation of the complainants to pay it was conditioned by the faithful performance by the vendor of her obligation to vest in them a title free from incumbrances. She has failed to comply with her agreement, and the complainants invoke the aid of this court to reduce the amount to be paid upon their note by the damages which they must sustain by the failure of the vendor to comply with the conditions subsequent of the complainants' obligation to pay—her contract to furnish them a perfect title free from incumbrances. This theory of counsel for the complainants does not at first blush appear to be irrational, nor does the relief they seek seem to be either unjust or inequitable.

The purpose of the bill is to present and enforce an equitable defense to the action for payment of complainants' note. That defense is not, as counsel for the defendants seem to suppose, either a set-off or a counterclaim. Hence neither an independent cause of action in the defendant to recover damages of the complainant, nor a claim for liquidated damages, is an indispensable element of it. The defense is simply an equitable reason why the amount which the defendant should recover upon his note should be reduced below the amount which appears to be due upon its face. It springs out of and is a part of the same transaction from which the note arises. It is reduction or equitable recoupment, for it is analogous to the defense of recoupment at law. That defense crept from courts of chancery into the practice at law to enable courts of law to avoid the expense of suits in equity, to prevent circuity of action, and to obtain its benefit. *Reab v. McAlister*, 8 Wend. 109; *Nashville Trust Co. v. Fourth National Bank (Tenn.)* 18 S. W. 822, 15 L. R. A. 710, 714.

In *Wheat v. Dotson*, 12 Ark. 699, 711, Mr. Justice Scott, in an exhaustive and learned opinion, shows that recoupment is, in its nature and essence, an equity; that it was derived from the civil law; that it

is now uniformly applied where one brings an action for a breach of a contract, and the defendant can show that some stipulation in the same contract was made by the plaintiff, which he has violated; and that under the modern practice at law a defendant in an action upon any contract to pay the purchase price of land, the title to which was warranted to him, may reduce the recovery by way of recoupment by proof of a partial failure of consideration which has resulted from a diminution in the quantity or quality of the land conveyed, but that a partial defect in the title to the land is inadmissible at law for this purpose, because equity has exclusive and peculiar jurisdiction over the title to real estate, and has the power to perfect it, because, in general, the vendee sustains no injury by a defect of title so long as he retains the possession and use of the land, and because courts of law lack the peculiar jurisdiction to cause defective titles to be perfected, and are unable to do final and complete justice between the parties, and to terminate all possible litigation over the controversy.

Recoupment is the keeping back of something that is due because there is an equitable reason for holding it. *Ives v. Van Epps*, 22 Wend. 155, 156. As the defense in this suit is not based upon a set-off or a counterclaim, but upon an equitable reason, inhering in the transaction out of which the note springs, why the claim of Neely ought, in equity and good conscience, to be reduced, and as it presents no affirmative cause of action for a recovery against Neely, the authorities cited by his counsel relative to the essential attributes of set-offs and counterclaims (*Simpson v. Jennings*, 15 Neb. 671, 19 N. W. 473; *Spencer v. Johnson*, 58 Neb. 44, 78 N. W. 482; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312; *Frick v. White*, 57 N. Y. 103; *Graham v. Tilford*, 1 Metc. [Ky.] 112; *Brash-ear v. West*, 7 Pet. 608, 616, 8 L. Ed. 801; and *Computing Scale Co. v. Churchill*, 109 Wis. 303, 85 N. W. 337) have no relevancy to the issues presented in this case, and they will not be farther noticed.

Bearing in mind the nature of this suit, and the ground of the equitable defense it seeks to present, let us consider the questions which condition its maintenance.

In an action by the vendor upon a promissory note for the unpaid purchase price of real estate which he has conveyed to the vendee by a deed with covenants of warranty and against incumbrances, the latter may reduce the amount of the recovery by proof of a partial failure of consideration which has resulted from a defect of title. 3 Sedgwick on Damages, § 1053; *Sutherland on Damages*, § 641; *Davis v. Bean*, 114 Mass. 358; *Schuchmann v. Knoebel*, Ex'r, 27 Ill. 175; *Jaques v. Esler*, 4 N. J. Eq. 461, 462; *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495; *White v. Stretch*, 22 N. J. Eq. 76, 80; *Johnson v. Gere*, 2 Johns. Ch. 546; *Walker v. Wilson*, 13 Wis. 522; *Wilson v. Cochran*, 46 Pa. 229, 231; *Clarke v. Hardgrove*, 7 Grat. 399, 407; *Scantlin v. Allison*, 12 Kan. 85; *Cross v. Noble*, 67 Pa. 74, 78; *Beecher v. Baldwin*, 55 Conn. 419, 431, 12 Atl. 401, 3 Am. St. Rep. 57; *Avery v. Brown*, 31 Conn. 398, 402; *Coy, Adm'x, v. Downie*, 14 Fla. 544, 562; *Lowry v. Hurd*, 7 Minn. 356 (Gil. 282, 285); *Wamsley v. Hunter*, 29 La. Ann. 628, 629; *Youngman v. Linn*, 52 Pa. 413, 416; *Crenshaw v. Smith*, 5 Munf.

415, 417. The reason for this rule is that the covenants in the deed and the promise in the note are mutual covenants, and the performance of each is the consideration of and the condition of the obligor's promise to perform the other. This is an evident proposition so long as the contract of sale is executory, and the covenant to vest good title and the promise to pay the purchase price are embodied in a single written instrument, which is signed by both the parties. Partial failure of the plaintiff to perform is always a good defense pro tanto to an action for damages for the defendant's failure to keep his agreement, or to a suit to enforce its specific performance. The reason for the rule, and its appropriate application to a covenant against incumbrances and a promissory note for the purchase price, would be equally obvious if these mutual covenants which accompany the transfer of title were embodied in a single written agreement which was signed by the parties. A moment's reflection will, however, convince that it can make no difference in the rights of the parties to the sale, or in the legal effect of the transaction, that the covenant of the vendor is in one writing, and the promise of the vendee is in another. The performance of the one is still the consideration and the condition subsequent of the other, and a partial failure to perform one ought to be and is still a defense pro tanto to an action or a suit upon the other. Hence it is that in *Davis v. Bean*, 114 Mass. 358; *Schuchmann v. Knoebel, Ex'r*, 27 Ill. 175; *Jaques v. Esler*, 4 N. J. Eq. 461, 462; *Union Bank v. Pinner*, 25 N. J. Eq. 495; *White v. Stretch*, 22 N. J. Eq. 76, 80; and *Wilson v. Cochran*, 46 Pa. 229, 231—the courts held, in actions by vendors upon promissory notes for portions of the purchase price of land which the vendors had conveyed to the defendants with covenants against incumbrances, that the vendees might reduce the amounts of the recoveries by the amounts of the incumbrances upon the titles. And on the other hand, in *Beecher v. Baldwin*, 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 57, the Supreme Court of Connecticut decided that, in an action by a vendee upon a covenant against incumbrances, his recovery could be reduced by the amount of his unpaid notes for a part of the purchase price.

Upon a breach of a covenant of warranty or of a covenant against incumbrances, the obligee has a choice of remedies. He may pay the purchase price and bring his action on the covenant, or he may reduce the vendor's recovery for the purchase price by the amount of the diminution of the value of the title on account of the defect in it. He may do this upon the ground that his obligation to pay the price was subject to the condition that the vendor would perform his obligation to furnish a title free from incumbrances, and that he has violated that condition, and upon the further ground that the performance of that condition was a part of the consideration of his agreement. *Lyon v. Bertram*, 20 How. 149, 154, 15 L. Ed. 847; *Dorr v. Fisher*, 1 Cush. 271, 273, 274. The general rule upon this subject is stated in these words by the Supreme Court in *Winder v. Caldwell*, 14 How. 434, 443, 14 L. Ed. 487—an action on a building contract; to which the defense of delay, poor materials, and poor workmanship was interposed:

"For, although it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, acts of nonfeasance or misfeasance, immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be given in evidence in mitigation of damages or recouped, not strictly by the way of defalcation or set-off, but for the purpose of defeating the plaintiff's action, in whole or in part, and to avoid circuity of action."

Withers v. Greene, 9 How. 214, 13 L. Ed. 109; *Van Buren v. Digges*, 11 How. 461, 13 L. Ed. 771.

The application of this rule to an action on a note or bond for the purchase price of land, in which the defense of a breach of a covenant through a defect of title is interposed, is perhaps nowhere better shown than by the Supreme Court of Pennsylvania (a state under whose system of jurisprudence legal and equitable rights are enforced in the same action) in *Wilson v. Cochran*, 46 Pa. 229, 231 (an action on bonds for the purchase price of land, in which the defendant, who held a warranty deed, was permitted to reduce the recovery by the diminution in the value of the title which resulted from the incumbrance of a right of way, of which both parties had constructive notice from the records at the time of the sale). That court said:

"The detention of purchase money on account of breaches of the vendor's covenant is a mode of defense that is peculiar to our Pennsylvania jurisprudence, but the principle is well settled with us that, where a vendor has conveyed with covenants on which he would be liable to the vendee in damages for a defect of title, the vendee may detain purchase money, to the extent to which he would be entitled to recover damages upon the covenant, and he is not obliged to restore possession to his vendor before or at the time of availing himself of such a defense. Where there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing; being presumed to have been compensated for the risk in the collateral advantages of the bargain. But where there is a covenant against a known defect, he shall not detain purchase money unless the covenant has been broken. If the covenant be for seisin or against incumbrances, it is broken as soon as made, if a defect of title or an incumbrance exist; but, if it be a covenant of warranty, it binds the grantor to defend the possession against every claimant of it by right, and is consequently a covenant against rightful eviction."

The broken covenant in the case in hand is a covenant against incumbrances, and it was broken as soon as it was made.

The later case of *Cross v. Noble*, 67 Pa. 74, 78, demonstrates the fact that it was not the intention of the Pennsylvania court in the case last cited to hold that the defense of a partial failure of consideration arising from a defect of title is not available in the absence of a covenant, for Mr. Justice Sharswood there says:

"Mr. Justice Kennedy, in *Roland v. Miller*, 3 Watts & S. 390, has stated the rule as it has always been understood and acted upon in this state: 'The doctrine of *Steinhauer v. Witman* [1 Serg. & R. 438] is that, if the consideration money has not been paid, the purchaser, unless it plainly appear that he has agreed to run the risk of the title, may defend himself in an action for the purchase money by showing that the title was defective, either in whole or in part, whether there was a covenant of general warranty or of right to convey or of quiet enjoyment by the vendor, or not, and whether the vendor has executed a deed of conveyance for the premises, or not.' *Lloyd v. Farrell*, 48 Pa. 73, 86 Am. Dec. 563; *Weakland v. Hoffman*, 50 Pa. 513, 88 Am. Dec. 560;

Herrod v. Blackburn, 56 Pa. 103, 94 Am. Dec. 49; Dankel v. Hunter, 61 Pa. 382, 100 Am. Dec. 651."

Grand Lodge of Masons v. Knox, 20 Mo. 433; Ives v. Van Epps, 22 Wend. 155; McAllister v. Reab, 4 Wend. 485.

These authorities perhaps sufficiently illustrate the general rule that a partial failure of consideration wrought by a defect of title is a good defense pro tanto to an action upon a promissory note for the purchase price of land conveyed by a warranty deed.

The next question for consideration is, when is this defense available at law, and when in equity? There is much diversity of opinion in the courts of the states upon the question when a partial defect of title is available to reduce a recovery in an action at law for the purchase price. A review of many of the decisions upon this subject may be found in 2 Sutherland on Damages, §§ 632-641. Naturally the use of the equitable remedy of an injunction against the prosecution of an action at law for the purchase price varies in the different states with the different rules which they have adopted for the admission of this defense at law. But the power to protect purchasers is more ample and is more freely exercised in courts of equity than in courts of law, and, where the remedy at law is not clearly adequate, their jurisdiction is never invoked in vain. The Supreme Court has repeatedly declared that:

"A court of chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration for the other, and the one failing leaves the other without a cause." Refeld v. Woodfolk, 22 How. 318, 327, 16 L. Ed. 370; Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, 517, 14 Sup. Ct. 842, 38 L. Ed. 802.

And the general rule upon this subject may be safely stated in these words: A court of equity should issue an injunction to stay an action at law upon a promissory note for the purchase price until the defense of reduction arising out of the same transaction is allowed whenever the remedy at law is less certain, prompt, and efficient to attain the ends of justice, either because the interests of the parties require that the title to the land should be perfected, that their rights should be adjudicated, and that the litigation over it should be closed—a result which no remedy at law is adequate to accomplish—or because it entails circuity of action, or because there is serious danger of unjustifiable loss or injury to the vendee, which a court of equity may, but a court of law cannot, prevent. Jaques v. Esler, 4 N. J. Eq. 461, 462; Johnson v. Gere, 2 Johns. Ch. 546; Koger v. Kane's Adm'r, 5 Leigh, 606, 607; Clarke v. Hardgrove, 7 Grat. 399, 407; Union Nat. Bank v. Pinner, 25 N. J. Eq. 495; White v. Stretch, 22 N. J. Eq. 76; Coy, Adm'r, v. Dowie, 14 Fla. 544; Walker v. Wilson, 13 Wis. 522. The case at bar falls well within this rule. The liens of the annuities have been fastened upon the land of the complainants by the decree of the state court, and they cannot escape their payment. A court of law has not the power to determine their amounts, to require their present payment and release, or to perfect the title to the land, in the action for the purchase price, or in an action on the covenant against incumbrances, because that court cannot grant relief of that nature. On

the other hand, a court of equity has plenary jurisdiction to render a decree in this suit which will determine the amounts of the liens and the parties who must pay them, which will perfect the title to the land, and put an end to the litigation concerning it. Moreover, if, as counsel for Richard M. Neely contend, the action upon the covenant against Annie M. Neely is barred by the statute of limitations, the complainants have no remedy at law by an action upon that covenant; and, if it is not barred, she is not a resident of the state of Nebraska, and an action at law in another jurisdiction is not as prompt and efficient a remedy as a suit in equity to determine the rights of the parties in the jurisdiction which Neely has invoked. *Rolling Mill Co. v. Ore & Steel Co.*, 152 U. S. 596, 617, 14 Sup. Ct. 710, 38 L. Ed. 565; *Quick v. Lemon*, 105 Ill. 578; *Taylor v. Stowell*, 4 Metc. (Ky.) 175; *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24; *Robbins v. Holley*, 1 T. B. Mon. 191; *Edminson v. Baxter*, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751; *Davis v. Milburn*, 3 Iowa, 163; *Green v. Campbell*, 55 N. C. 446.

The cases presented in opposition to this conclusion do not rule the issue which this case presents. A class of authorities is cited to the effect that a partial or total failure of the title conveyed by a warranty deed presents no defense in equity to the payment of the purchase price, unless the vendee has been evicted from, or has surrendered possession of, the land, because until that time there is no breach of the covenant against rightful claims for title and possession. *Patton v. Taylor*, 7 How. 133, 159, 12 L. Ed. 637; *Elliot v. Thompson*, 4 Humph. (Tenn.) 99, 40 Am. Dec. 630; *Buchanan v. Alwell*, 8 Humph. 516, 518; *Wimberg v. Schwegeman*, 97 Ind. 529, 530; *Wilkins v. Hogue*, 55 N. C. 479, 481; *Vick v. Percy*, 7 Smedes & M. 256, 45 Am. Dec. 303. These decisions seem to adopt the ancient rule of the common law that a partial failure of consideration is no defense to a promissory note. That rule has long since been abolished both at law and in equity, and an application of the modern rule evidenced by the decisions cited in the earlier part of this opinion leads logically to a different conclusion from that announced in these opinions. If, however, we concede their correctness, they go no farther than to hold that until the covenant against rightful claims to the title and possession, which was under consideration in those cases, is completely broken, and all the possible damage from the breach has accrued, equity will grant no relief. The relief sought in those cases was denied because the covenant against lawful claims to title and possession was not broken, and the damage from it had not accrued, so long as the vendee enjoyed the undisturbed possession and use of the land, and because an action upon that covenant, when broken, would furnish a complete remedy to the vendee. The facts of this case do not bring it within this rule. The covenant in question here is not the covenant against rightful claims to title and possession, but the covenant against incumbrances. That covenant was broken when it was made. The decree of the state court judicially established the paramount liens of the incumbrances. It judicially determined that the breach of the covenant against them, and the damages

therefrom, had arisen when the covenant was made. It as effectually demonstrated the complete breach of the covenant against incumbrances at the time it was made as a judgment at law, and eviction thereunder, would have established a breach of the covenant against rightful claims to the title and possession. *Boyd v. Bartlett*, 36 Vt. 9, 15; *Turner v. Goodrich*, 26 Vt. 707. In this way the complete breach of the covenant against incumbrances is established by the record before us, and an action upon it will furnish the complainants no adequate remedy, because it will not settle the claims to, or perfect the title to, the land, because it is probably barred by the statute, and, if it is not, it presents a more dilatory, circuitous, and doubtful remedy than the pending suit.

The cases of *Miller v. Avery*, 2 Barb. Ch. 582, *Senter v. Hill*, 5 Sneed (Tenn.) 505, and *Gayle v. Fattle*, 14 Md. 69, cited for Neely, rest upon the conceded proposition that averment or proof of an adverse action by a third party, without allegation or evidence that it is founded on a superior lien or title, is insufficient to invoke the aid of a court of equity. Nor does the decision in *Refeld v. Woodfolk*, 22 How. 318, 327, 16 L. Ed. 370, that a vendee who has completed the payment of the purchase price is not entitled to a decree that the vendor shall perfect the title, have any relevancy to the question under consideration in the case at bar. The equity of a vendee who has voluntarily paid the purchase price differs radically from that of one who resists its payment. There is no opinion of any court in these authorities cited for Neely inconsistent with the view that a court of equity has jurisdiction to grant the relief which the complainants in this case seek. In *Davis v. Wakelee*, 156 U. S. 680, 688, 15 Sup. Ct. 555, 39 L. Ed. 578, we find these words:

"It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. *Boyce v. Grundy*, 3 Pet. 210, 215, 7 L. Ed. 655; *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 265, 26 C. C. A. 389, 393; *Brown v. Arnold* (C. C. A.) 131 Fed. 723. The complainants have no such remedy at law. A court of equity alone has the power to grant them adequate relief, and its jurisdiction of this suit is complete.

But counsel for Richard M. Neely insist that, while an assignee of a chose in action takes it subject to all the defenses that could at the time of the assignment be presented against it in the hands of the assignor, yet he is exempt from these defenses because he is the payee of the note. They say that the complainants waived the defense which they now present by signing the note payable to Neely. But the essence of waiver is estoppel. Where there is no estoppel, there is no waiver. *Insurance Co. v. Wolff*, 95 U. S. 326, 332, 24 L. Ed. 387; *Assurance Co. v. Building Ass'n*, 183 U. S. 308,

357, 22 Sup. Ct. 133, 46 L. Ed. 213; *Society v. McElroy*, 28 C. C. A. 365, 372, 83 Fed. 631, 640; *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, 435, 43 C. C. A. 270, 278; *Insurance Co. v. Thomas*, 82 Fed. 406, 408, 27 C. C. A. 42, 45, 47 L. R. A. 450; *Unsell v. Ins. Co. (C. C.)* 32 Fed. 443, 445; *Warren v. Crane*, 50 Mich. 300, 301, 15 N. W. 465. The indispensable elements of an estoppel are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance upon that representation. There were none of these elements in the case at bar. Neely was not ignorant. He knew that the covenant of his mother against incumbrances and the covenant of the complainants to pay the note were mutual covenants, that each was a part of the consideration of the other, and that the violation of one was a defense to the other. He knew that the covenant against incumbrances was broken when he took the note, for these incumbrances rested upon the title to the land, and he must have known the law. The complainants made no misrepresentations. They did not declare that the note was good and that they would pay it, as did the defendant in *Thompson v. Emery*, 27 N. H. 269, cited by counsel for Neely. Neely never loaned to the complainants or paid to them any consideration whatever for the note. Conceding that he paid to his mother its full value, he was but her assignee of the complainants' obligation to pay the purchase price of the land, with full knowledge of all the equities between the original parties to the sale, and he took the note which evidenced that obligation subject to every defense which could have been asserted against it in the hands of the vendor. The legal presumption is that the payee of a promissory note knows its consideration and the facts which condition its execution. The fact that Neely was the payee here, and not the indorsee, instead of strengthening his position, adds this legal presumption to the conclusive proof of his actual knowledge which the record presents. One who buys of a creditor, for value, the obligation of his debtor, and takes the latter's promissory note, payable to himself, as evidence thereof, with full knowledge of its consideration and of the facts which conditioned the inception of the original obligation, takes the note subject to all the defenses which existed against the claim in the hands of the original creditor. *Vorce v. Rosenberg*, 12 Neb. 448, 451, 11 N. W. 879; *Chariton Plow Co. v. Davidson*, 16 Neb. 374, 377, 20 N. W. 256; *Camp v. Sturdevant*, 16 Neb. 693, 698, 21 N. W. 449; *Knapp v. Lee*, 3 Pick. 452, 460.

The authorities cited by counsel for Neely in opposition to this conclusion are not relevant to the facts of this case, and they fail to convince. *Sadler v. White*, 14 La. Ann. 177, 178, was a case in which the purchaser, who was not the payee of the note, which was given by a tenant for rent, was aware when he bought it that defenses to it might arise, although none had then arisen. The court held that this notice was not sufficient to subject him to a defense of partial failure of consideration which subsequently resulted from the ouster of the tenant by a paramount title before his term had expired. The court, however, remarked that the result would

have been different if the defense had existed and the purchaser had been aware of it when he bought the note. In the case at bar the covenant against incumbrances was broken, the defense to the note existed, and Neely knew it when he purchased the note. In *Glascocock v. Rand*, 14 Mo. 550, and *Van Buskirk v. Day*, 32 Ill. 260, 267, 268, all that is said upon this question is obiter dictum, and it goes no farther than to express a supposition and a doubt. The only question decided in the former case was that an affidavit for continuance did not disclose diligence to procure testimony, and the only issue determined in the latter case was decided by the jury, which found that there was no fraud in procuring the note, and hence no defense to it in the hands of any one. In *Steadwell v. Morris*, 61 Ga. 97, a husband gave to his wife the note of his partners in payment of a debt which he owed to her. She accepted it without notice that it was founded in a mistake in the accounting between the partners, and the court held that this mistake would not defeat an action on the note in her behalf. It is evident from the opinion, however, that if she had obtained actual knowledge of the defense to the note before she received it, as Neely did in the case at bar, she would not have been permitted to recover. In *Thompson v. Emery*, 27 N. H. 269, Simpson, the plaintiff in interest, took the note of the defendant as collateral security to the obligation of another. Before or when he obtained it he asked the defendant if it was good, and he replied that it was, and that he would pay it. Simpson knew of no defense to it, and there was none. When action upon it was brought, no defense was interposed, except that the note was not properly indorsed to Simpson. Of course, the plaintiff recovered. There is nothing in these cases in conflict with our conclusion that Richard M. Neely, the payee of the note, who had knowledge when he obtained it of its consideration, and of all the facts which conditioned the obligation which it evidenced, took it subject to every defense which could have been urged against the obligation to pay the purchase price of the land in the hands of the vendor. He stood in the shoes of his mother.

There is another defense to this note, to the extent of \$1,000, available to the complainants. It is that Richard M. Neely, as surety for Annie H. Neely, executed the bond to pay the legacies which constitute the incumbrances upon the title to this land. That bond is an obligation which he has never discharged, and which, in equity and good conscience, he ought to fulfill—an obligation which a court of equity may and should permit the complainants to set off against the amount owing upon their note. But as their defense to the full amount of the damage which they have sustained from the incumbrances upon their title is complete by way of equitable recoupment, it is unnecessary and would be useless to consider farther the defense *pro tanto* by way of the bond.

The next contention is that the defense to the note by way of equitable reduction is unavailable to the complainants because the cause of action upon the covenant against incumbrances is barred by the statute of limitations. Conceding, without deciding, that the bar of the stat-

ute had fallen upon the action on this covenant before this suit was instituted, that fact is not fatal to the defense of the complainants, nor to this suit to enforce it. That defense, as we have seen, is not set-off or counterclaim, but an equitable reason why the amount payable by the terms of the note should be reduced. It is reduction. It is that because the consideration of the note failed in part, and because the condition subsequent that the covenant against incumbrances should be kept was not fulfilled, the full amount of the note ought not to be paid. This defense attaches to and inheres in the note itself, and, while the cause of action upon that obligation survives, the defense lives and runs with it. The defense of reduction or recoupment which arises out of the same transaction as the note or claim survives as long as the cause of action upon the note or claim exists, although an affirmative action upon the subject of it may be barred by the statute of limitations. *Ord v. Ruspini*, 2 Esp. 569; *Beecher v. Baldwin*, 55 Conn. 419, 432, 12 Atl. 401, 3 Am. St. Rep. 57; *Aultman & Co. v. Torrey*, 55 Minn. 492, 57 N. W. 211; *Wood on Limitations* (3d Ed.) § 282; *Conner v. Smith*, 88 Ala. 300, 7 South. 150; 25 Am. & Eng. Enc. of Law, p. 561, par. 9.

Finally it is insisted that the complainants have been guilty of such laches that they are entitled to no relief. In the application of the doctrine of laches the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. *Rugan v. Sabin*, 3 C. C. A. 578, 582, 53 Fed. 415, 420; *Billings v. Smelting Co.*, 2 C. C. A. 252, 262, 263, 51 Fed. 338, 349; *Bogan v. Mortgage Co.*, 11 C. C. A. 128, 135, 63 Fed. 192, 199; *Kinne v. Webb*, 4 C. C. A. 170, 177, 54 Fed. 34, 40; *Scheffel v. Hays*, 7 C. C. A. 308, 312, 58 Fed. 457, 460; *Wagner v. Baird*, 7 How. 234, 258, 12 L. Ed. 681; *Godden v. Kimmell*, 99 U. S. 201, 210, 25 L. Ed. 431; *Wood v. Carpenter*, 101 U. S. 135, 139, 25 L. Ed. 807. The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. *Kelley v. Boettcher*, 29 C. C. A. 14, 21, 85 Fed. 55, 62. This defense of equitable recoupment or reduction, if it were available at law, would have survived as long as the cause of action upon the note was available. If the holder of the note had invoked the aid of a court of equity to foreclose the mortgage which secured it, this defense would have conditioned his recovery there. *Farmers' Loan & Trust Co. v. Denver, etc., R. Co.*, 60 C. C. A. 588, 593, 126 Fed. 46, 51. By analogy with these rules, the complainants are not guilty of culpable laches in enforcing their defense as long as the action on the note survives. Indeed, they were not fairly chargeable with any laches as long as no action upon the note was commenced, because they might well rest in the belief that no action would be taken by Neely to collect it until his bond and the covenant of the

vendor had been fulfilled, and the incumbrances upon the title and the defense to the note had been alike removed. Moreover, there are unusual conditions and extraordinary circumstances in this case which would appeal with compelling force to the conscience of a chancellor to allow the prosecution of this suit, even if the analogous limitation at law had expired. The complainants have long been involved in a tedious litigation in the courts of the state of Nebraska, where they doubtless hoped and expected that the rights of all the parties to this controversy would be judicially determined. That litigation alone furnishes ample excuse for their failure to invoke earlier the aid of other courts. The fact that they interposed their defense in the action at law upon the note, and pressed it until it was disallowed there, is not evidence of fatal laches, but rather of reasonable diligence. The facts that the same judge presided at law and in equity in the court below, and that his decision must determine in the first instance the somewhat vexed question whether their defense should be made at law or in equity, relieve their action below of any just criticism, or of any legitimate charge of unreasonable delay.

It is not culpable laches for one who has an equitable defense of reduction to a promissory note, which has become the subject of pending litigation in another court, and which, if available at law, would survive as long as the cause upon the note, to wait until an affirmative action at law upon the subject of the defense is barred, and until his defense is overruled in an action at law upon the note, before he invokes the aid of a court of equity to enjoin the prosecution of the latter action until his defense is allowed.

The result is that the court below has tried the action at law, and is about to enter a judgment against the complainants for the full amount of their note—an amount which, in equity and good conscience, they ought not to pay. The power was vested in the court of equity below, and the duty was imposed upon it, to enjoin the prosecution of this action at law until the amount of damages upon which the complainants have suffered from the incumbrances upon their title can be ascertained and applied in reduction of the recovery there sought, and to adjudicate the claims to the land in question and close this litigation, and in that way to prevent a rank injustice which the court at law was powerless to avoid. Any fact which renders it against conscience to enter or execute a judgment at law, and which was not available to the defendant in a court of law, confers jurisdiction upon a court of equity to enjoin the proposed entry or execution of the judgment. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336, 3 L. Ed. 362; *National Surety Co. v. State Bank of Humboldt*, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394.

The court below, sitting in equity, may and it should proceed to ascertain the present values of the annuities which constitute the incumbrances upon the title of the complainants, and to require the annuitants, upon the payment of those values, to release the three quarter sections of land from those liens, and to perfect the title thereto. In case it shall appear, as counsel have intimated, that since the final hearing below the complainants have paid and

secured releases of these liens, the court should reduce the amount of the recovery in the action at law upon the note by the amount, not exceeding the value of the annuities at the time such payments were made, which the complainants have necessarily expended in paying the liens of the annuities upon their land and in defending their title against them. That court undoubtedly has jurisdiction to adjudicate the rights and interests of all the parties to this suit in the three quarter sections of land to which the liens attach, and to put an end to this litigation.

The only question determined by the court below, and which this appeal was taken to review, was, were the complainants entitled to any relief? The Circuit Court answered that question in the negative. It has now been answered in the affirmative. Issues of law and fact may arise in view of this decision which are not fairly presented by this record, and which have not received the attention of court or counsel. It is unwise and inopportune to suggest or discuss them now.

There is, however, one other question which must not be overlooked. The district court of Richardson county, in the state of Nebraska, acquired jurisdiction of the real estate in controversy in this suit long before either the action at law or the suit in equity in the Circuit Court was instituted. The suit in the state court was commenced by the annuitants for the purpose of subjecting the three quarter sections of land to the payment of their annuities, and they obtained a decree that the liens of their legacies were paramount to the titles of the purchasers from the residuary legatees of Malony, and that the land should be sold to pay them. This portion of the decree was affirmed by the Supreme Court of the state, and it remains unassailed and unmodified. That suit, however, is still pending under an instruction from the Supreme Court to the court below to determine whether or not the complainant Joseph A. Williams may lawfully be required to pay the amount owing upon his note to Neely to the complainants in that suit. The court which first acquires jurisdiction of specific property by the issue and service of process in a suit to enforce a lien upon it, where in the subsequent proceedings it may find it necessary or convenient to take possession or control of it, is entitled to retain that jurisdiction to the end, without interference by any court of co-ordinate power. *Gates v. Bucki*, 53 Fed. 961, 969, 4 C. C. A. 116, 128, 129; *Memphis Savings Bank v. Houchens*, 115 Fed. 96, 110, 52 C. C. A. 176, 190, 191. Where a subsequent suit involving the rights of the parties to the same property is commenced in a court of co-ordinate jurisdiction, that suit should not be dismissed, but, before a seizure of the property is made therein, it should be stayed until the proceedings in the court which first obtained jurisdiction are concluded, or ample time for their termination has elapsed. *Zimmerman v. So Relle*, 25 C. C. A. 518, 521, 80 Fed. 417, 420.

The decree below is reversed, and the case is remanded to the Circuit Court, with directions to enjoin or stay the farther prosecution of the action at law upon the promissory note signed by the

complainants until the amount of the reduction to which the complainants are equitably entitled shall be ascertained and allowed, to permit the parties to file a supplemental bill and answers presenting material events which have occurred since the former hearing, and to take farther testimony, and, when this shall have been done, to take further proceedings in accordance with the views expressed in this opinion.

HOOK, Circuit Judge (dissenting). The facts in this case—some admitted, and the others established by the overwhelming weight of the evidence—are as follows: Through the will of her father and a deed from a co-devisee, Annie H. Neely became the owner of a tract of land, subject to a mortgage given by the testator in his lifetime, and to two annuities which he bequeathed. The mortgage was the prior lien. Mrs. Neely was an executrix of the will. Richard M. Neely, an appellee herein, is her son. Acting as the agent of his mother, he made a contract with Williams for the sale of the land for \$6,000, \$500 of which was paid at the time, \$2,000 was to be paid when the sale was consummated, and the remaining \$3,500 was to be evidenced by a note secured by a mortgage upon the property. There is no pretense that he practiced any deception upon Williams; that he made any covenant against incumbrances, or personally obligated himself in any way or to any degree whatsoever. He was professedly acting for his mother in the making of the contract of sale and Williams so understood it. The existence of the mortgage and the annuities were equally apparent from the public records. The contract of sale was susceptible of exact performance. It could have been fully carried out, and all of the liens against the land could have been discharged. Between four and five months afterwards the sale was consummated. Williams received a deed from Mrs. Neely containing covenants of warranty and against incumbrances. He paid the \$2,000, and executed his note and mortgage for the remaining \$3,500. But Richard M. Neely was not present at the time. He prepared none of the instruments, and did not in any manner participate in the closing of the transaction. For some reason not disclosed in the record Williams did not require the release or satisfaction of the annuities when he took the deed, paid the money, and gave his note and mortgage. Whether this arose from mistake of fact or of law does not clearly appear, but there is not even the slightest ground for attributing it to Richard M. Neely. He was not there, and was wholly innocent in fact and intent. The note and mortgage for the balance of the purchase price were made by Williams direct to Richard M. Neely, instead of to his mother, for the reason that he paid to her and for her benefit the full sum of \$3,500 for such securities. Nearly \$2,500 of this amount was applied by Mrs. Neely's agent, who attended to the consummation of the sale, towards the discharge of the old mortgage which it is conceded was a first lien on the property. There is no reasonable doubt that the full value of the new securities was paid from the funds of Richard M. Neely to his mother, or for her benefit, in the clearing of

the title to the property, and the record shows that counsel for Williams assisted materially in proving this fact. The sources from whence the money was obtained were fully and conclusively shown. Williams knew that his note and mortgage were not made to Mrs. Neely, the vendor, but were made to the absent Richard M. Neely. And now, many years after the consummation of the transaction, when Richard M. Neely seeks payment of that which he bought and paid for innocently and in good faith, there is set up against his demand a breach of the covenant against incumbrances arising from the existence of the lien of the annuities. The majority of the court hold in the foregoing opinion that this may be done, but I am unable to bring myself to the conclusion that any just application of legal or equitable principles can accomplish that result.

In *Glascocock v. Rand*, 14 Mo. 550, it was held:

"If a purchaser of land executes a negotiable note for the purchase money to an apparent stranger to the title, and fails to secure himself by a proper penal covenant, he has no one to blame but himself, and cannot set up as a defense to the note the failure of the parties in interest to execute proper conveyances to him."

In *Cagle v. Lane*, 49 Ark. 465, 5 S. W. 790, a similar rule was announced. Cagle purchased from Cummings an interest in a patent right, for which he was to give his note. At Cummings' direction, Cagle made the note direct to Lane, the plaintiff, who paid Cummings a consideration therefor. The patented invention proved to be worthless, and Cagle refused to pay the note; claiming inter alia a failure of consideration, and that the plaintiff was not a bona fide purchaser. The court held that the transaction was the same in substance as if the note had been drawn in favor of Cummings, and by him indorsed to the plaintiff, and that the defense was not maintainable.

In *Iron Co. v. Brown*, 63 Me. 139, the court said:

"Where, at the request of the party with whom he deals, one makes his promissory note, which is to be a partial payment for a piece of work to be done for him, payable to a third party, who is a creditor of the party with whom he contracts for the work, and it is credited by the payee to such party in good faith, the maker cannot set up a failure of consideration, as between himself and the party with whom he deals, in defense of a suit upon such note in the name of the payee."

The English rule is the same. *Munroe v. Bordier*, 8 C. B. 862, 65 E. C. L. 861; *Porier v. Morris*, 2 El. & Bl. 89, 75 E. C. L. 88.

Moreover, it is common doctrine, no longer open to debate, that knowledge of the conditions surrounding the consideration of a promissory note, without knowledge of a breach, will not affect the rights of a purchaser. *Miller v. Ottaway*, 81 Mich. 196, 45 N. W. 665, 8 L. R. A. 428, 21 Am. St. Rep. 513; *Rublee v. Davis*, 33 Neb. 779, 51 N. W. 135, 29 Am. St. Rep. 509.

In *United States Nat. Bank v. Floss*, 38 Or. 68, 62 Pac. 751, 84 Am. St. Rep. 752, it was held that knowledge in the purchaser of a note that it was given in consideration of a good title to land, does not affect his right to recover, in case of a breach of the contract to convey, unless he knew the breach had already occurred.

In *Parsons on Notes & Bills* it is said that knowledge on the part of the holder at the time he took the note that it was not to be paid on a specified contingency is not sufficient to defeat his right to recover, although the contingency had then happened, if he was ignorant of the fact. Volume 1, p. 261.

In *Tiedeman on Commercial Paper* it is said:

"The authorities generally hold that the purchaser of commercial paper is not burdened with the requirement to see to the execution and full performance of the consideration merely because he knows what it is." Section 300.

Under the settled rule of the Supreme Court, a much stronger case could be assumed against Richard M. Neely than the record justifies, and yet not impair his right to recover from Williams. That rule is that bad faith alone will defeat the right of the purchaser, but a suspicion of a defect or knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, is insufficient. *Hotchkiss v. Banks*, 21 Wall. 354, 359, 22 L. Ed. 645; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857.

With these principles in mind, I am unable to find any support for the reversal of the decree of the Circuit Court. It is not asserted in the foregoing opinion that Richard M. Neely personally obligated himself in respect of existing incumbrances, nor that he was guilty of bad faith, nor, except by suggestion or inference, that he was aware or even had any suspicion that his mother had failed to lift or make satisfactory provision concerning the annuities during the months succeeding his sole connection with the transaction. Nor is the result rested on a contention that he did not pay his mother full value for the note and mortgage.

It is said in the foregoing opinion that the deed, note, and mortgage "were prepared by Annie H. Neely, or by one of her agents." A cursory reading of the opinion would convey the inference that Richard M. Neely may have been the agent, or may have been present. But the record shows, without dispute, that he was not present, did not prepare any of the instruments, and did not in any manner participate in the closing of the sale. And it does not appear that he was aware of any default of his mother when the deed was delivered. It is also said in the foregoing opinion that what amount, if any, he paid his mother for the note and mortgage, was "left in grave doubt by the evidence"; and while this is said to be immaterial, in the view of the case which is adopted, its tendency is to support an inference that, after all, a just result was attained by the opinion of the court. I have already observed that it was overwhelmingly shown that the consideration was paid, and where it came from, and that counsel for Williams assisted in showing it. The greater portion of it came from the payment for another tract of land, which belonged to Richard M. Neely and a brother, and in which their mother had no interest whatever. Again, the fact is referred to in the foregoing opinion that Richard M. Neely was one of the sureties upon the bond of his mother as executrix. It is true that he was, but I am at a loss to perceive why that fact was referred to as even remotely justifying the conclusion which was

reached. The suit was not one directly or indirectly to reach Richard M. Neely's responsibility as a surety. Moreover, the maximum of his liability as a surety was limited by the bond to \$1,000, and that is not the limit which the court in the foregoing opinion has placed upon his liability to respond for the breach of his mother's covenant against incumbrances. On the contrary, it is expressly said that the undischarged incumbrances are about equal to the amount of the note, which is now several times the penal sum of the bond of the executrix. The case of Williams is solely supported by a number of unrelated facts and circumstances which are consistent with his own mistake, negligence, or voluntary acquiescence when the sale was consummated, but which neither singly nor in combination show bad faith on the part of Richard M. Neely, or knowledge of the failure of consideration for the note and mortgage, or absence of consideration for his purchase of them.

For these reasons, I am of the opinion that the decree of the Circuit Court should be affirmed.

UNITED STATES v. HUNG CHANG.

(Circuit Court of Appeals, Sixth Circuit. December 1, 1904.)

No. 1,339.

1. CHINESE EXCLUSION—JUDGMENT OF DISTRICT COURT—MODE OF REVIEW.

An appeal is the proper proceeding for the review by the Circuit Court of Appeals of a judgment of a District Court rendered on appeal from an order of a commissioner for the deportation of a Chinese person arrested under section 13 of Act Sept. 13, 1888, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317].

2. SAME—NATURE OF PROCEEDINGS FOR DEPORTATION—RULES OF EVIDENCE.

A proceeding for the deportation of a Chinese person under the exclusion acts is civil, and not criminal, in its nature, and the constitutional provisions which safeguard the rights of persons accused of crime do not apply therein. Admissions or statements of a defendant, voluntarily made to the officers by whom he is arrested in answer to questions put by them either before or after his arrest, are admissible in evidence against him, and the government has the right to call and examine him as a witness.

3. SAME—PROCEEDING FOR DEPORTATION—ISSUES AND PROOF.

In a proceeding for the deportation of a person under Chinese Exclusion Act Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317], as affected by Act May 5, 1892, c. 60, § 3, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], two questions are put in issue by defendant's plea of not guilty: First, whether or not he is a Chinese person or person of Chinese descent; and, second, if so, whether he is entitled to be and remain in the United States—the burden of proof on the latter issue being on the defendant. Upon either issue proof to the satisfaction of the commissioner or the court is all that is required, and upon the issue as to race the appearance of defendant, his color, manner of wearing his hair, his dress and language may properly be taken into consideration by the commissioner or court; and inspectors and interpreters employed by the government in the enforcement of the exclusion laws, who state their ability from practical experience to identify persons of the Chinese race from such characteristics, are competent to testify upon such issue, although they may have no theoretical knowledge of the science of ethnology.

4. SAME—EVIDENCE CONSIDERED.

Evidence before a commissioner in a proceeding for deportation considered, and *held* sufficient to sustain his finding that defendant was a Chinese person, and to warrant his order of deportation, in the absence of any evidence of defendant's right to remain in the United States.

Appeal from the District Court of the United States for the Northern District of Ohio.

For opinion below, see 126 Fed. 400.

John J. Sullivan, U. S. Atty., and T. H. Garry, Asst. U. S. Atty.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. Hung Chang, appellee, was arrested under a warrant issued in pursuance of section 13, c. 1015, Act Sept. 13, 1888, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317], charged with being a Chinese person, or person of Chinese descent, found unlawfully in the United States, and, after a hearing before a commissioner of the United States for the Northern District of Ohio, was adjudged to be one not lawfully entitled to remain in the United States, and ordered deported. From this finding and order, made October 26, 1903, Hung Chang appealed "to the District Court of the United States in and for the Northern District of Ohio, and to the judge of said court," and, after a hearing, the order of the commissioner was reversed and Hung Chang directed to be discharged from custody. Thereupon the United States applied for a writ of error from this judgment, which the District Judge declined to allow, except to his action as a judge and not as a court. In this condition the case came before us upon the question as to whether the appeal under the act was to the District Judge sitting as a judge or as a court, and we held, following *In re United States, Petitioner*, 194 U. S. 194, 24 Sup. Ct. 629, 48 L. Ed. 931, that the appeal was to the District Court, and not to the judge thereof as an individual. 130 Fed. 439. In accordance with the suggestion in our opinion, the case went back, the proper entries were made, and it is now here on appeal and writ of error to obtain a review of the action of the District Court. The case brought here both by appeal and by writ of error is but one case and will be so considered. *Hurst v. Hollingsworth*, 94 U. S. 111, 24 L. Ed. 31. In our opinion it is properly here by appeal. *Ark Foo v. U. S.*, 128 Fed. 697, 63 C. C. A. 249; *Tsoi Yui v. U. S. (C. C. A.)* 129 Fed. 585.

The order of the commissioner was apparently based not only upon the oral testimony, but the appearance of Hung Chang himself; the order, among other things, reciting:

"Whereas, an examination was thereupon had by me of said Hung Chang upon the said charge, from which examination, and from the evidence adduced before me, it appears to me that the said Hung Chang is by race, language, color, and dress a Chinese person, and a laborer by occupation," etc.

¶ 4. Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. Same*, 35 C. C. A. 332.

In the hearing before the District Court, the government introduced three witnesses, the defendant none. Two were inspectors, the third an interpreter.

Thomas O'Neill, a Chinese inspector, testified he had been such about three months. He first met the defendant on a Nickel Plate train, at the station in Cleveland. Hung Chang was accompanied by six other Chinamen. The witness asked him in Chinese for his certificate, which he did not produce. In reply to questions he said he came from Vancouver, and then from Buffalo, and that he came over in a boat. At that time (as when in court) he had his hair done up in a queue, braided, and wound around the top of his head. His hair was black; the color of his skin yellow. Failing to produce a certificate, Hung Chang was placed under arrest, and subsequently made a detailed statement to the witness, through the government interpreter, which was testified to by the latter. The witness testified that for three months his official work had been with Chinese persons; that some years before, when employed in the Boston navy yard, he had for several years been in the habit of visiting friends, some 15 or 20, among the Chinese residents of that city. He stated that from association and observation he had made a practical study of the racial characteristics of the Chinese, and he was prepared to testify that Hung Chang was a Chinese person; but the court refused to permit it, because he admitted he had not made a study in the books of the science of ethnology.

Frank Pierce, the Chinese inspector in charge, was 43 years old, and had been a Chinese inspector since June, 1902. It had been his business closely to observe Chinamen, and he had made a study of their peculiarities. He testified that he had the means of knowing whether the defendant was a Chinaman, that he had examined him for the purpose of determining that question, and he was prepared to testify that he was a Chinaman; but the court would not permit it, because he admitted that his knowledge was practical, that he had not made a study of racial distinctions in books.

Shere F. Moy, the Chinese interpreter, was 40 years old. He was born in China, in the Sun Ling district; lived there until he was 13, and then came to this country; lived here until 1883; spent the next two years in China, and has been back here ever since. The witness talked with Hung Chang in Chinese. He testified that Hung Chang used the dialect of the Sun Ling district, where witness was born and raised. Witness testified that he was able to distinguish a person of Chinese descent from one of any other nationality, and he was ready to testify that Hung Chang was a person of Chinese descent, but the court would not permit him to, because he admitted on cross-examination that if a Chinaman had his queue cut off and did not speak the Chinese language he might be mistaken for a Korean or a Japanese. Shere Moy further testified, under objection, that Hung Chang stated to O'Neill, the inspector, through him, that his name was Hung Chang; that he was born in China; that he came from Hong Kong, and landed at Vancouver; that he lived there seven months, then came to Toronto, where he lived over a year, and from there came surreptitiously, by

boat, along with a lot of other Chinamen, to the United States, landing in a sandy place, from which they walked to a place where they took a train. He stated he was a laborer—a laundryman. Afterwards, at the United States Attorney's office, in answer to questions, Hung Chang stated that he was a full-blooded Chinese, and that his parents and grandparents were Chinese. It did not appear that these statements were induced by any promise or threat. At the same time the defendant was not warned that they would be used against him in the trial. The court excluded them on the ground the case was a criminal one, and they were not made voluntarily.

Hung Chang was present in person, presenting every outward appearance of being a Chinaman. He had his own Chinese interpreter. After the court had excluded the testimony of the three witnesses mentioned, the government requested that Hung Chang take the stand, and, through his interpreter, put to him two questions: First, whether he was a Chinese person; and, second, what was the nationality of his father and mother. These questions were objected to by counsel for the defendant, and the objections were sustained, the court taking the view that the case was a criminal one, and that he could not and would not compel the defendant to be a witness against himself.

To all of these rulings the government excepted, and the broad questions for consideration are: First, the nature of the proceeding; second, the kind of evidence required; and, third, whether there was enough to demand the deportation of the defendant.

1. By the treaty with China of December 8, 1894 (28 Stat. 1210), the coming, except under certain conditions specified in the treaty, of Chinese laborers to the United States, was absolutely prohibited. Article 1. Registered Chinese laborers were to be permitted to return to the United States under certain conditions and within certain periods, but only upon the production of proper certificates. Article 2. The provisions of the treaty were not to affect the right then enjoyed of Chinese officials, teachers, students, merchants, or travelers, but not laborers, to come to the United States, but only upon the production of certificates from their government, viséed by the diplomatic or consular representatives of the United States at their ports of departure. Article 3. For the purpose of carrying out the policy, thus broadly indicated, of excluding from the United States all Chinese persons with few exceptions, and of imposing upon all Chinese persons arrested and charged with being unlawfully within the United States the burden of establishing their right to be and remain here, the Chinese exclusion acts provide, among other things, as follows:

"That any Chinese person or persons of Chinese descent found unlawfully in the United States or its territories may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge or commissioner of any United States court, returnable before any justice, judge or commissioner of a United States court, or before any United States court, and when convicted upon a hearing and found and adjudged to be one not lawfully entitled to be or remain in the

United States, such person shall be removed from the United States to the country whence he came."

"But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district." Section 13, c. 1015, Act Sept. 13, 1888, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317].

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." Section 3, c. 60, Act May 5, 1892, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320].

Hung Chang was arrested and tried under section 13, subject to the regulation established by section 3. His plea of "not guilty" put in issue two questions: First, was he a Chinese person or a person of Chinese descent? second, was he entitled to be and remain in the United States? If found to be a Chinese person or person of Chinese descent, it then became his duty to establish his lawful right to remain in the United States, and this he was to do "by affirmative proof to the satisfaction of such justice, judge or commissioner." In the case of laborers, this right can be shown only by producing the certificate required by section 6 of the act of May 5, 1892, as amended November 3, 1893. 28 Stat. 7, c. 14 [U. S. Comp. St. 1901, p. 1320]. In the case of merchants and others of the excepted classes only by producing the certificate required by section 6 of the act of May 6, 1882, as amended by the act of July 5, 1884. 23 Stat. 115, c. 220 [U. S. Comp. St. 1901, p. 1307]. As the record shows, Hung Chang had every appearance of being a Chinaman. His name, his language, his color, his mode of dressing the hair, his garb, all bespoke a person of Chinese descent. To any person of common knowledge and information, his appearance testified unmistakably to his race; and he himself had not denied, but admitted, his origin and nationality. Under these circumstances, what was the nature of the proof required to establish, to the satisfaction of the court, this obvious and only technically denied fact, namely, that he was a Chinese person or a person of Chinese descent? But before taking this up let us consider the nature of the proceeding, whether criminal or civil.

2. Whether based upon the power which every sovereign nation has of forbidding the entrance of foreigners within its territory, or upon the power under the Constitution to regulate commerce with foreign nations, it is settled by the decisions of the Supreme Court that Congress has the power to exclude or expel aliens from the United States, to provide for the deportation of those unlawfully here, and to intrust this to executive officers, acting either alone or in connection with the courts. The Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; *Nishimura Ekiu v. U. S.*, 142 U. S. 661, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Fong Yue Ting v. U. S.*, 149 U. S. 699, 713, 731, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Lem Moon Sing v. U. S.*, 158 U. S. 539, 15 Sup. Ct. 967, 39 L. Ed. 1082; *Wong Wing v. U. S.*, 163 U. S. 229, 237, 16 Sup. Ct. 977, 41 L. Ed. 140; *U. S. v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456,

42 L. Ed. 890; *Fok Yung Yo v. U. S.*, 185 U. S. 305, 22 Sup. Ct. 686, 46 L. Ed. 917; *Chin Bak Kan v. U. S.*, 186 U. S. 193, 201, 22 Sup. Ct. 891, 46 L. Ed. 1121; *Japanese Immigrant Case*, 189 U. S. 87, 97, 23 Sup. Ct. 611, 47 L. Ed. 721; *Ah How v. U. S.*, 193 U. S. 65, 24 Sup. Ct. 357, 48 L. Ed. 619; *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; *Turner v. Williams*, 194 U. S. 279, 290, 24 Sup. Ct. 719, 48 L. Ed. 979.

Referring to the character of the Chinese deportation proceeding, the Supreme Court, speaking by Mr. Justice Gray, said in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 730, 13 Sup. Ct. 1016, 37 L. Ed. 905:

"The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application."

This language was quoted with approval in *Wong Wing v. U. S.*, 163 U. S. 236, 16 Sup. Ct. 980, 41 L. Ed. 140, in which the court held that section 4 of the act of May 5, 1892 (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1320]), which provides that Chinese persons convicted of being unlawfully within the United States should be imprisoned at hard labor for a period not exceeding one year, was in violation of the fifth and sixth amendments to the Constitution, because under it infamous punishment might be imposed without a trial by jury. 163 U. S. 237, 16 Sup. Ct. 981, 41 L. Ed. 140. But in that case, referring to the nature of the detention pending a hearing to deport, the court says:

"We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense." 163 U. S. 235, 16 Sup. Ct. 980, 41 L. Ed. 140.

Accordingly, while holding that a Chinese person could not be punished by imprisonment without a trial by jury, the power of Congress to expel by executive process was sustained, the court saying (page 237, 16 U. S., page 980, 16 Sup. Ct., 41 L. Ed. 140):

"We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identify-

ing and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials."

See, also, *U. S. v. Mrs. Gue Lim*, 176 U. S. 459, 461, 20 Sup. Ct. 415, 417, 44 L. Ed. 544; *Turner v. Williams*, 194 U. S. 279, 291, 24 Sup. Ct. 719, 722, 48 L. Ed. 979.

3. We regard it settled by the cases we have cited, and others referred to therein, that the proceeding to deport is civil, and not criminal, in its nature. Its object is to expel the alien from a place where he has no right to be, and to send him back where he belongs. It does not punish him, for expulsion from a place where one has no right to be is not punishment, and it does not forfeit any right within the rule in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, for he has no right to be here, and therefore possesses none to forfeit. It is no more criminal in character than is a proceeding to eject a person wrongfully in possession of real estate, or to enjoin one from wrongfully enjoying an easement in real estate. Neither the rules of evidence nor the nature of the proof required in criminal cases govern. The Supreme Court has expressly held that the amendments to the Constitution which safeguard the rights of persons accused of crime do not apply. The rule in the *Bram Case*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, respecting the admission of statements made by a person charged with crime, does not control. The statements made by Hung Chang to the inspector and interpreter should have been admitted. These statements, partly made before and partly after his arrest, were not made involuntarily. They were made in answer to questions officially put. If the defendant had sought to enter the country in a lawful way, through a port of entry, it would have been the duty of an officer of the United States to examine him as to his right to enter, and his statements could have been used against him. His coming surreptitiously into the country did not materially alter the situation. It was now the duty of an officer to examine him as to his right to remain. The statements he made were not introduced as confessions of crime, but as admissions in a civil matter.

It further follows from the fact that this was a civil proceeding that Hung Chang could not assume the attitude of a defendant in a criminal case, refuse to testify, and insist his refusal should in no way be used against him. It is unnecessary to decide whether he could have been compelled to answer. No attempt was made to compel him. His counsel advised him not to answer, and the court approved of this, and excluded the questions. This refusal to testify upon matters peculiarly within his knowledge was proper for consideration by the court. *United States v. Lee Huen et al.* (D. C.) 118 Fed. 442, 456.

4. All the testimony of the government identifying Hung Chang as a Chinese person was excluded. In the cases cited the Supreme Court has sustained the authority of Congress to provide, through executive agencies, for the identification and deportation of Chinese persons unlawfully in this country. To identify such Chinese persons in the first instance, inspectors and interpreters are employed. The witnesses offered were two inspectors and one interpreter. These witnesses had devoted and were devoting their time to the identification and examination of Chinese persons. They had made a practical study of the

characteristics of Chinamen. They were prepared to testify that Hung Chang was a Chinese person; but the court would not permit it, because they did not qualify as experts in the sciences of anthropology and ethnology. A study of Chinamen as they are was not sufficient. One must know what they are said to be in books. The court assumed there are certain racial characteristics concealed somewhere about Chinamen, which can only be known by great study in books, and that the identification of a person as a Chinaman upon any other grounds of distinction is worthless as evidence. Nothing but the testimony of experts in the science of race distinctions would, in his opinion, satisfy the demand for proof upon the point whether Hung Chang was a Chinaman or not. The court even went to the extent of holding that if the statements of Hung Chang were admitted, to the effect that he was born in China, and that his parents and grandparents were Chinese persons, his testimony would not be important, saying:

"The fact that an individual was born in China is in no wise conclusive that he is a Chinese person, nor does it tend to prove that he is such. The statement that his father and mother and his grandparents were Chinese persons is only the expression of an opinion, and can have no more weight in coming from the defendant than if coming from any one else."

No support for the view thus taken by the court of the kind of proof required in a deportation proceeding can be found in the policy or provisions of the Chinese exclusion acts. A history of their adoption may be found in the opinion of Mr. Justice Field in the Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. Referring to the immigration of the Chinese into California, he says that, notwithstanding the favorable provisions of the early treaty with China, "they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living." Page 595, 130 U. S., page 626, 9 Sup. Ct., 32 L. Ed. 1068. And this was one reason for their exclusion. The Chinese are a peculiar people, not hard, but easy, to recognize. Their racial characteristics are plain and apparent. The acts themselves recognize this in providing that, when a Chinese person found unlawfully in the United States is deported, "the person who brought or aided in bringing such person in the United States shall be liable to the government for all necessary expenses incurred in such investigation and removal"; and heavy penalties are imposed on the master of any vessel who permits any Chinese person to land in the United States in violation of law. Because the distinguishing characteristics of the Chinese—such as the color, the mode of dressing the hair, the language, and the garb—are marked and obvious, open to all, these are not, therefore, to be rejected as worthless, and the government restricted to other characteristics, which are not described, and apparently are unknown except to supposed experts in an occult science. The nature of the proof required is not that demanded in a criminal case. These acts are to receive a sensible construction, such as will effectuate the legislative intention. *Lau Ow Bew v. U. S.*, 144 U. S. 47, 59, 12 Sup. Ct. 517, 36 L. Ed. 340; *U. S. v. Mrs. Gue Lim*, 176 U. S. 459, 467, 20 Sup. Ct. 415, 44 L. Ed. 544. The statute

provides that any Chinese person arrested on the charge of being unlawfully within the United States must establish his right to remain here by affirmative proof, to the satisfaction of the commissioner or court. No greater degree of proof is required on the part of the United States. It is not required to do more than satisfy the commissioner or judge, by affirmative proof, that the one under arrest is a person of Chinese descent. This does not mean to satisfy beyond any possibility of doubt, but only to a reasonable degree of certainty, such as a rational mind would demand in any serious matter of personal concern. *U. S. v. Lee Huen* (D. C.) 118 Fed. 442, 457. It may be questioned whether Congress ever contemplated in this proceeding the raising of the question whether the person arrested was or was not a Chinese person. Congress apparently assumed that the characteristics of Chinese persons are matters of common knowledge. A Chinese person found unlawfully in the United States was to be arrested, and, after a hearing, deported, unless he satisfied the authorities that he had a right to remain. This apparently left to the inspector who made the arrest the identification of the Chinaman as such. Indeed, although the exclusion acts have been in force for some 20 years, this is the first case in which the question was raised and proof demanded. It is not necessary to consider whether the question of race goes to the jurisdiction of the commissioner, and might or should be raised by a proceeding in habeas corpus, as in *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317. Undoubtedly it is necessary for the commissioner and the court to find that the defendant is a person of Chinese descent, in order to sustain their jurisdiction and justify the deportation. But under the circumstances it is necessary for neither to close their eyes to the obvious facts. The commissioner, as pointed out, apparently took into consideration the real evidence furnished by the defendant himself as to his race. It was entirely competent for the court below to do the same thing. Upon the question of race ancestry, the person involved is often the best evidence to produce. It is a case of "*res ipsa loquitur*." The tribunal judges by looking at the person. 1 *Greenleaf on Evidence* (16th Ed.) § 13c; *Chamberlayne's Best on Evidence*, p. 196, notes.

In *Garvin v. The State*, 52 Miss. 207, it was held that, where an indictment described the accused as a "colored person," that fact might be proven by his production before the jury; the court saying (page 209):

"It is urged that this was erroneous, because it is said that the jury can know nothing except by the testimony of witnesses. This is not true as to physical facts, which may be brought to their attention by ocular demonstration. It would not be necessary to prove by other testimony than profert of the party that he was 'a person,' 'a man,' if so described in the indictment." See, also, *Warlick v. White*, 76 N. C. 175, 179.

In the case of *Ark Foo v. U. S.*, 128 Fed. 697, 63 C. C. A. 249, Ark Foo claimed he was born in the United States. A witness testified that he was 29 years old, and was born in the United States. The commissioner rejected this testimony, saying that he was satisfied

from the defendant's appearance that he was certainly over 40 years of age, and therefore placed no reliance in the witness' story. The Circuit Court of Appeals of the Second Circuit sustained the action of the District Judge in holding that the commissioner's determination ought not to be disturbed on appeal; saying:

"To the commissioner is delegated the duty to determine in the first instance these questions of fact; and if it were perfectly apparent to him, as he says it was, that the appellants' witness had falsely stated the age of one of them, the commissioner was justified in rejecting the entire testimony."

The appearance of Hung Chang, his color, his mode of dressing the hair, his language, all are described in the record in testimony not objected to. All were present and apparent to the court. They were proof sufficient, in the absence of explanation or contradiction, to warrant the finding that he was a Chinaman or person of Chinese descent. In addition, there was the testimony of the government witnesses, which was received, tending to show he was a Chinaman, and also the fact that he refused, in answer to questions, to state whether he was or was not a Chinese person, and what was the nationality of his father and mother. In our opinion, the proof thus produced was ample to establish the fact that the defendant was a person of Chinese descent, and, no proof being produced by him tending to show his right to remain in the United States, the judgment of the lower court is reversed, and the case remanded, with directions to enter a judgment affirming the finding and order of the commissioner, and directing the deportation of the defendant, Hung Chang.

PFLUEGER v. LEWIS FOUNDRY & MACHINE CO.

(Circuit Court of Appeals, Sixth Circuit. December 14, 1904.)

1. MECHANICS' LIENS—MACHINERY—FIXTURES—BANKRUPTCY.

A bankrupt, engaged in manufacturing steel and iron, purchased a "squeezer" and a steam pump for use in his steelmill. The squeezer was a heavy piece of machinery; weighing, with the pump, 37,500 pounds. It was erected on a brick base, to which it was fastened with bolts. To provide proper space therefor, the roof of the building was carried up some six feet, and a skylight built on top. The pump was to be put on a similar base, but none of the parts of the machine were connected with the wall of the building. *Held* that, as between the bankrupt and the seller, such machinery was a fixture, and within Rev. St. Ohio 1892, § 3184, providing for a mechanic's lien for the furnishing of machinery for a mill, etc., on the mill or manufactory, and on the interest, leasehold, or otherwise, of the owner in the lot or land on which the same may stand.

2. SAME—PAYMENT—CHECKS.

Where a bankrupt gave checks to the seller of machinery in payment therefor, both parties expecting that the bankrupt would provide necessary funds within a few days to pay the checks, during which the payee agreed to hold them, but funds were never so provided, and there was no express agreement that the checks should be received as payment, the seller was remitted to his original rights under the contract of sale, without regard to the checks.

Appeal from the District Court of the United States for the Northern District of Ohio.

W. E. Young and Francis Seiberling, for appellant.

Charles J. Estep and Robert M. Morgan, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This controversy arose in the court below upon a petition presented by The Lewis Foundry & Machine Company, praying for the recognition and enforcement of a mechanic's lien which it claimed, under the statutes of Ohio, upon the mill or manufactory of the bankrupt, the Ohio Steel & Iron Specialty Company, as well as upon the lands and premises upon which the same was built, and specifically upon certain particular machinery which it had furnished and sold to the bankrupt to be put into and used in said mill. It was for the purchase price of this particular machinery that the petitioner claimed the lien. The referee disallowed the petition, and the matter was taken before District Judge Wing upon a petition for review. The District Judge reversed the order of the referee, and directed the entry of an order allowing the lien claimed upon the mill and the land on which it stood, but disallowing it in so far as it was asserted as a distinct and separate lien upon the particular machinery sold by the petitioner to the bankrupt. No appeal was taken by the petitioner from this last part of the order, but the trustee has appealed from so much of the order as allows the lien upon the mill and the premises occupied by it. The mill was a rolling mill, used for the manufacture of steel and iron products. For the purpose of equipping it with machinery desirable for its work, the bankrupt on March 31, 1903, purchased, and the appellee sold to it, a machine called a "squeezer," and a steam pump to supply it with hydraulic pressure. The function of a squeezer is to receive the product of the furnace after it has passed from the furnace between the rolls, and further to compact it by squeezing under hydraulic pressure, after which it is cut into billets. The squeezer is a heavy piece of machinery; weighing, with the pump, as much as 37,500 pounds. In the mill it was erected upon a base built of brick, four feet high, through which bolts were carried up to receive the base of the squeezer and burrs or nuts to hold the latter securely on its foundation. To provide a proper place for it, the roof of the building was in this instance carried up some six feet, and a skylight put in at the top. The steam pump was to be put upon another similar base. Neither of the parts of the machine was connected with the wall of the building. The squeezer had already been erected in the mill at the time when the petition in bankruptcy was filed, but the steam pump, although it has been delivered at the works, had not yet been set up. The pump was to get its steam from the "header"—a large conduit coming from the boiler and carried out into the building to supply steam by branches to the different engines or machines in the building. The purchase price of the machinery was \$3,750, to be paid within 30 days from the date of the contract. The necessary proceedings to obtain a lien were duly taken within the time prescribed by the statute. The purchase price not be-

ing paid when it became due, the appellee pressed for payment. The Ohio Steel & Iron Specialty Company was in straitened circumstances and could not, or at least did not, pay the debt, but at length gave to the appellee its two checks, for \$1,875 each, in settlement. These checks were drawn upon a bank where, as both the parties knew, the drawer had no funds, but where it was supposed by them he would before long have sufficient to pay the checks; but, though the checks were afterwards presented, no part of them was ever paid. On or about July 3, 1903, a petition in bankruptcy was filed by the creditors of the Ohio Steel & Iron Specialty Company, whereon it was shortly thereafter adjudged bankrupt. Pflueger was appointed trustee.

The principal questions argued by counsel orally and by brief are, first, whether the Ohio statute requires that the machinery, etc., furnished to a mill, manufactory, etc., must be something intended to be so attached to the realty as to become fixtures thereon, or whether the statute extends to machines not having that characteristic, and may continue to be personal property; and, second, whether this particular machinery should, upon the facts stated, be adjudged to be fixtures or chattels. The statute (section 3184 of the Revised Statutes of Ohio of 1892) provides as follows (omitting irrelevant matter):

"A person who performs labor or furnishes material or machinery * * * for erecting, altering, repairing or removing * * * a mill or manufactory * * * by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment of the same upon such * * * mill or manufactory * * * and upon material and machinery so furnished, and upon the interest, leasehold, or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."

The statutes of the different states providing for this class of liens vary so much that the construction which has been put upon them, and the language employed by their courts in such construction, must be attentively observed, before one can properly appreciate the value of the decisions relating thereto. We are required, however, to accept and conform to the construction which the Supreme Court of Ohio has given to this statute. It would seem, as a matter of first impression, that the Legislature of Ohio did not intend by section 3184 to prescribe, as a test for the application of its enactment, the question whether the thing furnished is something intended to become a fixture, and will be such when placed in the intended location and relation to the mill or manufactory. The statute makes a distinction between the mill or manufactory and the real estate and the machinery furnished by the lienor. If the machinery furnished becomes a fixture, there was no need to expressly declare that the lien should extend to it. The Ohio Supreme Court holds that the lien given by this statute arises when it is furnished, and is not postponed until it is put in its place in the mill (*Beckel v. Petticrew*, 6 Ohio St. 247)—a conclusion wholly inconsistent with the idea that the lien attaches only when the machine or other thing is parcel of the realty, for nothing becomes a fixture until it is affixed. It was held by the Circuit Court of Appeals for the Fifth Circuit, affirming the decision of Judge Newman, in *Re Georgia Handle Co.*, 109 Fed. 632, 48 C. C. A. 571, that, under the statute of Georgia which gives a lien upon the "factory" to those furnishing materials or machinery for such factory, it was immaterial whether the

machinery therein should be considered real or personal property. In either case it was subject to the lien. The record failed to show how the machinery was attached to the building. But it was held sufficient that it showed there was such attachment as was necessary to its operation. However, as we intend to decide this case upon another ground, we refrain from expressing any definite opinion upon the question just stated, and do not pursue the consideration of it further.

If the machinery which was furnished by the appellee was of the nature of a fixture to the mill, it is not doubted—indeed, it is conceded by the counsel for the appellant—that the furnishing it entitled the appellee to the lien admitted and allowed by the District Court. In considering whether it was in the nature of a fixture, it is necessary to keep the facts clearly in view. The purchaser was the owner of the mill, and of the land on which it stood. The mill was devoted to the business in which this machinery was to be employed. It had been reorganized for the business of a rolling mill. The foundations in the floor of the mill and the opening in the roof for the squeezer were all constructed for a permanent location in that part of the mill, and it seems reasonable to suppose that the purchaser intended it to be permanently located and to perform its service in that location—not, indeed, irremovably located, because the exigencies of the business might require a demolition or reconstruction of the mill, in which event a fixture may revert to its original status as personal property. This machinery performed a part of the operations of the mill, and was supposed to be a necessary, or at least a useful, factor in performing that part of the work to which it was to be devoted. It was a ponderous structure, not easily moved from place to place. Not only the seller contemplated all these things, but the seller knew or anticipated the substance of them. We have not to decide the question whether, upon such facts, in a case between landlord and tenant, the machine should be held to be a fixture. Nor is there any other relation between the parties which gives rise to any special rule of that character. The general rule upon this subject rests largely upon the presumed intention of the party who acquires the chattel and brings it into fixed association with his own real property. What that intention was in the present case seems clear. We think there can be no doubt that the Ohio Steel & Iron Specialty Company intended to affix the machine in question to the real estate as a part of the mill—to remain such permanently. The modern authorities, at least, upon this subject, with hardly any exception, agree that, upon such a state of facts as is presented here, the machine or other thing becomes a fixture, in the absence of any statute leading to a different result. *Hill v. National Bank*, 97 U. S. 450, 24 L. Ed. 1051; *New York Life Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229; *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 111 Fed. 81-94, 49 C. C. A. 229; *William Firth Co. v. South Carolina L. & T. Co.*, 122 Fed. 569, 59 C. C. A. 73; *Murray v. Bender*, 125 Fed. 705, 60 C. C. A. 473, 63 L. R. A. 783; *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Voorhis v. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *McRae v. Central National Co.*, 66 N.

Y. 489; Pond Mach. Tool Co. v. Robinson, 38 Minn. 272, 37 N. W. 99; Dudley v. Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368; Fifield v. Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166; Delaware, L. & W. R. Co. v. Oxford Iron Co., 36 N. J. Eq. 452; Coleman v. Stearns Mfg. Co., 38 Mich. 40; Longbottom v. Berry, L. R. 5 Q. B. 123; Holland v. Hodgson, L. R. 7 C. P. 334 (in Exch. Chamb.).

Counsel for the appellant contends, however, that, although there is no statute of Ohio which controls the determination whether a thing is a fixture, yet the Supreme Court of the state has settled the law of the state otherwise than as we understand the general rule to be.

In Allison v. McCune, 15 Ohio, 726, 45 Am. Dec. 605, a mortgagee of a mill site described by metes and bounds, "with all appurtenances," brought suit against an execution creditor who had levied upon and removed the machinery of a steam grist and saw mill standing on the mortgaged premises, for the impairment of the mortgagee's security. The question was whether the machinery was personalty or fixtures belonging to the realty. The court held that it was part of the realty, and gave judgment for the plaintiff; saying, "The evidence shows it was placed there for permanent use; that it was attached to the mill and the freehold."

The next case, which is one principally relied upon by the appellant, is Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634. This, also, was a suit by a mortgagee of a lot by its number, "on which," as recited, "is erected a woolen factory," against execution creditors of the mortgagor who were levying upon the boiler, engine, and the carding, breaking, spinning, and other machines such as are used in such mills. The question, so far as it related to the boiler and engine, was eliminated from the case during its progress, but remained for decision in respect to the other machinery. This other machinery was fastened to the floor by cleats to keep it steady while in operation. It was easily removable, and the mortgagor had been accustomed, while he had used and occupied the building, to remove it from one part of the building to another to suit his convenience; to sell it, and purchase other machinery adapted to his wants, and place it in the building. At the time when the mortgage above mentioned was given, the mortgagor gave another mortgage upon part of the machinery to secure the same debt to the same mortgagee. In the opinion, Judge Bartley discusses the whole doctrine of fixtures with much elaboration. Many suggestions applicable to different branches of the subject are made, which it is not necessary to canvass now. He states, as the result of his examination and review of the authorities, his conclusion to be that the safest criterion is the united application of the following requisites:

"(1) Actual annexation to the realty, or something appurtenant thereto. (2) Appropriation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made."

We may observe, in passing, that the facts of the case at bar fully respond to all the conditions thus proposed.

Applying this test to the facts, the court held that the machines, other than the boiler and engine, were not fixtures, but personalty. The court did not rely upon the fact that a chattel mortgage had been given, but stated that the conclusion would have been the same if that transaction had not occurred. In the course of his discussion, the learned judge suggests as a line of demarcation between a fixture and personalty the distinction of the motive or propelling power of the mill from the machinery which is propelled by the power. Upon this distinction, as there indicated, counsel for the appellant here contends that the squeezer and pump would fall without the line which includes fixtures. This might admit of some question. But it is evident from the test which the court proposed for itself that the distinction just mentioned was not intended to be given as a constant criterion, but only one of the lights by which in many cases the proper conclusion might be reached. The court admits that the character of the article may be changed from one side of the line to the other by agreement of parties, and that a conveyance, by describing its subject as a mill or manufactory, would carry the machinery fixed and used therein. Another reason for supposing that the court did not intend to lay down such a test as a rule is that it could not always or often be applied without confounding the principles of the law of fixtures as they have always and universally been applied—as, for instance, between landlord and tenant, administrator and heir, and grantor and grantee. For, however the decisions have varied in respect to the law governing particular classes, they have never failed to recognize that different rules apply to different classes of parties. It is to be noticed that the case of *Allison v. McCune*, supra, was cited approvingly, and without any suggestion of limitation.

Fortman v. Goepper, 14 Ohio St. 558, was a case between the mortgagee and subsequent creditors of the mortgagor, and involved the nature of certain machinery in a brewery covered by the mortgage. The property had been conveyed to the mortgagees by a deed of the land and a bill of sale of the personal property, and each was in like manner separately mortgaged back for the purchase price. It was held—pursuing the course of dealing of the parties—that the machinery should be regarded as personal property. This was applying a principle recognized in *Teaff v. Hewitt*, supra, which may be stated to be that, when an article of personal property is associated with or attached to realty, its character may be fixed by the agreement of the parties concerned, provided the rights of third parties are not thereby interrupted.

The next case involving this subject was *Brennan v. Whitaker*, 15 Ohio St. 446, where a mortgagee of chattels—machinery in a steam sawmill—brought suit against parties claiming under a subsequent mortgage of the real estate whereon the mill was situated, into which the machinery had been placed after the giving of the chattel mortgage above mentioned. The machinery consisted of boilers, an engine, mill shafting, a drum, a balance wheel, the gearing for an upright saw, one muley saw and its gearing, and one pony engine. The main shaft was detachably connected with the engine, and the drum was in like manner mounted on the shaft. The gearing of the upright

saw was connected by a belt with the drum. The other saw was connected with the main shaft. All these parts were detachable from each other. Some of the machinery could be taken through the doors of the mill, and some could not. The chattel mortgage contained a privilege to enter and remove the machinery in case of default in payment of the debt secured thereby. The court held that all parts of this machinery were fixtures, and that, although the chattel mortgage had been duly registered, the title of the mortgagee was subordinate to that of the mortgagee of the real estate. The case of *Teaff v. Hewitt*, supra, was cited by counsel on both sides, but was not referred to in the opinion of the court. It is obvious, however, that, if the suggestion of Judge Bartley in the latter case had been observed, this decision could not have been reached.

The last decision of the Supreme Court of Ohio to which our attention has been called is that of *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493. This was a suit by the assignee of one Patton, an insolvent debtor, for an interpleader between certain parties, of whom were the Case Manufacturing Company, who had supplied Patton with certain machinery, not including the engine and boiler, for a flouring mill, and the Mansfield Machine Works, who had supplied a boiler and engine for the same purpose. All this machinery had been placed and used in the mill. Both these parties claimed the proceeds of this machinery supplied by them. Other defendants claimed under mortgages of the real estate given by parties who derived title from Patton. The court below had sustained the claims of the mortgagees of the real estate. It appeared that, when the Case Manufacturing Company sold the machinery to Patton, it was mutually agreed between those parties that the title should remain in the vendor until the machines were fully paid for, and they had not been paid for. There was a similar agreement between Patton and the Mansfield Machine Company. Following *Brennan v. Whitaker*, supra, the Supreme Court held that the Mansfield Machine Company should be postponed to the claimants under the real estate mortgages, but that the Case Manufacturing Company should have priority over them. The conclusion in respect to the claim of the latter company could be supported on either of two grounds, namely, a holding that the machinery was not in the nature of fixtures, or a holding that, though it might otherwise have been regarded as a fixture, yet by a competent agreement of the parties it had been assigned the status of personal property. It is apparent that the court based its decision upon the fact that the parties had agreed to give this machinery the character of personality. Judge Minshall, who delivered the opinion of the court, begins by referring to this agreement and affirming its validity. He then proceeds to state the facts, and follows with a discussion of the general law on the subject as given in the text-books. Referring to the case of *Teaff v. Hewitt*, supra, he states Judge Bartley's suggestion of a method of distinction, and gives reasons for thinking it a simple and easy one; but that distinction was not applied and could not be, for he says (13 N. E. 497):

"There is no question but that the character of things which would otherwise be fixtures may be changed to that of personality by the agreement of the

parties, and conversely, so as to be binding upon them. And the stipulation of the vendor in each of these cases that the title to the property furnished by it should not pass until it had been paid for by the purchaser precludes the idea that either of them intended that the machinery furnished by it should become a part of the realty until payment had been made, as to impute a different intention would be to suppose that neither intended the benefit of a stipulation exacted with the greatest care in its own behalf."

And in that paragraph of the syllabus which states the holding of the court in regard to the claim of the Case Manufacturing Company, and which by the law of Ohio is to be regarded as the law of the case, the statement is that:

"Where prior to the act of May 4, 1885, regulating, among other things, 'conditional sales' of personal property (82 Ohio Laws, p. 238), A. sold and delivered to B. the machinery, other than the motive power, used for the manufacture of flour by the roller system, and stipulated that the title to the property should not pass until paid for, and thereupon the machines were, with the assent of A. and according to the understanding at the time they were sold, placed by B. in his mill, and, for the purpose of facilitating their use, were fastened to the floor by bolts, but could readily be removed without injury to the building or the machinery itself, and placed in another building, held, that the machines were personalty, although so fastened to the building, and that the agreement was valid, as against a subsequent mortgage of the realty without notice of the agreement."

The case of *Brennan v. Whitaker* is cited in the opinion with no indication of disapproval. We have analyzed the foregoing cases in detail for the reason that the appellant's case depends upon the question whether the law of Ohio upon this subject is peculiar, and establishes the distinction as one depending on the question whether the article is part of the motive power, or is part of the machinery propelled by it. The most that can be said—though we think it cannot be correctly said—is that there are conflicting utterances by the judges in the course of their opinions. There is no conflict in actual decisions. But if there were, inasmuch as neither the latest case, *Case Mfg. Co. v. Garven*, nor *Teaff v. Hewitt*, professes to overrule the cases of *Allison v. McCune* and *Brennan v. Whitaker*, or either of them, the law would be so unsettled that we should have to judge for ourselves.

It may further be observed that by the language of the statute the lien is given upon not only the real estate, but upon the "mill, manufactory * * * or other structure," etc. Significance should be given to this accumulation of descriptions. In a deed or mortgage, such further description added to the general description, as by metes and bounds or number of a lot, would, even by the unquestioned rule in Ohio, as elsewhere, carry the machinery, such as that here in question, as fixtures or parts of the mill. The reason for the rule is twofold—because the employment of the further description indicates a purpose to include something else than is included in the general description, and also because the use of such specific terms as "mill, manufactory," etc., imports that what goes to make the specific thing was intended to be included. We see no reason why this language in the statute should not be construed in the same way. The grounds for such construction are precisely the same. But we are content to rest our decision upon the conclusion reached in respect to the question previously discussed.

One other question remains: It appears that some time after the delivery of the machinery the vendee, on being pressed for payment, gave its checks upon a bank for the amount due. It further appears that it had no funds in the bank to pay them, but that the parties expected that the vendee would have the necessary funds there in a few days, until the expiration of which the payee agreed to hold them. But the funds were not provided, and the checks were never paid. There was no express agreement that the checks should be received in final payment, and, if there were, the failure of the drawer to provide the funds for payment would absolve the payee from his agreement. The just and reasonable conclusion to be drawn from the evidence is that they were taken as conditional payment only. *The Kimball*, 3 Wall. 37, 45, 18 L. Ed. 50; *Embrey v. Jemison*, 131 U. S. 336, 346, 9 Sup. Ct. 776, 33 L. Ed. 172; 2 Daniel on Neg. Inst. § 1623. The maker of the checks having provided no funds for their payment, the vendor was remitted to his original rights under the contract of sale. *Fleig v. Sleet*, 43 Ohio St. 53, 1 N. E. 24, 54 Am. Rep. 800.

For the reasons above stated, the order or decree of the court below is affirmed, with costs.

WATKINS v. AMERICAN NAT. BANK OF DENVER.

(Circuit Court of Appeals, Eighth Circuit, November 11, 1904. On Rehearing, February 10, 1905.)

No. 1,984.

1. PRACTICE—SPLITTING CAUSE OF ACTION BARS.

One who avails himself, by action or by defense to an action, of a part of an indivisible claim or cause of action, thereby estops himself from again maintaining an action or defense founded upon it. One may not split his cause of action.

2. SAME—DEFENDANT HAS OPTION TO USE FACTS CONSTITUTING DEFENSE AND AFFIRMATIVE CAUSE OF ACTION AS EITHER, BUT NOT AS BOTH.

A defendant who has a claim which constitutes a defense to the action against him and an affirmative cause of action against the plaintiff has the option to use it for defense or for attack, but he cannot do both.

If he avails himself of any part of it in defense of the action against him, he is thereby conclusively estopped from subsequently maintaining an action against the plaintiff to recover any portion of it, and he loses the excess.

3. CONTRACT TO CONVEY—DAMAGES FOR BREACH.

The measure of damages for the total breach of a covenant to convey is the value of the land which the vendor agreed to convey, whenever the purchase price has been paid, and whenever a prima facie liability of the vendee to pay it exists, which has not been released, abandoned, or adjudicated adversely, and which the vendor insists upon enforcing.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 1047-1058.]

4. VENDEE'S NOTE—BREACH OF VENDOR'S CONTRACT—DAMAGES.

Where each party has partially performed, and has accepted the benefits of partial performance by the other party, proof of the amount of damages from the breach of the vendor's contract to convey is indispensable to the defense of want of consideration of the vendee's promissory note for the purchase price, based upon such a breach, because the breach constitutes a defense to the amount of the damages from it only.

5. ACTION—SPLITTING CAUSES.

The vendor sued his vendee for \$6,000, balance owing upon his note for \$16,000, which was a part of the consideration for a contract for the sale of a large amount of real estate. A portion of this real estate had been conveyed to the vendee pursuant to the contract. The vendee denied liability to pay the balance of his note, because the vendor had lost title to the portion of the property which it had not conveyed to him. The court found the property which had not been conveyed to be worth \$25,000, and rendered a judgment for the defendant. The vendee then brought an action to recover of the vendor the difference between \$25,000, the value of the property, and \$6,000, the amount unpaid upon his note. *Held*, the vendee was estopped by the former suit to maintain the action. He could not thus split his cause of action.

Hook, Circuit Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

George H. Noyes, for plaintiff in error.

T. J. O'Donnell (Sterling B. Toney and John W. Graham, Jr., on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This writ of error challenges a judgment which sustained a demurrer to a complaint which presents this case: The plaintiff, Watkins, and the predecessor in interest of the American National Bank of Denver, the defendant, were originally bound by mutual and dependent covenants, each of which was the consideration for the other; the former by promissory notes to pay \$31,000 upon the conveyance to him by the latter of certain real property, and the latter by an agreement to convey the property upon the payment of the notes. Subsequently, and in the year 1896, the plaintiff had paid his note for \$15,000, and then by mutual agreement he paid \$10,000 upon the principal and \$800 interest upon his note for \$16,000. The bank conveyed to him all the property covered by the contract, except certain lots and lands described in the complaint in this action, extended the time of payment of the remaining \$6,000 owing upon his note until June 24, 1897, and agreed to convey the remainder of the property upon the payment of the \$6,000. The bank lost the title to this remnant of the property, so that it could not convey it. Thereupon it brought an action against Watkins in the United States Circuit Court for the Eastern District of Wisconsin upon his note to recover the \$6,000. At the time this suit was brought the title of the bank to the property had been irrevocably lost, so that Watkins had a cause of action against it for all the damages that ever could arise from the breach of its covenant to convey. *Anvil Min. Co. v. Humble*, 153 U. S. 540, 551, 552, 14 Sup. Ct. 876, 38 L. Ed. 814; *Roehm v. Horst*, 178 U. S. 1, 15, 20 Sup. Ct. 780, 44 L. Ed. 953. Watkins answered the action upon his note that the agreement of the bank to convey the property was the consideration of his obligation, that the property was worth \$25,000, that the bank had lost the title to it so that it could never convey it, and that he was not liable to pay

the note. These averments were denied by a reply, there was a trial of the issues thus tendered upon the merits, and a judgment in favor of Watkins for costs. He has now brought an action in the court below, based upon the same facts which he pleaded and proved in the action upon his note in Wisconsin to recover the excess of his damages from the breach of the bank's covenant, over the \$6,000 which remained unpaid upon his note, to recover the difference between \$25,000 and \$6,000. Under the statutes of Wisconsin which governed the trial of the action upon his note, he might have secured a judgment for this \$19,000 in that action upon the facts which he there pleaded and proved if he had simply denominated his pleading a counterclaim, and asked for that measure of relief. Rev. St. Wis. 1898, §§ 4262-4264, 2656.

In this state of the case, the plaintiff is met here by the familiar rules that one may not split an indivisible cause of action, and that a judgment in a prior action between the same parties which involves the same subject-matter renders *res adjudicata* every question which was directly or impliedly involved in the decision. His counsel seeks to escape from the effect of these principles upon two grounds: (1) That the damages which Watkins suffered from the breach of the bank's covenant were not \$25,000, but only \$19,000; and (2) that, if he is in error in this, he did not use the \$6,000 of these damages which were requisite to defeat the action on the note as a counterclaim, but only as a defense to that action on the ground that the consideration of the note had failed.

The measure of damages for the total breach of a covenant to convey property is the value of the property which the vendor agreed to convey, in case the purchase price has been paid. Where the price has not been paid, and the claim for it is released or abandoned, the measure of damages is the difference between the value of the property and the unpaid purchase price. If Watkins had paid his note, or if the bank had sold it for value before maturity to an innocent purchaser, or if it had taken judgment against him upon it, the measure of Watkins' damages for the bank's breach of its agreement to convey would have been \$25,000. If the bank had surrendered the note to him, his damages would have been the difference between the amount of that note and the \$25,000 or \$19,000. When, however, the bank sued him upon the note, and insisted upon his liability upon it, his damages for the breach of the bank's covenant were the value of the property it agreed to convey, or the sum of \$25,000. The note was *prima facie* evidence of Watkins' liability to pay it, and, as long as the bank pressed that liability, and there was no agreement or adjudication that it did not exist, the damages for the breach of the covenant to convey were measured upon the basis that Watkins was bound to pay the note, that the bank was bound to convey the land, and that the damages for the breach of its obligation were the entire value of the property. Hence it was that, in the action in Wisconsin, Watkins alleged and proved that the bank's covenant to convey was the consideration of his note; that this covenant had been broken; that the value of the land which the bank was to convey, and hence the

damages from the breach of its covenant, were \$25,000. These averments and proofs were indispensable to his defense, because the breach of the bank's covenant constituted a defense to the note to the amount of the damages from that breach only. If the value of the land, and hence the damages from the breach, had been \$1,000 or \$3,000, or any amount less than \$6,000, the breach would have constituted a defense to the note pro tanto only, and the bank would have recovered the difference between the amount of the damages and the face of the note.

And here is the demonstration that the damages from the breach of the bank's covenant were \$25,000, and not \$19,000. The breach of that covenant was a defense to the note to the amount of the damages caused by the breach. If there had been no damages, the breach would have been no defense. If those damages had been \$5,000, there would have been a recovery of \$1,000 upon the note. If they had been \$7,000, the action upon the note would have failed, and \$1,000 of the damages would have remained unpaid. If they had been \$19,000, as counsel for the vendee now claims, the action on the note would have failed, and only \$13,000 of damages would have remained unpaid. It is because, and only because, the vendee's damages from the breach were \$25,000, and \$19,000 of them remained unpaid after applying \$6,000 to the satisfaction of his note, that the plaintiff demands judgment for \$19,000 in this action. He cannot escape the rule that one may not split his cause of action on the ground that his damages for the breach of the bank's covenant were but \$19,000. As long as his prima facie liability upon his note existed, and the bank insisted upon enforcing it, the measure of his damages for the latter's failure to convey was the value of the property which it agreed to transfer to him, and he had an indivisible, affirmative cause of action against it for \$25,000.

But counsel for the plaintiff persuasively argues that, even if the measure of damages for the breach was \$25,000, this case is not violative of the rule against splitting causes of action because his client did not plead the failure of the bank to perform its covenant as a counterclaim, and did not claim any recovery on account of it in the action on the note, but interposed that breach and the damages from it in support of his defense that the consideration of his note had failed, and for that purpose only. But the same facts which constituted this defense to the note also constituted a counterclaim against the bank, upon which the vendee might have recovered in his action upon the note the judgment for \$19,000 which he now seeks to obtain. If these facts had constituted matter purely defensive, it is conceded that he would have been barred from again presenting them if he had not interposed them in the action upon the note. But as they established both a defense and an affirmative cause of action, he might have reserved them, and have permitted judgment against him upon the note, and that judgment would not have estopped him from subsequently maintaining his affirmative cause of action in an independent suit for

the breach of the covenant of the bank. 1 Van Fleet on Former Adjudication, § 198; 2 Van Fleet on Former Adjudication, § 436; 1 Freeman on Judgments, §§ 277, 224; Cook v. Moseley, 13 Wend. 277; 1 Sutherland on Damages, § 187; Batterman v. Pierce (N. Y.) 3 Hill, 171, 174; Britton v. Turner, 6 N. H. 481, 495, 26 Am. Dec. 713; Barth v. Burt, 43 Barb. 628; Mimnaugh v. Partlin, 67 Mich. 391, 34 N. W. 717. In other words, when he was sued upon his note he had the option to reserve the breach of the bank's covenant for an independent action, to interpose it as a counterclaim, or to interpose it as a defense only in the action in Wisconsin. But could he interpose it as a defense, and subsequently maintain an independent action upon it? May a defendant who has a claim against the plaintiff which is available, at his option, either as a defense or as an affirmative cause of action, use it first as a defense, and then as the basis of an independent suit? This is not the first time that this question has been presented to this court. The First National Bank of Newton sued W. E. Brown upon his promissory note. He interposed a claim much in excess of the amount of his note for the waste by the bank of collateral securities. He pleaded this claim both as a defense of payment (Brown v. First National Bank, 112 Fed. 901, 904, 50 C. C. A. 602, 56 L. R. A. 876), and as a claim for a judgment over against the bank for the excess. A demurrer to his pleas for affirmative relief was sustained, and a judgment on the merits in support of his defense of payment was rendered. Thereupon he brought an action in the United States Circuit Court for the District of Kansas against the bank to recover the excess of his claim for the waste of the collaterals over the amount applied to the payment of his note. An examination of the authorities and a consideration of the reasons pertinent to the questions presented, which are adverted to in the opinion of this court, led to the conclusion that this was the true rule: "A defendant who has a claim, which constitutes a defense to the action against him, and an affirmative cause of action against the plaintiff, has the option to use it for defense or for attack, but he cannot do both. If he avails himself of any part of it in defense of the action, he is thereby conclusively estopped from subsequently maintaining an action against the plaintiff upon any portion of it, and he loses the excess"—and the dismissal of the second action by the court below was sustained. Brown v. First National Bank (C. C. A.) 132 Fed. 450. This rule is abundantly supported by authority. O'Conner v. Varney, 10 Gray, 231; Britton v. Turner, 6 N. H. 481, 495, 26 Am. Dec. 713; Batterman v. Pierce (N. Y.) 3 Hill, 171; Machine Co. v. Farmer, 27 Minn. 428, 430, 8 N. W. 141; Bolen Coal Co. v. Brick Co., 52 Kan. 747, 749, 35 Pac. 810; Bierer v. Fretz, 37 Kan. 27, 30, 14 Pac. 558; Howell v. Goodrich, 69 Ill. 556, 559; Simes v. Zane, 24 Pa. 242, 244; Lucas v. Le Compte, 42 Ill. 303, 305; Sutherland on Damages, §§ 186, 187, 189; Freeman on Judgments, §§ 277, 224; 2 Van Fleet on Former Adjudication, p. 867; Desha v. Robinson, 17 Ark. 245; Burnett v. Smith, 4 Gray, 50, 52; Sargent v. Fitzpatrick, 4 Gray, 511; Ins-

lee v. Hampton, 11 Hun, 156, 158; Wilder v. Case, 16 Wend. 583; Rogers v. Rogers, 1 Daly, 194; Rogers v. Wiggs, 12 B. Mon. 504; Henderson v. Henderson, 3 Hare (Ch.) 100, 115; I. B. & R. Ry. Co. v. Koons, 105 Ind. 507, 5 N. E. 549; Jennison Hardware Co. v. Godkin, 112 Mich. 57, 62, 70 N. W. 428; Resseguie v. Byers, 52 Wis. 650, 656, 9 N. W. 779, 38 Am. Rep. 775; Gillespie v. Torrance, 25 N. Y. 306, 311, 82 Am. Dec. 355; 22 Am. & Eng. Enc. of Law (1st Ed.) pp. 438, 439.

A reconsideration of this question and a review of the authorities have only served to strengthen the conviction that this rule is firmly established, wise, and salutary. The decisions cited in opposition to it rather evade than challenge it. They were rendered in sporadic cases, conditioned by peculiar facts, and, in so far as they are inconsistent with it, are in conflict with the general current of authority.

This rule governs the case in hand. When the bank had sued Watkins on his note, he had a single, indivisible cause of action against it for \$25,000 for its breach of its covenant to convey. The facts which conditioned that cause of action also constituted a defense to the action on the note. Watkins had the option to interpose them as a defense or as a counterclaim in the action against him, or to reserve them and to subsequently maintain an independent action upon them against the bank. But he could not do both. He elected to take the benefit of them as a defense, and he recovered the full measure of the relief which he demanded on their account. He might have recovered in that action upon the same allegations and proofs which he there made the judgment which he now seeks, if he had prayed for it. He did not do so, and the judgment in the action upon the note renders the question of the relief to which he is entitled *res adjudicata*, and estops him from maintaining an action to recover any remainder of the damages for the breach of the bank's covenant, a part of which he used to defeat its action upon the note.

The conclusion which has been reached upon the general demurrer to the complaint renders it unnecessary to consider the question, which was also raised below, whether or not this action is barred by the statute of limitations.

The demurrer to the complaint was rightfully sustained upon the first ground, and the judgment is accordingly affirmed.

HOOK, Circuit Judge, dissents.

On Rehearing.

SANBORN, Circuit Judge. A motion for a rehearing of this case has been made, based upon the conceded rule that where a contract to convey land and a promise to pay for it are entire, and each is the consideration for the other, and the defendant has received no benefits from the contract, it is a complete defense to an action upon either that the other has not been and cannot be completely performed. *Manitoba Fish Co. v. Booth*, 109 Fed. 594, 48 C. C. A. 564; *Griffin v. American*

Gold Min. Co., 114 Fed. 887, 52 C. C. A. 507; Bank of Columbia v. Hagner, 1 Pet. 455, 465, 7 L. Ed. 219; Telfener v. Russ, 162 U. S. 170, 175, 16 Sup. Ct. 695, 40 L. Ed. 930; Tyler v. Young, 2 Scam. (Ill.) 444, 35 Am. Dec. 116. But the complaint in this action presents no such case. It discloses the facts that the plaintiff's original contract was made on January 20, 1892, and was for the purchase of all lands, rights, and privileges pertaining to the Lake Miriam Ditch, and all reservoirs connected therewith, in addition to the specific lots and lands described in this complaint, for the sum of \$35,437.22; that the plaintiff paid \$4,437.22 in cash, and gave his notes for \$15,000 and \$16,000, respectively, for the balance of the purchase price; that prior to January 29, 1896, he had paid the note for \$15,000; that on that day an agreement was made between him and the bank that he should pay to it \$10,000 principal and \$800 interest upon his note for \$16,000, that the time of payment of the remaining \$6,000 should be extended until June 24, 1897, that the bank should immediately convey to him all the property described in the contract, except the lots and lands specified in the complaint, and that the bank would convey these lands upon the payment of the \$6,000 on June 24, 1897; that the plaintiff paid the \$10,800; that the bank conveyed all the property covered by the contract, save that thus expressly excepted; that it lost title to this excepted property; that it then sued the plaintiff in a court in Wisconsin for the \$6,000 remaining unpaid upon his note for \$16,000; that he answered that the bank could not convey the excepted property; and that the court in Wisconsin in that action, among other things, so adjudicated that this excepted property which has not been conveyed was worth \$25,000; that that fact is now *res adjudicata* between the parties to this action.

It is conceded that if on January 29, 1896, the plaintiff had derived no benefit from his purchase, he might then have defeated a recovery upon his note for \$6,000, and might have recovered back the purchase price which he had paid, if he had insisted that his contract of purchase was entire, and that the bank was entitled to none of the purchase money because it could not completely perform its agreement. When, however, he consented to a partial performance of the contract, he waived this defense. After he had accepted the conveyance of the ditch, its reservoirs, and other property, which constituted a part of the consideration for his note for \$16,000, upon which \$6,000 still remained unpaid, he could no longer successfully defeat an action for the collection of this balance upon the ground that the note which evidenced it was without consideration, or for the reason that the bank was unable to convey all the property described in its contract. By his acceptance and retention of a part of the property, he had estopped himself from any such defense. The only defense remaining to him was that the consideration of his notes had partially failed, and that to the extent to which it had failed he was entitled to be relieved from the payment of his obligation. If the property omitted from the bank's conveyance in 1896 was worth \$1,000, and if the failure of the bank to convey it entailed damages to the plaintiff to that amount, that fact was a defense to the action upon his note to that extent, and to that extent only.

The complaint in the action before us contains an averment that the fact that this un conveyed property was worth \$25,000 was so adjudicated in the action in Wisconsin that it is now *res adjudicata* between these parties. From this averment the inference was drawn, and the statement was made in the opinion in this case, that the plaintiff answered in the case in Wisconsin that this was the value of the excepted property and that this and other averments of that answer were denied by a reply. These facts do not otherwise appear in the complaint before us, and it is immaterial to the decision in this case in what way this issue was framed. However it may have been presented to the court in Wisconsin, the averment in the complaint in hand establishes the fact that the question of the value of this property in some way became a material issue in the action in Wisconsin, for the decision of that question could not have rendered that issue *res adjudicata* unless its adjudication had been necessary to the decision of that case. Its adjudication could not have been necessary to the decision in that case, unless the mere failure to convey the excepted property was not in itself a good defense to that action, unless the failure to convey it constituted a defense to the action upon the note to the extent of the value of the property which the plaintiff failed to receive only, and for that reason that value became material. The result is that, both by virtue of the general principles of the law and by virtue of the express averments of the complaint in this action, the failure of the bank to convey the excepted property was a defense to the plaintiff's note to the extent of the damages entailed upon him by such failure, to the extent of the value of the property only, and that, since the plaintiff used a part of his claim for these damages to defeat the action upon the note, he cannot now maintain an action for the remainder of his claim.

The motion for a rehearing must be denied, and it is so ordered.

HOOK, Circuit Judge, dissents.

IN RE DUCKER.

IN RE F. B. SHUSTER CO.

(Circuit Court of Appeals, Sixth Circuit. January 11, 1905.)

No. 1,344.

1. **CONDITIONAL SALES—MORTGAGES—STATE LAW.**

Under the law of Kentucky, a contract by which a bankrupt borrowed certain machinery from claimant under a written agreement reserving title in the claimant until the bankrupt paid certain prices specified therefor, etc., operated as an absolute sale of the machinery to the bankrupt, with a chattel mortgage back to secure the price.

2. **SAME—FAILURE TO RECORD.**

Ky. St. 1903, § 496, provides that no deed of trust or mortgage conveying a legal or equitable estate to real or personal property shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed shall be acknowledged or proved ac-

ording to law, and lodged of record. *Held*, that an unrecorded conditional sale of machinery to a bankrupt was void as to subsequent creditors without notice, and that such creditors were entitled to priority of payment from the proceeds thereof, though they had not acquired any lien on the bankrupt's property, other than that created by the bankruptcy proceedings.

Petition to Review an Order of the District Court of the United States for the Western District of Kentucky, in Bankruptcy.

For opinion of trial court, see 133 Fed. 771.

W. M. Smith, for bankrupt.

Benj. F. Washer, for trustee and creditors.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This case comes here on appeal from an order of the District Court, sitting in bankruptcy, which denied the priority of a lien claimed by the F. B. Shuster Company on certain goods which came to the trustee from the bankrupt. As the question involved is one of law, the facts being undisputed, and counsel for the appellee raising no objection to this mode of review, this court is disposed to exercise its appellate jurisdiction, treating the appeal as equivalent to a petition for review.

The facts, as stated in the brief of counsel for the appellant, which statement is conceded by counsel for the appellee to be correct, are as follows:

"On the 29th day of February, 1904, Alexander L. Ducker, trading and doing business in the city of Louisville, Ky., under the name of the Kentucky Wire Works, filed his voluntary petition in bankruptcy in the District Court of the United States for the Western District of Kentucky, sitting at Louisville. Fred Breyfogle was afterwards duly appointed trustee under said proceedings, and there was listed in the schedule of said bankrupt, among other things, certain property claimed by the F. B. Shuster Company, or, in the event that the specific property was not delivered it by the court, then it claimed a prior lien thereon. Said property claimed by the F. B. Shuster Company consisted of machinery, which is fully described in Exhibit G, filed with the petition of the F. B. Shuster Company in said case, which is found on pages 18 and 19 of the printed record. Said exhibit reads as follows:

"New Haven, Conn., Jan. 11, 1904.

"Kentucky Wire Works,

"Louisville, Ky.

"Borrowed and received of the F. B. Shuster Company the following named articles, the same to remain the property of said The F. B. Shuster Company until such time as the price set against them shall be paid, as per memorandum in the margin, when they are to become the property of the borrower, Kentucky Wire Works, Louisville, Ky.

"Notes and drafts, if given, are not to be considered as payment until they have been paid in cash.

"The said borrower agrees to pay the price named, and in such manner as shall be stated in the margin, and, in the meantime, to keep the property in repair and sufficiently insured for the benefit of the said F. B. Shuster Company, and to permit them to enter and remove the same, if the payment is not made as herein agreed. In those States where the law requires it, this agreement shall be duly recorded.

"Payments to be made: 2-months note, dated Jan. 15, 1904, with interest,

renewable every two months, provided one-sixth of amount of price of machine within and interest be paid at each and every maturity of note.

\$387.15.

| | |
|-------------------------------------------------------------------------------------------|----------|
| One ¼ inch 11-foot cut auto W. S. & C. machine, with counter-shaft, "Shuster" model | \$347 50 |
| Extra 11-foot guide bar | 22 00 |
| Extra ½ inch arbor and bracket | 22 00 |
| Two extra sets of tools, making machine capable of handling down to 1.16 inch wire | 12 00 |
| | <hr/> |
| | \$403 50 |
| Less 5 per cent. | 20 18 |
| | <hr/> |
| | \$383 32 |
| Interest for 2 months at 6 per cent. per annum. | 3 83 |
| | <hr/> |
| | \$387 15 |

"[Signed]

Kentucky Wire Works,
"A. L. Ducker, Prop."

"Said exhibit shows, as the trial court determined, an absolute sale, with a mortgage back to secure the purchase money; that is, the contract entered into between the parties stipulated that the title to the merchandise should remain in the seller until the purchase price was paid, and power was given to the seller to retake possession of the property and remove it if it was not paid.

"In its original petition of interpleader, the Shuster Company claimed the specific property. This petition was filed on March 30, 1904. On April 16, 1904, it filed an amended petition, asking therein that if, in the opinion of the court, it is not thought that this petitioner retains the title to said property, then it states and charges that it does, in law, create a mortgage, and that thereunder it is entitled to a prior lien upon said property, and it prays that it be so adjudged.

"A demurrer was entered to this petition and amended petition of the Shuster Company, and the referee allowed the claim as a general claim, but sustained said demurrer to the petition and amended petition, and refused to allow said claim as a lien claim.

"Upon a petition for review, the District Court approved and confirmed said ruling of the referee, and directed that the funds arising from the sale of said merchandise claimed by the Shuster Company be administered, and that, in so doing, to see that the priority of the Shuster Company in the proceeds of said merchandise is subordinated to the payment of those creditors of the bankrupt whose debts were created subsequent to the delivery of that merchandise to the bankrupt, provided, however, that if, as to any such subsequent debts, the Shuster Company shall, in due season and in proper form, allege and prove that, at the time said debt or debts were so created, the creditors had notice of the Shuster Company mortgage, such creditors shall be postponed to the Shuster Company, and the referee is further directed, in the administration of said assets, to give to the Shuster Company a priority out of the proceeds arising from the sale of the mortgaged property claimed, over the creditors whose debts were created prior to the delivery of said mortgaged merchandise by the Shuster Company to the bankrupt, to all of which the said Shuster Company at the time objected and excepted."

To this statement the further facts should be added that the foregoing contract of sale was never recorded as required by the law of Kentucky applicable to chattel mortgages, and that there are creditors who became such after the vendee acquired the goods, and who are not shown to have had notice of the reservation of the title by the vendor.

The resultant question in the controversy depends upon the solution of two subordinates: First, what were the relative rights, in

respect to these goods, of the petitioner and of the creditors of the bankrupt, who became such after he acquired the goods, and before he was adjudged bankrupt? And, second, what were the rights of the trustee, as the representative of all the creditors, and of the petitioner, respectively, in the property sold by the petitioner to the bankrupt? The first question is to be determined by the law of Kentucky; the second, by the bankrupt act.

Section 496 of the Kentucky Statutes of 1903 declares that:

"No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proven according to law, and lodged for record."

It appears that, by the settled construction of this statute, such a contract as that between the petitioner and the bankrupt is the equivalent of a sale, and a mortgage back to the seller, and that, in its character of a mortgage, it is subject to the provisions of the statute just recited. *Greer v. Church*, 13 Bush, 430; *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146; *Manufacturing Co. v. Hart*, 1 S. W. 414, 8 Ky. Law Rep. 223. And it further established that the "creditor" against whom the conveyance shall not be valid is one who becomes a creditor at a time when the appearance of ownership arising from the debtor's possession may have misled him into the giving of credit upon the faith of such ownership, and not one who became a creditor prior to the acquisition of the property by the debtor.

From these propositions it clearly follows that, before the adjudication of bankruptcy, the creditors, in whose favor the statute declared the mortgage void, had acquired a priority of right to have recourse against this property, not only as against the mortgagee, but also against those creditors as to whom the mortgage was not void. In these conditions the property passed under the dominion of the bankruptcy act, and the question now is whether, by the operation of that act, the creditors who had priority of right for the satisfaction of their debts out of the mortgaged property under the state law have lost it by the intervention of the bankruptcy proceedings. The court below held that they had not, and we concur in that conclusion.

In certain instances, which are distinctly specified in the act, what might otherwise be rights or privileges are suppressed in order to give way to the operation of the general purpose of a just and equal distribution of the bankrupt's assets. They are suppressed because they give unfair and inequitable advantages. But in other respects, and generally, it is foreign to the purposes of the act that it should operate to destroy rights or privileges lawfully acquired, whether of a legal or an equitable nature. On the other hand, the manifest intention is that they shall be recognized and protected. The estate of the bankrupt is devolved upon the trustee, subject to the rights of other persons therein. The substance in which those rights inhere is impounded. But except as before stated, it is the same substance, with the same incidents as before. The court takes it into its exclusive dominion and control, and, in harmony

with the general principle of law governing the exercise of jurisdiction in such cases, it accords to every person who has an interest in the res the privilege of intervening and establishing his rights in the thing which has been seized. It does no such iniquity as to transfer from one who has done no act obnoxious to the law a right which belonged to him, and give the fruits thereof to another, who had no claim to it. Thus, in the present instance, a ruling that these subsequent creditors no longer have the protection given them by the statute would not only deprive them of the priority which they have acquired, but would give the benefit of this deprivation to the secret lienholder, and the object of the statute is completely defeated. The trustee is the hand of the court. He stands as its agent to liquidate the assets, to protect them, and bring them before the court for final distribution. He is not, in fact, more representative of one creditor or claimant than another. The trustee, in the procedure, because he has the legal title to the assets, and is charged with the duty of saving and protecting them, represents the general fund. He is not a purchaser, but as the title of his office imports, he is trustee for all who have interests, and according to those interests. He himself has no interest, and there is nothing in his representation which stands between the court and those who have interests, for the recognition and protection of which they appeal to its authority. We have thus explained our views upon this subject, founded, as they are, upon what we conceive to be fundamental and controlling principles. Other courts, for whose opinions we entertain great respect, have held, apparently, somewhat different views on this subject.

In the case *In re New York Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133, the Circuit Court of Appeals for the Second Circuit held, in a bankruptcy case, that only such creditors as had taken steps to subject the mortgaged property by seizure in legal proceedings could maintain their priority in respect of the mortgaged property after the mortgagor had been adjudged bankrupt. This was so held because, as the court thought, the Court of Appeals of the state had so settled the construction of the statute. The Circuit Court of Appeals did not apparently consider the practicability of working out the right of the creditor in the bankruptcy court, and we should have thought it doubtful whether the state court had gone so far as to hold that a seizure under legal process must necessarily be a seizure under the process of a court of law or of equity, as distinguished from the court in bankruptcy, which has power to seize the debtor's property, and subject it to the claims of creditors according to their merit. And in the case *In re Antigo Screen Door Co.*, 123 Fed. 249, 59 C. C. A. 248, the Circuit Court of Appeals for the Seventh Circuit, upon a review of the Wisconsin decisions, held that, although the question had not been positively determined, the trend of the decisions was to the effect that the creditor, under the statute of that state, must have acquired a lien by judicial process, in order to save his right to have recourse to the mortgaged property; and the Circuit Court of Appeals held in accordance therewith. But the court found that by the law of Wis-

consin the mortgagee of an unfiled mortgage, by taking possession before the creditors had seized the property, would gain precedence over them, and in the case before the court the mortgagee had taken possession before the petition in bankruptcy was filed. The conclusion was stated by Judge Jenkins as follows:

"Assuming, then, that the filing of the petition in bankruptcy is, as stated in *Mueller v. Nugent*, supra [184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405], in effect an attachment, and a seizure and sequestration of the property of the bankrupt for the benefit of his creditors, the fact remains that possession of the mortgaged property was taken by the mortgagee prior to the filing of the petition in bankruptcy, so that the case is not otherwise than that of possession taken before execution upon a judgment in favor of a creditor."

This is a distinct recognition of the equivalency of the seizure in bankruptcy with the seizure in other forms of legal proceeding.

On the other hand, the Circuit Court of Appeals, in *Re Pekin Plow Co.*, 112 Fed. 308, 50 C. C. A. 257, held that, notwithstanding the Supreme Court of Nebraska had construed the chattel mortgage of that state as meaning only to invalidate an unfiled mortgage in favor of those who had taken steps by legal process to assert their claims, yet that such claim might be made under the seizure of the court in bankruptcy, which is a seizure for all the creditors, whereon the property of the debtor is appropriated according to the right of each, and that this conclusion was in harmony with the doctrine of the state decisions. And in *Chesapeake Shoe Co. v. Seldner*, 122 Fed. 593, 58 C. C. A. 261, a like decision was made in reference to the effect of a statute of Virginia relating to conditional sales containing a reservation of the title until the price is paid, under which the possession is transferred to the vendee, and the contract of sale is not recorded. Such a reservation was declared void as to the creditors of the vendee. Upon an intervention by the vendor of certain goods, which had been conditionally sold to the bankrupt, it was held that, whether or not the creditors protected by the statute are only those who are taking steps to subject the property to their claims, still the seizure by the bankruptcy court was in effect an attachment of the property for the creditors of the bankrupt, whereon they are entitled to come in and establish their claims. And we think it proper, in passing, to say that we doubt whether, in the decisions of courts where such statutes are held to make void unfiled conditional sales or chattel mortgages, only such creditors are intended as secure protection by seizure under legal process, anything more is meant than that the statute comes in aid only when the creditor invokes it in a judicial proceeding taken before a paramount right of other persons has supervened. Until he comes into the forum, the conditions for the assertion of his right have not existed.

The question whether the Kentucky statute, when it declares such transactions to be invalid as to creditors, means only such creditors as have sued out process and levied upon the property, has never been decided by the Court of Appeals of that state. It was held in *Cincinnati Leaf Tobacco Warehouse v. Combs*, 109 Ky. 21, 58 S. W. 420, that an assignee for the benefit of creditors is neither

a purchaser for value nor a creditor, and takes the property subject to all the equities to which it was subject in the hands of his assignor, and that such equities may be enforced as if the assignment had never been made. Surely the reasons for such a rule are much more potent in the case of a seizure by the bankruptcy court.

An observation was made by Judge Du Relle in *Wicks v. McConnell*, 102 Ky. 434, 43 S. W. 205, which is much relied upon by appellee. In delivering the opinion of the court, the learned judge used this language:

"On the one hand, the unrecorded lien is upheld as against creditors who cannot be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit are protected, as against the secret lien, in the rights which they secure by their diligence in the levy of their execution or attachment."

This observation was made in a case where the creditor had sued out an attachment, and was seeking to enforce his claim to priority as against the holder of the unfiled mortgage. It was not necessary to decide how the claim would stand if there had been no levy. No question of that sort was present or was agitated, and it is not at all probable that the learned judge had in his mind that question. However, if we are right in thinking that the seizure of the bankruptcy court, being a seizure for all the creditors, and involving the right to present such claims for allowance and satisfaction as the creditors had at the time of the seizure, was a seizure in a judicial proceeding, and the equivalent of an attachment, the statement of the judge would not be at all in conflict with the conclusions which we have formed upon the question.

But in the case *In re Sewell* (D. C.) 111 Fed. 791, Judge Cochran, of the Eastern District of Kentucky, adopted the foregoing statement in *Wicks v. McConnell* as the basis of his decision; taking it as the settled law of Kentucky. The case before him arose upon the intervening petition of one who had sold goods to the bankrupt upon a contract for retention of the title until payment of the price, which had not been filed, and there were subsequent creditors who had not seized the goods before the bankruptcy. The petitioner claimed a preference over the creditors by virtue of his mortgage. This was disallowed by the referee, but his decision was reversed by the court upon review; the learned judge being of opinion, apparently, that the creditors could not enforce their equity in the bankruptcy proceedings. We think he was in error in relying upon the statement in *Wicks v. McConnell* as settling the law of Kentucky for all cases where such a question might arise upon differing circumstances—as, for instance, such a case as *Graham v. Samuel*, 1 Dana, 166, where there had been no levy either by attachment or execution, but only an equitable lien acquired by the filing of a creditors' bill after the return of an execution unsatisfied. But we also think that in the *Sewell* Case the court failed to give due consequence to the effect of the proceedings in bankruptcy. The conditions are not the same as those of a case of an assignment for

the benefit of creditors, as in that case there is a mere devolution of the estate upon the trustee for collection and distribution. But the taking over of the bankrupt's estate by the District Court is much more than that. The assignee can exercise no judicial authority, and cannot determine conflicting claims. All his acts are purely ministerial. In respect to such acts the position of a trustee in bankruptcy is somewhat similar to that of a trustee under an assignment, except as the bankruptcy act imposes peculiar duties upon the trustee. But the trustee is the instrument of the court in the administration of the estate. For reasons which we need not repeat, we cannot assent to the rule adopted in the *Sewell Case* as one conclusive in the result, for we think there are super-added, in the bankruptcy proceeding, conditions which make it possible to give effect to the equity given to the creditor by the statute.

The subsequent creditors are not shown to have had notice of the mortgage. But they had parted with their property while the bankrupt was in possession and appeared to be the owner of the property, and while the mortgagee was at fault in not giving the notice required by the statute. In such circumstances, we think, if actual notice would have been the equivalent of the filing of the mortgage, it was incumbent on the mortgagee to prove that they had actual notice of the mortgage at the time they became creditors. 1 *Jones on Mort.* § 580; 21 *Encycl. of Law* (2d Ed.) 589; *White v. McGarry* (C. C.) 47 Fed. 420; *Stout v. The Richard J. Carney Co.*, 53 Fed. 927, 4 C. C. A. 111; *Gratz v. Land & River Imp. Co.*, 82 Fed. 381, 27 C. C. A. 305, 40 L. R. A. 393. And in *Miles v. Blanton*, 3 *Dana* (Ky.) 525, the court, though it did expressly declare the rule, treated the case as if the party alleging notice took the burden of proving it. And to that effect is *Carr v. Callaghan*, 3 *Litt.* 871.

The order made by the District Court in respect to the disposition of the proceeds of the goods sold to the bankrupt by the petitioner gives rank as follows: First, to the subsequent creditors; second, to the petitioner; third, to the antecedent creditors—with a proviso that the petitioner have leave to prove before the referee that the subsequent creditors had notice of the *Shuster* mortgage when their claims originated, and, in case such notice shall be proven at a hearing, those creditors shall be denied precedence of the *Shuster* mortgage, and shall rank with the other creditors. It was discretionary with the District Court to allow the hearing to be reopened to receive the further proof upon the subject indicated. The statute is construed by the Kentucky Court of Appeals as not giving protection to those who become creditors with actual notice of the mortgage.

We think the order conforms to the equity of the case, and it is therefore affirmed, with costs.

In re ABBEY PRESS.

(Circuit Court of Appeals, Second Circuit. December 20, 1904.)

No. 25.

1. BANKRUPTCY — SECURED CLAIMANTS — EXAMINATION — ORDER — CLERK — POWERS.

Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], provides that a court of bankruptcy may by order require any designated person to appear in court or before a referee to be examined. General bankruptcy order No. 3 (89 Fed. iv, 32 C. C. A. vii) declares that all process, summons, and subpoenas shall issue out of the court, under seal thereof, and be tested by the clerk, and that blanks, with the signature of the clerk and seal of the court, may be furnished to the referees. *Held*, that an order for the examination of a secured creditor in bankruptcy proceedings was not void because it was executed by the clerk, and not by order of the court.

2. SAME — SUBPOENA — SEAL — WAIVER.

Where a witness appeared for examination before a referee in bankruptcy without objection on the ground that the subpoena was not sealed, the defect was waived.

3. SAME.

Where a witness was actually present before the referee in bankruptcy for examination when an order that he be sworn was made, the fact that the subpoena issued and served upon him was not sealed was immaterial.

4. SAME — REFEREES — POWERS.

Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], authorizes a court of bankruptcy to require any designated person to appear before a referee for examination, etc., and section 1a, cl. 7, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], defines "court" to mean a court of bankruptcy in which the proceedings are pending, and may include the referee. Section 38, cls. 2, 4, 30 Stat. 555 [U. S. Comp. St. 1901, pp. 3435, 3436] authorize referees in bankruptcy to exercise the powers vested in courts of bankruptcy for the examination of persons as witnesses, etc., and to perform such duties, except as to questions arising out of applications of bankrupts for compositions or discharges, as are conferred on courts of bankruptcy, and as shall be prescribed by the rules and orders thereof; and general bankruptcy order No. 12, subd. 1 (89 Fed. vii, 32 C. C. A. xvi), provides that all the proceedings, except such as are required by the act or by the general orders to be before the judge, shall be had before the referee. *Held*, that where a bankruptcy proceeding had been referred generally to the referee, as authorized by Bankr. Act July 1, 1898, c. 541, § 22, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], the referee had jurisdiction to order a secured creditor to appear before him for examination.

5. SAME — REFEREES — QUALIFICATION TO ACT — STATUTES — CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, § 39b, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3436], providing that referees shall not act in cases in which they are directly or indirectly interested, does not apply to the interest of a referee by way of commissions on sums paid to creditors as dividends.

6. STATUTES — CONSTITUTIONALITY — CIRCUIT COURT OF APPEALS — JURISDICTION.

The Circuit Court of Appeals has no jurisdiction to determine a question of the construction or application of the federal Constitution with reference to the validity of Bankr. Act July 1, 1898, c. 541, § 38, cls. 2, 4, 30 Stat. 555 [U. S. Comp. St. 1901, pp. 3435, 3436], prescribing the jurisdiction of referees in bankruptcy.

† 6. Jurisdiction of the Circuit Court of Appeals, see notes to *Lau Ow Rev v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.

7. SAME--ORDERS OF REFEREE--RECITALS.

General bankruptcy order No. 23 (89 Fed. xl, 32 C. C. A. xxvi), providing that in orders made by a referee it shall be recited according to the fact that notice was given, and the manner thereof, or that the order was made by consent, or that no adverse interest was represented at the hearing, or that the order was made after hearing adverse interests, has no application to a mere ruling that a secured creditor be sworn before the referee, etc., or that he shall not answer certain questions.

8. SAME.

Under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], providing that a court of bankruptcy may, by order, require any designated person to appear in court or before a referee to be examined, and general bankruptcy order No. 3 (89 Fed. iv, 32 C. C. A. vii), providing that all process, subpoenas, etc., shall issue out of the court, and be tested by the clerk, and that blanks, with the signature of the clerk and seal of the court, etc., may be furnished to referees, an order for the examination of a witness made by a referee to whom a bankruptcy proceeding had been referred generally was not an order of the referee, but of the court.

9. SAME--ORAL APPLICATION--DISCRETION.

Under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], authorizing the court of bankruptcy to require any designated person to appear in court or before a referee to be examined, it is within the discretion of a referee, acting as a court of bankruptcy, to order the examination of a third person on an oral application.

10. SAME--RIGHT TO COUNSEL.

On the examination of a secured creditor before a referee in bankruptcy as authorized by Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], it is within the judicial discretion of the referee to refuse to permit such creditor to be represented by counsel.

11. SAME--REVIEW.

Where a secured creditor of a bankrupt was examined as a witness before a referee in bankruptcy, as authorized by Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], he was entitled to have the proceedings before the referee reviewed by a judge of the court, as authorized by general bankruptcy order No. 27 (89 Fed. x, 32 C. C. A. xxvii).

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

Roger Foster, for petitioner.

J. N. Barr, for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The petitioner is the holder of a chattel mortgage given by the bankrupt. He had been examined by a receiver before a commissioner, and afterwards, at the request of the attorney for the trustee, was subpoenaed to appear before the referee to testify and produce documents. He appeared with counsel and produced the documents, but declined to be sworn.

By his counsel, he made a preliminary objection to the examination on the ground that the subpoena was insufficient, as no order had been obtained by the trustee for the examination under section 21a of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]; that he had been previously ex-

amined before the commissioner; that the referee had no jurisdiction to make any order under section 21a of the bankruptcy act; and that, if he had such jurisdiction, the order must be made in writing, and only upon an application in writing, with opportunity to traverse the application and offer evidence in opposition to its allegations; and he asked permission to offer evidence against such application and the making of the order. No previous application in writing or written order having been made, the attorney for the trustee orally asked for an order. The referee thereupon overruled all of said objections, and directed the petitioner to be sworn, and to submit to an examination forthwith, which petitioner declined to do. The attorney for the trustee objected to petitioner's being represented by counsel, on the ground that he was merely a witness, which objection was sustained.

All of said rulings were excepted to by counsel for the petitioner. He contends that as the statute (section 21a) provides that "a court of bankruptcy may * * * by order require any designated person to appear in court or before a referee * * * to be examined," etc., such order could not be issued by the clerk, and that the subpoena was invalid because it was issued by the clerk, and not by order of the court, and under its seal.

General orders in bankruptcy No. 3 (89 Fed. iv, 32 C. C. A. vii), provides:

"All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees."

This order would seem to provide for the procedure which was apparently followed in the present case, namely, the delivery by the referee of such a subpoena. This course would seem to be justified by the act and rule.

The subpoena did not bear the seal of the court. The petitioner, however, attended before the referee, and does not seem to have made the objection there. This defect was therefore waived by the appearance of the witness without objection on that ground, and, as he was actually before the referee when the order to be sworn was made, the absence of the seal is immaterial.

Counsel for petitioner further contends as follows: (1) That the referee had no power to order the examination, because the statute grants such power to the court alone, and that it appears that the word "court" does not there include the referee, because of the reference in the context to the place of examination as "in court or before a referee." (2) That section 38 of the law (30 Stat. 555 [U. S. Comp. St. 1901, p. 3435]) confines the powers of referees on this subject to "the administering of oaths to and the examination of persons as witnesses" upon issues of fact, whose appearance is lawfully compelled, "and for requiring the production of documents in proceedings before them," and that therefore this proceeding was not properly before the referee. (3) That the jurisdiction conferred by section 38 does not apply to the case at bar, because the proceedings herein were not pending before the referee at the time the order was made.

Section 21a of the bankruptcy act (30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]) provides as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt * * *, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. * * *"

Section 1a, cl. 7, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419] provides that:

"'Court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee."

Section 38, cls. 2, 4, 30 Stat. 555 [U. S. Comp. St. 1901, pp. 3435, 3436], respectively vests the referees with jurisdiction to:

"Exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment."

"Perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

General orders in bankruptcy No. 12, subd. 1 (89 Fed. vii, 32 C. C. A. xvi), provides that, after the order referring a case to the referee, "all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

The proceedings required by the act to be had before the judge are applications for discharge, for approval of compositions, for punishment for contempt, contested involuntary petitions in bankruptcy, and all petitions for adjudication when the judge is in the district. The proceedings other than these required by the general orders to be had before the judge are applications for injunctions to stay proceedings of a court or officer of the United States or of a state, and for the removal of a trustee.

No question is made but that this case had been referred generally to the referee, as provided in section 22 of the act (30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]). The referee, therefore, constituted a court, with all the powers of the court, for the purposes of this examination.

The contention that the proceeding was not pending at the time when the order was made is not well founded. Section 38a of the act invests the referees with jurisdiction to "consider all petitions referred to them * * * and make the adjudications," etc. And thereafter, under general order No. 12, supra, all the proceedings, except those enumerated above, are to be had before the referee.

Jurisdiction of the cause having been thus expressly conferred by statute, the subsequent proceedings are incident or necessary to the exercise by referees of their jurisdictions, within the principle discussed by counsel for petitioner.

Counsel for petitioner claims that, as the referee would have a commission of 1 per cent. upon the amount collected, a statute giving him authority to compel the examination before himself of a third person,

against whom it was sought to establish a claim on behalf of the estate, would be void, as unconstitutional, or at least so inconsistent with the fundamental law that no doubtful language should be construed to include such authority. It seems clear that the act and general orders, taken together, do give this authority. The only pertinent statutory limitation upon the powers of referees in this connection is that they "shall not act in cases in which they are directly or indirectly interested." Section 39b, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3436]. This provision cannot apply to the compensation by way of commissions or sums paid as dividends, etc., because, if so applied, the effect would be to disqualify the referee from acting in any case. The referee's commission is upon the amount paid creditors, not necessarily upon the amount collected, which might be largely disbursed in making the collection. Referees, in the performance of their duties, must be constantly deciding matters which will affect the amount paid to creditors. The amount of allowance of attorneys and appraisers, the decision of applications by third parties for property in the custody of the trustee, but claimed to belong to them, must always affect their commissions. If the statute were held unconstitutional on this ground, such ruling would terminate substantially all of the present procedure thereunder. So far, however, as this contention raises a question of the construction or application of the Constitution of the United States, such question of constitutionality is one over which we have no jurisdiction, and which is not before us for review. *United States v. Lee Yen Tai*, 113 Fed. 465, 51 C. C. A. 299; *United States v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861.

Counsel for petitioner further contends that the order for the examination of the witness, and that he be sworn, must be upon a written application showing cause therefor; and he apparently claims that the witness must be first served with a notice of the application, and be allowed to file an answer thereto, and be heard with evidence as to the propriety of issuing the order. If this contention be well founded, we see no reason why a witness may not decline to testify on the new issue thus raised, and so on ad infinitum, and render an efficient administration of the law impossible. Such a practice would greatly impede the ascertainment of the facts.

General order No. 23 (89 Fed. xi, 32 C. C. A. xxvi) is as follows:

"In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests."

We do not think this order should be held to apply to a mere direction or ruling that a witness be sworn, or that he shall not answer certain questions. Nor can it be held to apply to such an order for the examination of the witness, in view of the provisions of the act and orders quoted above. The order for the examination of the witness is not an order of the referee, but of the court, under section 21a (30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]). The issuance of such order by the referee is contemplated by general order No. 3 (89 Fed.

iv, 32 C. C. A. vii), providing for the furnishing of blank process, summons, and subpoenas to the referees.

Under the corresponding sections of the act of 1867, it was held that the register had jurisdiction to make such orders for the examination of witnesses (*In re Pioneer Paper Co.*, 7 N. B. R. 250, Fed. Cas. No. 11,178), and that it was discretionary with the register to require a written application or to grant such order on a verbal one; and such appears to us to be the proper construction of the present law, and to have been the general practice under it (*In re Pioneer Paper Co.*, supra; *In re Solis*, 4 N. B. R. 68, Fed. Cas. No. 13,165; *In re Vetterlein*, 4 N. B. R. 599, Fed. Cas. No. 16,926; *In re E. B. Howard*, 2 Am. Bankr. Rep. 582, and note, and cases cited, 95 Fed. 415; *In re Fixen & Co.*, 2 Am. Bankr. Rep. 822, 96 Fed. 748; *In re Albert Cobb*, 7 Am. Bankr. Rep. 104, affirmed by Judge Lowell).

In *In re Solis*, supra, Judge Blatchford, reviewing his previous decisions, in which in one case he confirmed the refusal of the register to grant such an order on petition or affidavit, and in another case had confirmed a decision of the register ordering such examination, said as follows:

"The register denied the motion, and I confirmed his decision, and concurred in his view that it was discretionary whether to grant an order, and what cause should be shown for it. In the present case the register, in the exercise of his discretion, thought proper to grant the order without requiring a petition or affidavit, duly verified, showing good cause for granting the same. Nothing appears to show that that discretion was improperly exercised, and the order must stand."

Any order for examination of any witness other than the bankrupt, whether on a first or second examination, should be for a special cause shown; but the authorities cited show that it has been uniformly held that it is within the discretion of the referee to decide in each particular case what cause is sufficient, and upon what information he will make the order. It must be held, therefore, that the grant or refusal of the order is a matter intrusted by law to the discretion of the court; the referee being in the present instance the court.

Finally it is contended that the petitioner was entitled to be represented by counsel. No authority is cited in support of this proposition. Such a course would be contrary to the rulings in other courts, and, as we understand it, contrary to the practice and decisions in the bankruptcy courts. In any event, no such representation should be allowed except in the discretion of the court; that is, of the referee. The action of the referee may, as in the present case, be reviewed by the judge. The referee has before him the whole circumstances of the case, and is in a better position than any one else to determine what measures should be taken for the protection both of creditors and witnesses.

The objections taken herein are highly technical. The enforcement in the bankruptcy courts of the practice contended for would greatly embarrass the ordinary course of procedure, and would unnecessarily delay proceedings for the administration of the bankrupt's property, and for the distribution of his assets among his creditors. If any injustice is done the witness by any order of the referee, he has the right to review the same, and to be heard thereon before a judge of the

court under general order No. 27 (89 Fed. x, 32 C. C. A. xxvii). It is believed that by such course all rights intended to be secured by the statute may be protected without resort to technicalities at the hearings in the referee's court.

The decree is affirmed, with costs.

BEAN et al. v. AMERICAN ALKALI CO.

(Circuit Court of Appeals, Third Circuit, January 9, 1905.)

No. 55.

1. CORPORATIONS—STOCK ASSESSMENT—STOCKHOLDERS' LIABILITY—ACTIONS—EVIDENCE.

A corporate stock subscription provided, in accordance with the company's charter, that after payment of \$10 per share on the preferred stock the subscribers should not be liable for any balance on their subscriptions, except on such shares as should stand of record on the books of the company in their names when any subsequent assessment was made, but that the holders of shares of record at that time only should be liable therefor. *Held*, that evidence that defendants subscribed for the shares in question as brokers only, that they paid the \$10 per share, as required, for their clients, and had the stock issued in the name of their clerk M. as trustee for such clients, etc., and that they had an arrangement with the corporation to obtain subscriptions on its behalf, was admissible in an action by the corporation to charge them with a liability for a subsequent assessment on the stock.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 125 Fed. 823.

John G. Johnson, for plaintiffs in error.

Reynolds D. Brown, for defendant in error.

Before ACHESON and GRAY, Circuit Judge, and KIRKPATRICK, District Judge.

ACHESON, Circuit Judge. The plaintiff in the court below was the American Alkali Company, a corporation organized and existing under the laws of the state of New Jersey, to the use of Arthur K. Brown and Henry I. Budd, Jr., receivers of the company. The defendants were Charles H. Bean and George E. Bean, copartners trading as Charles H. Bean & Co. The suit was an action at law to recover an assessment of \$2.50 per share on 2,100 shares of the preferred stock in the company standing of record on the books of the company in the name of George W. Mactague. The assessment was made in September, 1901, by the company itself, while it was a solvent and going concern, and the declared object of the assessment was "for the purpose of providing funds for the completion of the present works, the building of additional works, and providing working capital." The receivership was created under proceedings instituted on September 9, 1903. About the 15th of May, 1899, Charles H. Bean & Co. signed a subscription agreement for 9,700 shares of the preferred stock of the company, of which the above-mentioned 2,100 shares were part. At the bottom

of the subscription was the following memorandum: "Make ctfs. 100 shs. each name of Geo. W. Mactague, 521 Morris St." The subscription agreement specified that the stock was to be paid for as follows: Twenty per centum (or \$10 per share) upon 10 days' notice after subscription, and the balance as might be required in the development of the business in installments upon notice. The subscription agreement contained the following further provision:

"Upon payment of the first installment of twenty per cent. the full-paid certificates of common stock and partially paid certificates of preferred stock, setting forth that twenty per cent. has been paid thereon, shall be delivered to the subscribers hereto, and as subsequent installments are paid they shall be indorsed on the latter. Provided, however, that after the payment of the twenty per cent., provided for above, amounting to a total of ten dollars per share, the subscribers hereto shall no longer be liable for any balance of their subscription, excepting upon such shares as shall stand of record on the books of the company in their names at the time any subsequent assessment or calls are made, but the holders of such shares of record on the books of the company at that time, and they only, shall be liable for the same."

The above-cited provision of the subscription agreement, which Charles H. Bean & Co. entered into, was expressly authorized by, and was in strict accordance with, the terms of the company's charter, which contains the following provision:

"After payment of ten dollars per share on the preferred stock, the subscribers thereto shall not be liable for any balance of their subscription excepting upon such shares as shall stand of record on the books of the company in their names at the time when any subsequent assessments or calls are made, but the holders of such shares of record on the books of the company at that time, and they only, shall be liable for the same."

The 20 per centum (amounting to \$10 per share) of all the stock subscribed for by Charles H. Bean & Co. was duly paid. The plaintiff's statement of claim, which embodied the subscription agreement, also disclosed the fact that at the time the subsequent assessment here in question was made George W. Mactague was registered on the books of the company as the holder of the 2,100 shares of stock, which are involved in this action. To avoid the effect of this admission, the statement of claim contained the following averment, namely:

"Plaintiffs are informed, believe, and expect to be able to prove, and therefore aver, that said shares were so placed in the name of Mactague for the convenience and accommodation of defendants for the purpose of concealing the real ownership thereof, escaping liability for possible assessments, or for other reasons unknown to the plaintiffs, and that the said George W. Mactague acted in the premises at the request of and on behalf of the said defendants, but without any interest whatsoever in the said shares."

It is quite plain that the plaintiffs' action proceeded upon the alleged ground that Charles H. Bean & Co. were the real owners of the stock in question at the time the assessment or call sued for was made, and therefore were liable for the same. But the alleged ownership of the stock by the defendants was squarely traversed by the affidavit of defense, which set forth that the defendants, in the course of their business as bankers and brokers, subscribed for the 2,100 shares of stock for customers—sundry firms and individuals—upon orders given by them to the defendants; and the affidavit of defense alleged that the defendants never had any right, interest, or property whatever in or

to the said shares, or any part thereof. And, specifically answering the above-quoted averment of the affidavit of claim, the affidavit of defense contained the following statement:

"Deponent further denies that said shares of stock were placed in the name of said Mactague for the convenience or for the benefit or advantage of said defendants, or to enable them to escape liability of any nature or character, or that said Mactague acted in the premises for them, or either of them, but expressly avers that said Mactague acted solely as above stated for the benefit of the lawful owners of said shares of stock, but in no respect for these defendants."

Upon the trial of the case, after the plaintiff's side was closed, and a motion for a compulsory nonsuit had been overruled, Charles H. Bean, one of the defendants, took the witness stand, and testified that the defendants were bankers and brokers, and in that capacity were authorized by their clients to subscribe for shares of stock in the American Alkali Company under the conditions set forth in the subscription paper, and that accordingly the defendants subscribed for their clients the said 9,700 shares of preferred stock; that the defendants paid on account of this stock the first installment of 20 per centum, or \$10 per share, by their own checks, but after they had received from their clients the corresponding amount of money to make the payment; that the defendants had no pecuniary interest whatever in the stock except a small stock commission; that the certificates (which were issued in the name of George W. Mactague) as received were delivered to their several customers for whom the stock was taken, and that the entire 2,100 shares of stock involved in this action were so delivered to their clients prior to the 7th of August, 1899—i. e., before the assessment or call sued for was made. The whole of this testimony the trial judge, upon the motion of the plaintiff's counsel, struck out. The defendants then called William W. Gibbs, and offered to show by him that at the time of the signing by the defendants of the subscription paper he was president of the American Alkali Company, and that he entered into an arrangement with the defendants "to obtain subscriptions on behalf of the company, and that as president of the company he had knowledge that Messrs. C. H. Bean & Co., when they signed this paper, were signing on behalf of others." This offer the court rejected. The court directed the jury to find a verdict for the plaintiff, and, the jury accordingly having rendered a verdict in favor of the plaintiff for the sum of \$5,880, the amount of the claim sued for, judgment for that sum was entered against the defendants.

Was the court justified in its rulings? It will be perceived that upon the issue of the actual ownership of the stock at the time of the assessment or call the evidence was with the defendants. Now, by the terms of the subscription agreement the defendants bound themselves absolutely only to the extent of 20 per centum of their subscription. That obligation was discharged by the payment of that amount. Thus the defendants were brought directly within the proviso of the subscription agreement, which stipulates "that after the payment of the twenty per cent. provided for above, amounting to a total of ten dollars per share, the subscribers hereto shall no longer be liable for any balance of their subscription, excepting upon such shares as shall stand of record on the books of the company in their names at the time any subse-

quent assessments or calls are made, but holders of such shares of record on the books of the company at that time, and they only, shall be liable for the same." No share of stock stood of record on the books of the company in the name of the defendants at the time the subsequent assessment or call was made. The holder of the shares of record on the books of the company at that time was George W. Mactague. He, be it observed, was made the holder of record by the deliberate act of the company, which, in the first place, issued the stock in his name, and then registered him on the books of the company as the holder. What justification was there for the court's denial to the defendants of the benefit of the proviso? Its validity is not open to question by the American Alkali Company. The provision which secures to subscribers a restricted personal liability is expressly authorized by the company's charter. Of any fraud practiced by the defendants either upon the company or the public there is not a particle of evidence. The court, however, ruled that Mactague held the stock for defendants as the absolute owners thereof. The reasons for this conclusion, as stated by the court, are these:

"At the time they signed that agreement, and by writing immediately under their signature, they directed that the certificates for the stock should be in 'the name of George W. Mactague,' who was their clerk, and who admittedly did not own any of the shares."

But these circumstances did not create a question of law for the court to decide, for they admit of more than one inference. From the evidence on the part of the defendants which was received but afterwards was stricken out it appeared that the subscription to the stock was made by the defendants, as brokers, for clients; that the defendants had no pecuniary interest in the transaction beyond their commission; that the purchase money (the 20 per centum) which was paid had been furnished by the clients; that the stock certificates issued in the name of Mactague had been delivered to the owners, the clients for whom the stock was taken, long before the assessment in question was made; that the defendants had no interest, legal or equitable, in the stock; and that Mactague did not hold the stock as agent of or in trust for the defendants. The evidence tended to show that Mactague held the legal title in trust for the persons for whom the stock was subscribed, and who paid the original installment of 20 per centum. The rejected offer was to show that the defendants acted in this matter under an arrangement entered into with them by the president of the alkali company to obtain subscriptions on behalf of the company, and that as president of the company he knew at the time of the subscription by the defendants that they were acting on behalf of others. Neither the evidence received but afterwards stricken out, nor the evidence offered but rejected, tended to avoid the subscription agreement or defeat any of its provisions. The personal liability of the defendants to pay the primary installment of 20 per centum was not the subject of dispute. That payment had been made. The claim pressed against the defendants was in opposition to the terms of the agreement. The evidence under discussion did not contradict the agreement, nor did it add to or subtract from it, or in any wise change or vary its provisions. This evidence directly met the averment in

the statement of claim hereinbefore recited. The written agreement, as it stands, exempts the defendants from the liability in suit. The parol evidence was intended to rebut, and was admissible to rebut, an inference sought to be drawn from certain circumstances that the defendants' relation to Mactague and the stock standing in his name was of such a nature as to deprive the defendants of the benefit of the contract stipulation which on its face absolved them from liability. We are of opinion that the court erred in striking out the testimony for the defendants given by Charles H. Bean, in rejecting the defendants' offer of evidence when William W. Gibbs was on the stand, and in instructing the jury to find a verdict for the plaintiff.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with direction to award a venire facias de novo.

UNITED STATES v. A LOT OF PRECIOUS STONES AND JEWELRY et al.

(Circuit Court of Appeals, Sixth Circuit. January 12, 1905.)

No. 1,336.

1. INTERNAL REVENUE—UNLAWFUL IMPORTATION—STATUTES—FORFEITURES.

Where it was charged that certain precious stones and jewelry were imported with intent to defraud the United States of duty thereon, a proceeding in rem to forfeit the same was properly brought under Rev. St. § 3082 [U. S. Comp. St. 1901, p. 2014], providing for forfeiture of merchandise fraudulently imported.

2. SAME.

But such proceeding in rem does not lie under said section 3082, Rev. St. [U. S. Comp. St. 1901, p. 2014], to forfeit money arising from the sale in this country of goods fraudulently imported.

3. SAME—INDICTMENT—ACQUITTAL—BAR.

Where a person charged to have fraudulently imported certain merchandise with intent to defraud the United States of duty legally payable thereon was tried and acquitted, such acquittal was a bar to a further proceeding to forfeit the merchandise as against him.

4. SAME—NOLLE PROSEQUI.

An information having been filed to forfeit certain merchandise and money for fraudulent importation, with intent to defraud the United States of duty, indictments were found against the alleged importer and his wife; and on trial thereof the importer was acquitted, after which the indictment against the wife was nolle. *Held*, that such nolle prosequi was not a judgment of acquittal, and was, therefore no bar to the proceeding to forfeit as against the wife.

In Error to the District Court of the United States for the Eastern District of Michigan.

Wm. D. Gordon, U. S. Atty., and James V. D. Willcox, Asst. U. S. Atty.

H. Charles T. Wilkins, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an information filed on behalf of the United States to forfeit a lot of precious stones and jewelry, and \$1,020 in money, which had been seized by an in-

spector, and was in the custody of the collector of customs at Detroit. The proceeding was instituted under section 3082 of the Revised Statutes [page 2014, U. S. Comp. St. 1901]. The information contained three charges: First, that this lot of precious stones and jewelry was fraudulently imported into the United States from Canada by Albert Schmidt and Sara A. Crawford, without invoicing the same or paying the duty thereon, with intent to defraud the United States of its lawful revenue, to wit, said duty; second, that, after the lot of precious stones and jewelry had been thus fraudulently imported into the United States contrary to law, Albert Schmidt and Sara A. Crawford, knowing the fact, did unlawfully receive, conceal, and facilitate the transportation thereof with the same intent; and third, that after certain other precious stones and jewelry had at the same time been fraudulently imported into the United States contrary to law, and with the same intent, Albert Schmidt and Sara A. Crawford, knowing the fact, did receive, conceal, and facilitate the sale thereof, and thus converted the same into money, being the \$1,020 seized and sought to be forfeited in this case.

After the filing of the information, criminal indictments were found and presented in the court below against Albert Schmidt and Sara Crawford Schmidt, then his wife (being the Sara A. Crawford of the information), separately charging each with a violation of the provisions of section 3082 of the Revised Statutes [page 2014, U. S. Comp. St. 1901], by having fraudulently imported into the United States the lot of precious stones and jewelry described in the information, and of having unlawfully received, concealed, and facilitated the transportation of the same, with intent to defraud the United States of its lawful revenue, to wit, the duty thereon. The unlawful acts charged against each separately in the indictments were the same as those alleged against the two jointly in the information. Albert Schmidt was tried under the indictment against him, and acquitted. Thereupon the court, at the request of the United States attorney, entered a nolle prosequi to the indictment against Sara Crawford Schmidt.

In the suit below, Albert Schmidt and Sara Crawford Schmidt appeared individually as claimants, each asserting the title to a portion of the precious stones and jewelry described. A demurrer was interposed to the claim of forfeiture made to the \$1,020 in money, and a plea in bar to that set up to the lot of precious stones and jewelry. The plea in bar sets forth that the fraudulent acts, omissions, and intents charged in the indictments against Albert Schmidt and Sara Crawford Schmidt were the same acts, omissions, and intents relied on in the information, and that the acquittal of Schmidt, followed by the nolle as to his wife, constituted a bar to the further prosecution of this action. The case was submitted to the court below on an agreed statement of facts. The court held that the money in question was not subject to forfeiture in this proceeding, and sustained the demurrer to that portion of the information. With respect to the lot of precious stones and jewelry, it was held that, in view of the agreed statement of facts, the

acquittal of Schmidt in the criminal case was a bar to any further prosecution of the forfeiture proceedings. The action of the court in these particulars is assigned as error.

1. It is contended that the \$1,020 in money was subject to forfeiture under section 9 of the act of June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], known as the "Customs Administrative Act." This section provides that:

"If any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice * * * or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise * * * affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited," etc.

It is to be observed that, in terms, the section only authorizes the recovery of the value of the merchandise "from the person making the entry." But if this is construed to mean that the value of the merchandise may be recovered from the person guilty of any willful act or omission by which the United States shall be deprived of the lawful duties on any merchandise, whether entered or not, still the remedy is one by an action to recover the value of the merchandise from the person referred to, and not by an action in rem against the money itself. *United States v. Zucker*, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777. It is our opinion, however, that the information in this case was properly based, not on section 9 of the customs administrative act, but on section 3082 of the Revised Statutes [page 2014, U. S. Comp. St. 1901], which does not provide for the forfeiture of the value of any merchandise fraudulently imported into the United States.

2. It is clear that under the rule laid down in *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, approved in *Boyd v. United States*, 116 U. S. 616, 634, 6 Sup. Ct. 524, 29 L. Ed. 746, *United States v. Zucker*, 161 U. S. 475, 478, 16 Sup. Ct. 641, 40 L. Ed. 777, and *Stone v. United States*, 167 U. S. 179, 184, 17 Sup. Ct. 778, 42 L. Ed. 127, the acquittal of Schmidt operated as a bar to the further prosecution of the suit in rem, so far as it concerned him, for by the agreed statement of facts it is conceded that the issues presented by the indictment were the same as those raised by the information, and on the trial these issues were determined in his favor. But this is not true as to Sara Crawford Schmidt. Although her indictment grew out of the same alleged fraudulent transaction inquired into in his case, the acquittal of Schmidt was no bar to the prosecution of the indictment against her. She could nevertheless have been placed on trial. It is true she was not. The indictment against her was nolle. But this did not operate as an acquittal. *Dealy v. United States*, 152 U. S. 539, 542, 14 Sup. Ct. 680, 38 L. Ed. 545. She had not at that time been put in jeopardy, and, notwithstanding the nolle, might have been indicted again for the same offense and tried. If the question of her guilt might have been thus inquired into in a criminal case, notwithstanding the acquittal and the nolle, we are unable

to perceive any valid reason why it may not be inquired into in the forfeiture proceeding which is still pending. If there had been no indictments found against Albert Schmidt and Sara Crawford Schmidt individually, and upon the trial of the information the jury had found that Albert Schmidt was not guilty of the charge, and Sara Crawford Schmidt was, a judgment for the forfeiture of the goods seized and libeled would have followed. Since the information charges her, along with Albert Schmidt, with the fraudulent importation of these goods, and since there has been no adjudication of the question whether she was individually guilty or not, we are of the opinion that that question may still be tried in the forfeiture proceeding.

The judgment of the lower court sustaining the demurrer to the claim of forfeiture made to the \$1,020 in money, and holding that the acquittal of Albert Schmidt was a bar to the further prosecution of the forfeiture proceeding against him, is affirmed; but the judgment holding that, under the agreed statement of facts, the acquittal of Albert Schmidt, either alone, or taken in connection with the nolle of the indictment against Sara Crawford Schmidt, is a bar to the further prosecution of the forfeiture proceeding against her, is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

OMAN et al. v. BEDFORD-BOWLING GREEN STONE CO.

(Circuit Court of Appeals, Sixth Circuit. January 10, 1905.)

No. 1,354.

1. JUDGMENTS—RES ADJUDICATA.

A decision of the state Court of Appeals to the effect that the owner of cutting-stone rights had no property right in a switch over the land is res adjudicata, as to such ownership, in a subsequent suit between the parties.

2. RAILROADS—SALE OF SWITCH—OBLIGATIONS TO PUBLIC.

The sale of a terminal switch by a railroad to the owner of the land over which it is laid does not violate any public obligation of the railroad.

3. SAME—MOTIVES.

The motives of a railroad in selling a terminal switch to the proprietor of the land over which it is laid do not affect the validity of its action.

4. FIXTURES—RAILROAD TRACKS—RIGHTS OF LANDOWNER.

Rails, ties, etc., constituting the tracks of a railroad, when bought by the proprietor of the land over which they were laid, were not so immovably attached to the soil as to preclude it, as against an owner of cutting-stone rights in the land, from treating them as it saw fit—either using them as tracks, or removing them as personal property.

5. QUIETING TITLE—CLOUD—RIGHT TO USE RAILROAD TRACK.

A claim by the owner of cutting-stone rights of the right to have tracks kept on the land, to be used for the shipment of his freight, is the claim of an easement in the land, and a cloud on the title of its proprietor.

6. SAME—REMOVAL OF CLOUD—PARTIES.

Where a railroad sold terminal tracks to the proprietor of the land on which they were laid, it was not necessary for the latter to make the

former a party in a suit to remove a cloud consisting of a claim advanced by the owner of cutting-stone rights in the land to the right to use the tracks.

7. JUDGMENTS—RES ADJUDICATA—SCOPE OF DECISION.

An adjudication in favor of the right of an individual to car service over a side track operated by a common carrier is not conclusive on that right in a subsequent suit, brought after the sale of the track by the carrier to a private corporation which was a party to the former suit, and based upon such sale.

8. INJUNCTIONS—PROCEEDINGS IN STATE COURTS—INTERFERENCE BY FEDERAL COURTS.

A decree of the Circuit Court enjoining a party from setting up any claim to the right to use a railroad switch, which the state court had held that he was entitled to use, is not an injunction of proceedings in a state court, in violation of Rev. St. U. S. § 720 [U. S. Comp. St. 1901, p. 581], where, since the decision of the state court was made, the railroad had sold the switch to a private owner, at whose instance the injunction was obtained.

Appeal from the Circuit Court of the United States for the Western District of Kentucky. For opinion below, see 134 Fed. 441.

Lewis McQuown, C. U. McElroy, and Morrison R. Waite, for appellants.

John B. Baskin (John E. Du Bose and Bodley, Baskin & Flexner, of counsel), for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit brought by the appellee, the stone company, against the appellants, the Omans, to quiet the title of the former to certain real estate, known as lots 1 and 4, and the railroad tracks (including rails, ties, etc.) thereon, and to restrain the latter from asserting any interest in said tracks, or claiming the right to use the same for the shipment of their freight. The stone company and the Omans own adjacent quarries in Warren county, Ky., on or near lots 1 and 4. Both these lots are owned by the stone company, but the Omans possess the cutting-stone rights on lot 4. The land on which these quarries are located is connected with the main line of the Louisville & Nashville Railroad Company by a switch about three miles long. The controversy involves the use of the terminal tracks on lots 1 and 4, which carry the switch into the quarry grounds. The switch, including the terminal tracks, was built under a contract between a remote vendor of the stone company and the railroad company. At that time the only quarry there was that owned by the predecessor of the stone company. Under the contract the railroad company was to construct and maintain the switch, receiving a certain rental, based upon its cost; the tracks to remain its property, with the right to remove the same, unless the stone company should desire to purchase and own them. Many years after the opening

¶ 8. Federal courts restraining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.

of the original quarry by the predecessor of the stone company, and the construction of the switch, the Omans became the possessors of the cutting-stone rights on lot 4, and opened their quarry. Then arose the question as to their right to use the existing switch and terminal tracks. They claimed not only the right to use them in connection with their quarry, but an actual interest therein. This the stone company denied. In consequence, a suit was brought in the local court, which eventually reached the Court of Appeals of Kentucky. 73 S. W. 1038. The parties to that litigation were the stone company, the Omans, and the Louisville & Nashville Railroad Company. In a carefully considered opinion, that court held that, while the Omans did not have any property interest in the tracks on lots 1 and 4, they had the right to have the Louisville & Nashville Railroad Company use the switch, including these tracks, to transport their freight. The court based this right on the fact found by it, that the railroad company, under the existing contracts, owned and operated the switch, including these tracks, as a part of its general system, and, being a common carrier, was, of course, bound to transport the freight of the Omans when delivered at a reasonable point on the switch. After this decision, the stone company, acting under legal advice, purchased from the railroad company the terminal tracks on lots 1 and 4, and brought the present suit to quiet its title thereto. The case was heard below upon the pleadings and the evidence. The court, in an able opinion, sustained the claim of the stone company, and granted the decree prayed for. There are a number of assignments of error. We shall consider those we deem material.

1. The parties to the suit decided by the Court of Appeals of Kentucky were the stone company, the Omans, and the Louisville & Nashville Railroad Company. The action involved the right of the Omans to the use of the switch. The stone company claimed to be the exclusive owner of the switch. On the other hand, the Omans claimed a part ownership, with the right of use, and, if this was overruled, then that the switch was a part of the railroad system of the Louisville & Nashville Railroad Company, over which they had a right to have their freight transported. The lower state court held that the Omans were part owners of the switch, and gave them relief upon that theory, enjoining the stone company from interfering with their use of the switch, and requiring the railroad company to transport their freight over it. The Court of Appeals, after a review of the facts shown, reached the conclusion that the Omans had no interest in the switch, the only interest purchased by them being "an interest in the cutting stone, and not an interest in the railroad switch." This finding is *res adjudicata* upon the point that the Omans had and have no property interest in the switch. But the Court of Appeals, after an examination of the provisions of the contracts under which the switch was built and was being operated, reached the conclusion that the Omans did have a right to use the switch, in the sense of requiring the railroad company to transport their freight over it, because it was owned

and was being operated by the railroad company as a part of its general system; saying upon this point:

"This contract and other evidence in the record bearing upon this question show that the Louisville & Nashville Railroad Company during the continuance of this last contract had the control and management of the railroad switch. It owns, controls, and operates the engines and other rolling stock which pass over the line. It keeps the roadbed in repair, and owns all of the material which goes into it. So far as this record shows, it exercises the same control and dominion over this line that it does over any other part of its system, and we think, by the terms of the contract in question, the switch, during the continuance of the contract, at least, becomes a part of the general system of the Louisville & Nashville Railroad Company. This being so, it cannot lawfully refuse to receive and transport freight belonging to appellees to and from such reasonable points along the line at which they may lawfully ship, or receive it."

After citing and quoting from some authorities in support of this conclusion, the court says:

"While it is the duty of the railroad company thus to receive and transfer freight for appellee, this can be done only at points along the line of the railroad switch in question at which appellee may lawfully receive or ship it. He has no right to trespass upon the private property of appellants in order to reach the road. We think, under his right to the cutting stone, as now fixed by contract, appellee is entitled to ship and receive freight at any reasonable point along the road, as now constructed, which lies upon any part of the Loving tract, which was set apart and conveyed to him in the settlement had between him and the Columbia Finance & Trust Company. Although the part of the Loving tract upon which the railroad switch lies (being No. 4 on the plat) is now owned in fee by appellants, Bedford-Bowling Green Stone Company, the right to take the cutting stone which belongs to appellee necessarily carries with it such reasonable use of the surface over the stone as is necessary to make appellee's interest in the land available. If it should be found impracticable, from the topography of the land, to reach the railroad on tract No. 4, then appellee may acquire the right of way by contract with appellants, or condemnation under section 815 of the Kentucky Statutes of 1903, to any practicable point on the line, which will not unnecessarily interfere with appellants' quarry as now operated."

It is obvious that this decision was based wholly upon the fact, found to exist under the contracts then in force, that the switch was the property of the railroad company, wholly under its control, and being operated as a part of its system. While thus held and run, the company, under its obligations as a common carrier, could not refuse to receive and transport the freight of the Omans, when delivered at a reasonable point on the switch.

2. The switch was built by the White Stone Quarry Company under a contract with the railroad company by which it agreed to pay the railroad company a certain rental, based on the value of the material in the tracks, which was to remain the property of the latter. By the supplemental contract of May 23, 1893, made by the railroad company with the Bowling Green Stone Company, the latter recognized the former as the sole and exclusive owner of all the material in the existing tracks. A basis of valuation per ton was fixed. The stone company agreed to pay the railroad company, as rent, 6 per cent. per annum on the value of the material, and to keep the tracks in repair at its own expense. If the stone company should be in arrear for rent for six months, the railroad company

could remove the tracks without notice. By the contract of May 1, 1897, between the same parties, the railroad company released the stone company from the payment of rent, and also agreed to keep the tracks in repair; "reserving the right, however, to discontinue doing so, and the right to cancel this contract on sixty days' notice in writing," whenever it should deem the freight furnished insufficient to justify the maintenance of the switch. The contract then provided:

"In case said contract should be canceled in the manner above provided, the said Bowling Green Stone Company is hereby given the right to purchase the material in said track by paying cash to said Louisville & Nashville Railroad Company within sixty days from the receipt of notice of cancellation the value of said material and should the Bowling Green Stone Company fail to exercise its option to purchase said material, then, the said Louisville & Nashville Railroad Company, hereby reserves and is given the right to take up and remove said material without let or hindrance on the part of said Bowling Green Stone Company or any other person."

So it seems the railroad company had reserved the right at any time, on 60 days' notice, to cancel the contract upon which the decision of the Kentucky Court of Appeals was based. Upon the termination of the contract, the stone company was to have the right to purchase the track material within 60 days, and, if it failed to do so, the railroad company might remove them. It is therefore plain that the railroad company, in selling, and the stone company, in buying, the terminal tracks, were only exercising rights expressly reserved under the contract. Nor did the exercise of these rights in any way violate any public obligations of the railroad company. *Jones v. Newport News & M. V. R. Co.*, 65 Fed. 736, 13 C. C. A. 95. Having the right to cancel the contracts as to the entire switch, and sell or remove the materials thereof, it only sold the terminal tracks located on the land of the stone company, and canceled the contracts as to them. Having the right to do this, the motives which induced the action are immaterial. *South Dakota v. North Carolina*, 192 U. S. 310, 24 Sup. Ct. 269, 48 L. Ed. 448.

3. The rails, ties, etc., constituting the tracks, were held by the railroad company as personal property. When bought by the stone company, they did not for that reason become so immovably attached to the soil as to put it beyond the power of the stone company to treat them as it might see fit. It had the right to continue to use them as tracks, or remove them as personal property. In other words, they became the individual property of the stone company, applicable to whatever use it might put them. But the Omans claimed the right to use them as railroad tracks in the transportation of their freight. This was an assertion of an interest not only in the track material, but in the roadbed—of the right to have the tracks kept where they were, and used for the shipment of their freight. It was the claim of an easement in the real estate, and operated as a cloud upon the title of the stone company.

4. The agreement of sale, having recited the various contracts under which the switch and terminal tracks were built and were being operated, proceeds as follows:

"And whereas said railroad company having this day sold and delivered to said stone company all the ties, rails and other materials in the railroad track located on lots Nos. 1 and 4; * * *

"Now, therefore, it is hereby stipulated and agreed that said four contracts do not and shall not cover nor apply to any part of the railroad tracks located on said lot marked No. 1 nor on lot No. 4, and said railroad company shall not be deemed as bound by said contracts or otherwise to operate, control, use, maintain or haul cars or engines over any part of said tracks which are located on said lot No. 1 and lot No. 4. In all other respects and as to the railroad from Memphis Junction to the easterly boundary of said lot No. 1 said contracts shall remain in full force and effect until the same are terminated by the parties in accordance with the terms and provisions of the same."

The terminal tracks having thus been sold and become the property of the stone company—no longer under the control of the railroad company—was it necessary to make the railroad company a party to this suit to quiet the title of the stone company to the property thus acquired? The appellants insist it was, but we do not think so. This is simply the case of a sale, and the assertion by a third party of an interest adverse to that acquired thereunder. The vendee may bring an action against an adverse claimant to quiet his title without making the vendor a party. The stone company bought the terminal tracks located on its own ground for its individual and exclusive use, and the Omans are claiming the right to use them too. This claim is inconsistent with the title and possession of the stone company. The dispute is between these two parties alone. The railroad company is not interested. It is not setting up any claim inconsistent with the property rights of the stone company. It has not repudiated the sale. It stands by the sale, and, so far as that transaction is concerned, is fully represented by the stone company. The present controversy is between the stone company and the Omans. No third party need be brought in to settle it. Its determination turns altogether upon the effect of the sale in changing the status which existed when the Court of Appeals of Kentucky rendered its decision. If the sale was effective for this purpose, as we believe, then the terminal tracks are the property of the stone company, and a decree in this case will restrain the Omans from claiming any interest in them or any right to use them. If the sale was not thus effective, then they remain under the control of the railroad company, and the mandate of the Court of Appeals of Kentucky will enforce the right of the Omans to use them. In other words, if the sale was good, a new situation exists, which the decree in this case will protect. If bad, the old status continues, with rights which the decree of the Kentucky court will enforce.

5. It is urged that the judgment of the Court of Appeals of Kentucky is a bar to the prosecution of this action; but that cannot be, for this suit is based on the sale of the terminal tracks to the stone company, which did not take place until after the decision of the Kentucky case. *Cromwell v. County of Sac*, 94 U. S. 351, 352, 24 L. Ed. 195; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 29, 15 Sup. Ct. 756, 39 L. Ed. 873.

6. It is also contended that the decree prayed for in this case will operate to stay proceedings in the Kentucky case, in violation of section 720 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 581]; but we think not, for the Kentucky decree only applies to the switch when in control of the railroad company, and being operated by it under the contracts mentioned. It is still so applicable, but the terminal tracks have been taken out of the contracts, and are now in the possession and control of the stone company. The Omans are still entitled, under the decree of the Kentucky court, to the use of the switch, excluding the terminal tracks, under the limitations defined in the opinion of that court. The judgment of this court will not interfere with the proper enforcement of the decree in that.

The judgment of the lower court is affirmed.

BARKER v. PULLMAN CO.

(Circuit Court of Appeals, Second Circuit. November 22, 1904.)

No. 33.

1. CONTRACTS—OPTIONS.

Where a contract between an insurance company and a palace car company provided that the insurance company agreed, on the expiration of the palace car company's policies, to renew the same for three years at a specified rate, which agreement was signed by both parties, it constituted a mere option, which did not bind the car company to take the insurance.

2. SAME—REFORMATION—MUTUAL MISTAKE.

Where negotiations for a contract for insurance were made between agents of the respective parties, and the contract, which, when reduced to writing, constituted a mere option, was signed by both principals, evidence that the agents understood the agreement to be different from the contract embodied in the writing was insufficient to establish a mutual mistake on the part of the principals, warranting a reformation of the written contract.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 124 Fed. 555.

This cause comes here upon appeal from a decree of the Circuit Court, Northern District of New York, dismissing the bill.

On March 10, 1898, the Wagner Palace Car Company and the Agricultural Insurance Company entered into a written contract providing:

"That in consideration of one dollar and other valuable considerations, the Agricultural Insurance Company agrees, on the expiration of the present insurance policy of the Wagner Palace Car Company, to renew the same for three years for the rate of $29\frac{17}{100}$ annual premium, payable in nine equal installments, one each in September, October, and November, respectively of each year.

"The Agricultural Insurance Company agrees to give substantially the same companies comprising the syndicate now on the risk.

"In witness whereof the parties hereto have hereunto appended their signatures and seals the day and year first above-written.

"The Wagner Palace Car Company,

"By W. S. Webb, President.

"The Agricultural Insurance Co.

By _____."

"Witness, F. G. Smith.

In accordance with this agreement the Agricultural Company furnished insurance to the Wagner Company in the year 1899, and down to August 13, 1900. Before the expiration of the second year, negotiations between the Wagner Company and the defendant, the Pullman Company, resulted in an agreement whereby the Wagner Company sold, assigned, and transferred to the Pullman Company all its property and assets. The complainant contends that, by the terms of that agreement, defendant adopted all the benefits and assumed all the responsibilities of the Wagner Company. The defendant company refused to continue the insurance for the third year. Thereupon the complainant, to whom the Agricultural Insurance Company had assigned the contract and all its claims thereon, brought a bill in equity to have the above-quoted agreement reformed by inserting the words, "And the said Wagner Palace Car Company agrees to accept such insurance for the term of three years as aforesaid," before the attesting clause of said agreement, and to recover damages for the breach of said agreement, thus reformed. The cause is reported at Circuit in 124 Fed. 555.

E. J. Nathan, for appellant.

Allan McCulloh, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. It is conceded that the facts are undisputed. The main questions presented are whether the complainant can enforce a contract made between the Wagner Palace Car Company and the defendant, for the benefit of a third party, the Agricultural Insurance Company, assignor of complainant; and, secondly, whether reformation was justified if the inference to be implied from the language of the agreement failed to support the complainant's construction, viz., that it obligated the Wagner Company to accept renewals of the insurance for the full term of three years.

Upon this branch of the case the judge who heard the cause in the Circuit Court exhaustively discussed the evidence, and expressed the following conclusions:

"The agreement of March 10, 1898, is complete and perfect in itself. In consideration of one dollar and other valuable considerations (not mutual covenants and agreements therein contained, implying that such were in fact made and should have been inserted), the Agricultural Company agrees, on the expiration of a then existing policy of insurance, to renew the same on the terms mentioned. It may be claimed that it could not renew insurance unless the Wagner Company accepted the policy. But this agreement, as written, is in the nature of an option. The Wagner Company has paid for the agreement of the insurance company to renew the insurance, and may enforce the agreement, and insist on having what it has contracted for. But this is very far from justifying an implied agreement on the part of the Wagner Company to accept the insurance. There is nothing in the context of the agreement indicating the necessity for any such covenant to make it a complete contract, and one in accordance with the intent of the parties. It will be presumed, with such language, only that the Wagner Company did not intend to obligate itself to accept the renewal of the insurance. *Zorkowski v. Astor*, 156 N. Y. 393, 50 N. E. 983; *Hale v. Finch*, 104 U. S. 261, 26 L. Ed. 732; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 19 L. Ed. 349. Indeed, complainant admits that no covenant or agreement to accept the renewal of the insurance can be implied. The brief of his counsel says: 'Under the authorities, no implied covenant may be drawn from the language employed in the agreement herein.' Hence equitable relief is sought in this action, with the recovery of damages as an incident, on the ground that the covenant or agreement to accept the renewal of the insurance was omitted from the written contract by mutual mistake; that is, that both parties agreed that such a provision should go in the written

agreement, but that, by the error or oversight of the parties or draftsman, it was left out, and the omission not discovered and assented to by the parties at the time. The defendant denies any error or omission or mutual mistake. * * * But has any such mutual mistake been proved? The burden of proof was on the complainant and in such cases the evidence must be clear, convincing, and satisfactory. The mistake must be clearly shown. If the proofs are doubtful and unsatisfactory, and if the mistake is not made entirely plain, equity will withhold relief. *Baltzer v. R. Co.*, 115 U. S. 645, 6 Sup. Ct. 222, 29 L. Ed. 505. * * * It is impossible to find any specific oral agreement on the part of Dr. Webb to take this insurance, or to assent to a written agreement containing a covenant to accept the insurance and pay the premium. Webb was seeking to protect his company, which was as well done by having the agreement as it is, as it would have been by putting in a covenant binding the Wagner Company to accept the insurance. The testimony of the witness Smith that Webb agreed with his suggestion that they had better take this three-years insurance, as it would protect them (the Wagner Company) against an increase in the rate of premium during the three years, and positively save them one-sixth of the rate they were then paying, does not establish an agreement between Webb and Barker to accept the insurance. Barker was not present, and Webb's approval of, or acquiescence in the wisdom of, such a suggestion, is not proof that it was ever agreed to put a clause in the written agreement binding the Wagner Company to accept. These were expressions of opinion. No statement was made that a clause to that effect should go in the proposed agreement, which was then in writing and being discussed. All that was said had reference to the written agreement then under consideration, and which had been drawn up before that time, and was then submitted to Webb for his approval and signature. There is no suggestion of any proposed change in the writing as drawn. The officers of both companies had it, read it, and assented to it. Webb accepted the offer made in writing, but did not agree to accept and pay the premium. Well might he say it is wise to accept this offer made in writing, which he had before him, and so protect the company, so long as it imposed no obligation to accept. It is urged that the agreement, as drawn and executed, is one-sided. This may be, but this fact does not establish a different agreement, or a mutual mistake of the parties. There is no suggestion that the agreement was hastily drawn or executed. There is no suggestion that it was executed in any but a deliberate manner, after full consideration, and with a full understanding of its terms. This court cannot find from the evidence before it that there was a mutual mistake by which the provision sought to be inserted, in substance or effect, was omitted."

We entirely concur with the view thus expressed in the Circuit Court, and are of the opinion that the decree should be affirmed, with costs.

DACOVICH v. SCHLEY et al.

(Circuit Court of Appeals, Fifth Circuit. January 10, 1905.)

No. 1,409.

1. BANKRUPTCY—CLAIMS—LIMITATIONS.

An indebtedness of one member of a bankrupt firm for money advanced on specified dates to be used in his business before the firm was organized, on which no payments of principal or interest were made, was barred by the six-years limitation provided by Code Ala. 1896, § 2796.

2. SAME—FIRM DEBT—ALLOWANCE.

One of the members of a bankrupt firm, being indebted to his father-in-law, disclosed such indebtedness to his partner on the formation of the firm, and the partner thereupon assumed one-half thereof as a part pay-

ment for his interest in the firm, whereupon a duebill was executed specifying the dates and amounts of the advancements, and signed in the firm name. *Held*, that such duebill thereby became a new indebtedness of the firm, and, not being barred by limitations at the time bankruptcy proceedings were instituted against the firm, was allowable as a claim against it, though the original indebtedness was barred.

Appeal from the District Court of the United States for the Southern District of Alabama.

For opinion below, see 132 Fed. 394.

Wm. B. Inge, for appellant.

Jas. W. Gray, H. Pillans, Henry Hanaw, Palmer Pillans, and Henry Tonsmiere, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. The appellant, A. Dacovich, sought to prove in a bankruptcy proceeding against McGuire & Hanlein, a firm composed of Charles W. McGuire and Frank J. Hanlein, a debt which was evidenced by an instrument in writing presented by him, as follows:

"Due A. Dacovich.

| | |
|---------------------|---------|
| "Jan. 12, 1892..... | 5000.00 |
| "May 15, 1893..... | 3000.00 |
| "June 11, 1894..... | 2500.00 |
| "Value received, | |

"McGuire & Hanlein.

"Sept. 1st, 1898."

The trustee objected to the proof of this debt on the grounds shown in the record, as follows: First. Because said claim is not based upon a subsisting demand against said bankrupt estate. Second. Because the claim is barred by the statute of limitations of three years. Third. Because the claim is barred by the statute of limitations of six years. Fourth. Because said claim is based upon an indebtedness of Charles W. McGuire to A. Dacovich, and is void as to said bankrupt estate, because there is no promise in writing expressing the consideration therefor subscribed by McGuire & Hanlein, promising to answer for the debt of said McGuire to said Dacovich. The referee overruled the objections and allowed the debt to be proved. This action of the referee, on certificate to the District Judge, was by the said District Judge reversed, and a decision rendered sustaining the objections. The decision was placed upon the ground that the debt was barred by the statute of limitations of Alabama, and that the instrument which it was claimed removed the bar of the statute was insufficient for that purpose. The evidence in the case is briefly summarized in the record as follows:

"The testimony of both partners, McGuire and Hanlein, showed that McGuire had been doing business when he took Hanlein in about the date of this paper; that McGuire had borrowed from A. Dacovich the sums of money shown by this duebill on the dates named therein, and said sums were used in McGuire's clothing business to start him in such business; that Dacovich was the father-in-law of both McGuire and Hanlein; that McGuire had not paid Dacovich anything on account of these advances either by way

of principal or interest; that when the partnership with McGuire and Hanlein was formed Hanlein was informed by McGuire of the indebtedness owing by McGuire, including this indebtedness to Dacovich; that on the formation of the partnership it was agreed that Hanlein should come into the business, assuming his share of the indebtedness then owing; that Hanlein paid five thousand dollars for the half interest in the business, and that on the formation of the partnership this paper was signed and given to Dacovich."

We do not find it necessary to determine whether the duebill in question would, under the statutes and decisions in Alabama, be sufficient to prevent the running of the statute of limitations. The original debt unquestionably would be barred in six years from its date. Code Ala. 1896, § 2796. So that we must consider the effect of this duebill under the circumstances. The original debt was from McGuire individually to Dacovich. In 1898 Hanlein bought from McGuire a half interest in a stock of merchandise, the purchase price of such half interest being \$5,000. As a part of the contract of purchase, Hanlein agreed to assume his share of the indebtedness at that time of McGuire. A part of this indebtedness of McGuire was the claim of Dacovich, of which Hanlein was informed. The duebill in question was thereupon given, as a part of this arrangement, by McGuire & Hanlein to Dacovich. It became, therefore, a new indebtedness of McGuire & Hanlein, and a valuable consideration passed at the time. Hanlein obtained a half interest in McGuire's business, and the old debt due by McGuire individually to Dacovich was extinguished. An entirely new liability by the firm of McGuire & Hanlein was created, and one which, it seems to us, could have been enforced in the courts of Alabama or elsewhere. The duebill of McGuire & Hanlein was an original liability of the firm. While it is in the form of a duebill, it is, in effect, a promissory note of the firm. *Fleming v. Burge*, 6 Ala. 373. The bankruptcy proceedings in question are against McGuire & Hanlein as a firm and against the members of the firm individually. The indebtedness is proven in the bankruptcy proceeding by Dacovich against McGuire & Hanlein. We see no good reason why this duebill, given for a sufficient consideration by McGuire & Hanlein within six years, should be excluded from proof in the bankruptcy proceedings against that firm. Consequently the judgment of the District Court is reversed, with directions to permit the claim to be proven in the bankruptcy proceedings.

INTERSTATE BUILDING & LOAN ASS'N v. EDGEFIELD HOTEL CO.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 527.

1. BUILDING AND LOAN ASSOCIATIONS—ACCOUNTING WITH BORROWING STOCKHOLDER—INTEREST.

On a settlement between a building and loan association and a borrowing stockholder under a contract containing a provision that "upon final settlement with the association it shall retain as installments on said stock and interest no greater sum than the amount actually advanced,

with interest thereon at the rate of eight per cent. per annum," the stockholder has the right, at his election, to be treated as a borrower, simply; and in such case the rule of partial payments applies, and the excess of each payment made over the interest then accrued is to be applied in reduction of the principal of his debt, and subsequent interest computed on the principal as so reduced.

Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston.

For opinion below, see 120 Fed. 422. See, also, 109 Fed. 692.

W. A. Wimbish, for appellant.

Robert C. Alston and N. G. Evans (Arthur S. Tompkins and M. C. Wells, on the brief), for appellee.

Before MORRIS, BRAWLEY, and PURNELL, District Judges.

MORRIS, District Judge. The Interstate Building & Loan Association, a Georgia corporation, having its principal office in Columbus, in that state, was prior to October 24, 1892, doing business as a building and loan association. There was a local board in the town of Edgefield, in South Carolina. The purpose of these local boards was defined by its by-laws to be as follows:

"Article 1, § 2. To give to every city and town in the United States in which this association has an established branch the advantages and benefits of a local building and loan association combined with the advantages of safe and accumulative investment."

On October 24, 1892, the Edgefield Hotel Company, a corporation of South Carolina, having its place of business at Edgefield, in that state, obtained from the Interstate Building & Loan Association an advance of \$6,000. To do this, the hotel company had subscribed on September 24, 1892, for 120 shares of stock, and paid an admission fee of \$120. It made one payment of \$72 as installment dues on the 120 shares of stock before the loan was granted, and after the loan was granted it made, without default, 74 monthly payments, of \$102 each, amounting in all to \$7,650—the last payment being in December, 1898—and then tendered \$142, and demanded to have the mortgage released, as fully satisfied. The building association denied that its mortgage was satisfied, and in March, 1901, filed in the Circuit Court of the United States for the District of South Carolina its bill of complaint to foreclose the mortgage; alleging that there was still due to it the loan of \$6,000, with interest accrued from December, 1898, to March, 1901, and 10 per cent. attorney's fees. Subsequently the building association, in July, 1902, was adjudged insolvent, and a receiver appointed, who was made a party complainant in this cause.

To secure the performance of the conditions under which the hotel company obtained the loan of \$6,000, it executed a bond, secured by a mortgage, conditioned to pay \$72 on the third Wednesday of every month, as installments, and \$30 as interest, until the 120 shares borrowed on should have fully matured; that is, until each share by the installments paid on it, together with its declared proportionate profits, should be worth \$100. There was, however, inserted in the bond, to meet certain decisions of the courts of South Carolina with regard to

usury in building association mortgages, the following important stipulation, viz.:

"It is further understood that upon final settlement with the association it shall retain as installments on said stock and interest no greater sum than the amount actually advanced with interest thereon at the rate of eight per cent. per annum."

The hotel company has availed itself of this stipulation, and the sole question raised by this appeal is as to the method of computing the interest under this agreement. On behalf of the building association it was contended that the proper method is to charge the hotel company with the \$6,000 advanced, and 8 per cent. per annum interest thereon, and to credit on the sum thus ascertained the gross amount of all payments made, without allowing any interest on the payments. By this method the amount still remaining due would be over \$1,300. On behalf of the hotel company it was contended that the proper method of computation was to calculate interest at 8 per cent. in favor of the building association up to the date of each payment, and, as the payments always exceeded the interest due, to reduce the debt by the amount of the excess of the payment over the interest accrued, on the principle of partial payments. The court below (Simonton, Circuit Judge) sustained the contention of the hotel company, except that the admission fee of \$120 and the payment of dues before the loan was obtained were not taken into account; and, as the result, the auditor found that when the last installment payment was made by the hotel company there was only due by the hotel company a balance of \$34.21, with interest at 8 per cent. until paid; and as the hotel company had tendered, before the filing of the bill of complaint, \$144, the court adjudged that the building association should bear the costs, and that upon the payment of \$34.21, with interest thereon at 8 per cent. until paid, the defendant was entitled to have the mortgage canceled.

In the course of the proceedings several alternative methods were suggested by the building association for arriving at the proper sum payable by the hotel company under the bond and mortgage and the by-laws of the building association; but at the argument in this court the sole ground of error relied upon was that the decree below adopted the rule of partial payments as proper to be applied in this case, and that the costs were wrongly put upon the appellant.

Very little light is obtainable on this question from adjudications in building association cases, as the stipulation by which the settlement in this case is controlled is unusual. It is urged by the appellant that as the monthly installments were not paid in reduction of the loan, but were primarily paid by the hotel company, as shareholder, for the purpose of maturing its stock, and not as payments to be applied to its loan, and were payments on shares made as well by those who did not procure loans as by those who did, it is not consistent with justice or the contract of the parties that the installment payments should be applied to the loan. There would be force in this contention if the relation of the hotel company to the building association had remained that of a borrowing stockholder obliged to continue his installments until his stock matured. But the stipulation that the building association, in the final settlement, should not retain of the installments and

interest paid more than the amount actually advanced, and 8 per cent. interest, recognizes that in the final settlement the borrowing stockholder may elect to be treated as a borrower, simply, and settle as a borrower would settle with a lender. Without some restrictive stipulation, the borrowing stockholder might not be able to escape from his relation of stockholder, no matter how many years it might require to mature the stock, nor how excessive the rate of interest might become. To avoid this possible result, and to accord with the decisions in South Carolina, the stipulation was inserted for the borrower's protection in a contract prepared by the building association. Under such a contract prepared by the lender, if there is ambiguity, then by the established rule it is to be construed favorably to the party who, in order to obtain a loan at an exceptional rate of interest, is required to sign a contract, the stipulations of which are prepared by the other party to it. But we do not think that there is any ambiguity. What, under ordinary circumstances, would be the meaning of a stipulation that the lender should not retain out of the payments made to him more than the amount actually advanced with interest at 8 per cent.? It would, we think, be understood to mean that the lender should receive back the money advanced, and, for the use of his money while the borrower had it, 8 per cent. interest, and no more. If, in this case, the building association should receive the amount advanced, and 8 per cent. interest on it for the whole period of over six years, until the last payment was made, it would have had, in addition to 8 per cent. interest, the use of all the sums which in monthly payments during six years the borrower has paid back, and the use of which the borrower did not have. This would be greatly in excess of 8 per cent. interest. The rule to be applied in such a case between borrower and lender is the rule of partial payments, by which the excess of every payment made over the interest then accrued is applied in reduction of the principal, and the subsequent interest computed on the principal so reduced. *Woodward v. Jewell*, 140 U. S. 247, 248, 11 Sup. Ct. 784, 35 L. Ed. 478.

The stipulation in this case clearly states, in unmistakable language, that out of the installments and interest paid by the borrower the building association shall retain on final settlement no more than the amount advanced, with interest thereon at 8 per cent. There is nothing whatever to suggest that in making the computation the ordinary rule of computing interest is not to be applied, and we think the borrower is entitled to have the benefit of that ordinary rule. It was so held by the learned circuit judge who heard the case below, and his decision is ably supported by the opinion filed by him, reported in 120 Fed. 422.

Affirmed.

BRINTON et al. v. PAXTON et al.

(Circuit Court of Appeals, Third Circuit. December 22, 1904.)

No. 12.

1. PATENTS—VALIDITY AND INFRINGEMENT—KNITTING MACHINES.

The Paxton and O'Neill patent, No. 521,218, for a fashioning device for circular knitting machines, *held* valid, and infringed as to claims 1, 2, and 3 by one device made and sold by defendant, and as to claims 1 and 2 by a second device.

SAME—DAMAGES FOR INFRINGEMENT—PART OF MACHINE.

The damages recoverable for infringement of a patent covering a part of a machine must be determined on the best evidence obtainable, the burden resting upon complainant, however, to prove his case. Where the profit made on the patented part alone is shown, separate and apart from that made on the machine as a whole, and it also appears that no other substitute mechanism on the market was open to the use of defendant, complainant is entitled at least to recover such profits.

SAME.

Where a part of a machine made and sold by defendant is found to infringe complainant's patent, the court will not undertake to determine, in reduction of damages, the collateral question whether or not such part also infringes another patent, the validity and scope of which are not directly put in issue.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Joshua Pusey, for appellants.

Joseph C. Fraley and Henry N. Paul, Jr., for appellees.

Before ACHESON and GRAY, Circuit Judges, and HOLLAND, District Judge.

HOLLAND, District Judge. This bill alleges that respondents infringed claims Nos. 1, 2, 3, and 4 in letters patent No. 521,218, granted to John B. Paxton and Ellis I. O'Neill June 12, 1894, for fashioning devices for circular knitting machines. Upon argument the Circuit Court for the Eastern District of Pennsylvania so found, and entered a decree February 27, 1901, sustaining the validity of the patent, awarding an injunction against the respondents directing an accounting, and appointed a master to state the account. Subsequent to the issuing of the injunction, the respondents began the manufacture of a similar device, referred to in these proceedings as "Picker No. 3," and the complainants came into court alleging an infringement of the same claims in their patent in the manufacture of this picker. This question was referred to the master already appointed, who found the respondents' picker No. 3 did infringe, and further found and assessed damage to the complainants in the sum of \$1,221.89. Upon hearing, this amount was reduced to \$1,189.67, and a decree entered January 6, 1904, directing the respondents to pay complainants that amount, together with interest from the date of filing the master's report, and costs. On February 3, 1904, the respondents appealed to this court, and assigned as error the decrees of the Circuit Court made and entered on February 27, 1901, and January 6, 1904. The assignments of

error raise the questions (1) as to whether pickers Nos. 2 and 3 infringe complainants' claims Nos. 1, 2, 3, and 4; and (2) was the decree against respondents for \$1,198.67 properly entered?

In an opinion reported in 107 Fed. 137, the court below held that respondents' picker No. 2 infringes the claims in question, and awarded an accounting. In this, and for the reasons there stated, we concur; but the question as to whether picker No. 3 of respondents infringes the complainants' device was not then considered, as it was designed and put upon the market subsequent to the determination of the question of infringement raised in the original bill, and while the question of account was before the master, to whom this question of infringement was also referred by the court. The master found that this picker infringes claims Nos. 1 and 2 of complainants' patent, and included it in his report in assessing damages to them. This picker No. 3 carries the needle from the higher to the lower plane by a simultaneous rotary movement on the post, and a downward swing of the picker from a relatively fixed pivot on the lower end of the post, but at the same time it is a movement in a direction coincident with the axis of its rotation, and, instead of the arm sliding up and down the post, what has been aptly styled "the business end" of the arm, moves in a direction coincident with the axis of rotation. It appears that the complainants' invention covers an improvement in fashioning device for circular knitting machines, and in the description they state that:

"Upon a consideration of the types of our invention described in the foregoing specifications it will be obvious that they all have in common a characteristic principal of operation, viz., that a rotatable arm, so mounted as to be free to move in a direction coinciding with the axis of its rotation, is combined with guiding devices which compel such movement in the direction of the axis of rotation whenever the arm is rotated. We thus obtain the needle-shifting action by a movement which is the derivative of the rotation of the arm caused by its engagement with the needle hub in the act of passing by the same. While, therefore, we have specified the preferred methods of effecting this derivative movement, we do not limit ourselves to the use of the specific devices shown for effecting it; the only essential being that there should be, in combination with a rotatable arm, having the capacity to move in the direction of its axis of rotation, mechanism which is capable of modifying what otherwise would be a mere movement of rotation, and obtaining a resultant movement in what may be appropriately termed a spiral path."

It will be seen that this invention thus described is claimed by the complainants in their claims Nos. 1 and 2, as follows:

"(1) The combination with the needle cylinder, the cam cylinder, and actuating mechanism for said cam cylinder, of a rotatable needle shifter, capable of movement in the direction of its axis of rotation, and actuating mechanism arranged with reference to said needle shifter, substantially as set forth, whereby movement of the needle shifter in a direction coincident with said axis is derived from the rotation caused by engagement with and passage by the needle hub.

"(2) The combination, with the needle cylinder, the cam cylinder, and actuating mechanism for said cam cylinder, of a rotatable needle shifter, capable of movement in the direction of its axis of rotation, and a cam having an incline arranged with relation to said needle shifter, substantially as set forth, whereby movement of the needle shifter in the direction of said axis is derived from the rotation caused by engagement with and passage by the needle hub."

These two claims broadly cover a picker with a rotatable arm with a capacity of moving in the direction of its axis of rotation, and this is the device that seems to have overcome the objections in others already upon the market, as the movement was found to be much easier, and of a nature to accomplish the best results in knitting machines. The preferred method of effecting the derivative movement accomplished in complainants' device is set forth by them, and in that the rotatable arm is mounted upon a post, and is free to move up and down in a direction coincident with the axis of its rotation; but any other device which accomplishes this movement of the picker arm is within the contemplation of their description and the two claims above mentioned. We think, therefore, that the master and the court below were right in holding that picker No. 3 infringes claims Nos. 1 and 2 of complainants' patent.

It is conceded that 778 machines were made by the respondents, each having 4 pickers attached, a dropper and lifter on each side. They, however, only used a device or picker which infringed the complainants' picker as a dropper or top picker, one on each side of each machine manufactured; but did not use the lifter. As it appears that \$10 profit was made upon the sale of each machine by the respondents, the complainants urged that they were entitled to one-half, or \$5, on each machine, or, as an alternative, they were entitled to the amount of profit made by the respondents on the sale of each separate picker mechanism. It is established that they sold 204 machines containing picker No. 2 at a profit of \$1.105 on each picker (the said 204 machines being sold subject to a discount of 25 per cent.), equal to \$225.42; 310 machines containing picker No. 2, at a profit of \$1.935 on each picker, equal to \$599.85; 164 machines containing picker No. 3 at a profit of \$1.10 on each picker (the said 164 machines being sold subject to a discount of 25 per cent.), equal to \$180.40; 100 machines containing picker No. 3 at a profit of \$1.93 on each picker, equal to \$193—the total amount of profits on pickers of the said 778 machines being \$1,198.67. The respondents were selling the infringing device in connection with a machine or mechanism containing a large number of unpatented parts, which, as a whole, had a commercial value, upon which a profit was realized, according to the admissions of respondents themselves, of \$10 on each machine. The complainants, however, failed to establish just what portion of the profits were due to the infringing mechanism, and the master rejected their claim for the whole of the profits on the machine sold, for the reason that a patentee must show in what particular his improvement had added to the usefulness of the whole machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. *Garretson v. Clark*, 111 U. S. 121, 4 Sup. Ct. 291, 28 L. Ed. 371. It, however, plainly appears that the profits made upon each set of pickers attached to the machine sold by respondents, separate and apart from the machine itself, amounted in all to \$1,198.67. This amount was awarded, and a decree entered accordingly.

In some cases of infringement of patented improvements it is very difficult to exactly establish the damages resulting to the complainants, and, of course, the best evidence obtainable must be relied upon in cases of this kind; but the complainants must, notwithstanding this difficulty, prove their case. The complainants established that respondents made a certain profit upon the infringing devices of certain amount upon each and every one of them, separate and apart from the mechanism to which it is intended to be attached, and, it appearing that no other picker mechanism upon the market was open to the respondents to use, the master, under the circumstances, was justified from this evidence, together with other facts and circumstances before him, in finding that the total amount of these profits was the amount of the complainants' damages. *Mason v. Graham*, 90 U. S. 261, 23 L. Ed. 86; *Lattimore v. Hardsoog Mfg. Co.*, 121 Fed. 986, 58 C. C. A. 287; *Robinson on Patents*, § 1062, and notes. The respondents, however, urge that these complainants are not entitled to recover the entire profits thus ascertained, because these infringing pickers Nos. 2 and 3 may be said to be not only infringements upon the complainants' patent, but are also covered by the sixth claim of patent No. 451,637, issued to Mayo on October 13, 1891, and the burden is on the complainants to separate the profits attributable to respondents' infringements of the patent in suit from those attributable to the use of the Mayo invention. In other words, they urge that, as they are infringing complainants' and Mayo's patents, the complainants must establish just what part of the profits is attributable to the advantageous features of the complainants' patent and what is derived from the Mayo patent. This claim of the Mayo patent was recently before the Circuit Court for the District of Rhode Island, and Judge Brown gave it a certain specific construction, and observed that, if such construction were not given to the claim, it would, in the opinion of the court, be invalid (*Mayo Knitting Machine & Needle Co. v. E. Jencke Mfg. Co. et. al.* [C. C.] 121 Fed. 110); and the master in the case at bar found from the limited evidence before him that, if the claim in question be construed as it was by the court in Rhode Island, it is not infringed by the respondents' structures, and, if the said claim be given any construction of a broader nature, it would, in accordance with the opinion in the above-entitled case, be invalid. But, aside from the question as to whether or not the respondents' pickers Nos. 2 and 3 infringe the Mayo patent as well as that of complainants, there is another objection to this contention of the respondents that they are to be for that reason relieved from a portion of the damages claimed by the complainants, and that is that it has been the uniform practice of the courts to refuse to determine such collateral questions in suits where the validity and scope of a third party's patent are not directly put in issue, and this finds direct support in the decision of the Supreme Court in *McCreary v. Pennsylvania Canal Company*, 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817.

The decrees of the court below are affirmed.

SOUTHERN RY. CO. v. GREENSBORO ICE & COAL CO. et al.

(Circuit Court, E. D. North Carolina. December 16, 1904.)

1. **INTERSTATE COMMERCE—REGULATION—RESTRICTION ON POWERS OF STATES.**
Car loads of coal shipped from one state into another remain subjects of interstate commerce until delivery to the consignee, and an order of a state corporation commission directing the railroad company to place the cars on a certain track for unloading, as requested by the consignee, is without jurisdiction, and void, as an interference with interstate commerce.
2. **JURISDICTION OF FEDERAL COURT—SUIT AGAINST STATE COMMISSION.**
A suit against a state corporation commission to enjoin the enforcement of an order alleged to be void as an interference with interstate commerce in violation of the federal Constitution and laws is not one against the state, and is within the jurisdiction of a federal court.
3. **SAME—ENJOINING STATE BOARD.**
The North Carolina Corporation Commission, although made by the statute a court of record, is, in the exercise of many of the powers vested in it, merely an agent of the state, and may be enjoined by a federal court as to acts which are not judicial in character.

In Equity. Suit for injunction.

W. A. Henderson, C. B. Northrop, and F. H. Busbee, for complainant.

R. D. Gilmer, Atty. Gen., and R. H. Battle, for N. C. Corporation Commission.

E. J. Justice, for Greensboro Ice & Coal Co.

PURNELL, District Judge. This is a bill in equity to enjoin the defendants from bringing suits for penalties and damages by reason of the refusal of the complainant to place upon the trestle of the defendant ice and coal company four certain cars, and a failure to comply with the order of the defendant commissioners of the North Carolina Corporation Commission to so place the said cars. The bill coming on to be heard, after argument by counsel, a restraining order was entered, and the same referred to the standing master to find the facts. The following, omitting what is deemed unnecessary, are, in substance, the facts as found by the master:

The Southern Railway is a corporation created by and existing under the laws of the state of Virginia, and is a citizen and resident of the said state. All the defendants are citizens and residents of the state of North Carolina. The right of the Greensboro Ice & Coal Company, or of an individual shipper or consignee, to have cars transferred and switched upon his private sidings or spur track, irrespective of the rules and regulations of the Southern Railway Company, involves the right of the Southern Railway Company to conduct its business, both state and interstate. If all shippers or

¶ 2. Federal jurisdiction of suits against states, see note to *Tindall v. Wesley*, 13 C. C. A. 165.

¶ 3. Federal courts enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 375; *Copeland v. Bruning*, 63 C. C. A. 437.

consignees in North Carolina had the right to have cars switched and placed according to their orders, and irrespective of the rules and regulations of the Southern Railway Company, it would entail a loss to the Southern Railway Company much in excess of \$2,000. The right of the Southern Railway Company to conduct and manage its interstate business at Greensboro, N. C., and various stations in the said state, amounts in value to many thousands of dollars, far in excess of \$2,000. The right of the Southern Railway Company to conduct its interstate business at Greensboro, to dispose of its rolling stock and distribute it, and to refuse to permit its cars to be placed on private sidings, according to its reasonable rules, is of great value to them, and amounts to many thousands of dollars far in excess of \$2,000. Every day between the hours of 12 noon and 1:30 the Southern Railway Company has, arriving at Greensboro, N. C., seven mail trains and four trains carrying interstate freight. All of these trains arrive about the same time, and if the Southern Railway was obliged to get a car out of one of these trains, or was obliged to place a car on a certain siding at a certain time between these hours, under the orders and directions of the private shipper, or under the orders and directions of the North Carolina Corporation Commission, and irrespective of its own reasonable rules and regulations, it would mean detention and delay and damages not only to interstate freight, but the United States mail and passengers. Ordinarily, during other hours, except in cases of unusual congestion, which rarely occurs, cars can be placed on the said spur track and trestle within 24 hours of their arrival, without interfering with the business of the railroad company, either state or interstate; and it does not inconvenience the railroad, or interfere with its track or business, to place cars on the said spur track and trestle, any more than it would on any other spur track—that is to say, that this can be done in due course of business, and under reasonable rules and regulations of the company. In the event of congested condition by reason of the number of flat cars shipped to Greensboro, such condition would be relieved to some extent by using the said spur track or siding of the ice and coal company for the purpose of placing the said company's cars on the siding. The Greensboro Ice & Coal Company does a business which involves a shipment to it of about 200 cars per year, according to the testimony. It pays freight in the neighborhood of \$15,000 per year. The amount of the profits of the ice and coal company does not appear in evidence, but the business transacted largely exceeds the sum of \$2,000, the freight paid by the company being about \$15,000 per year. If the ice and coal company had to unload all of its freight on the team tracks other than the siding and trestle in question, the said company could not profitably conduct its business. The amount of loss or inconvenience to either party by actually placing the four cars in question upon the side or spur track or by failure to place the same would not and did not amount to \$2,000.

The North Carolina Corporation Commission has not, so far as the testimony discloses, attempted to interfere with the business

or management of the plaintiff company, except to the extent of requiring it to place the said four cars on the defendant company's siding, nor has the defendant company asked any further interference with said business management. The extent of said interference will more particularly appear by the order made by the North Carolina Corporation Commission. On October 31, 1903, the North Carolina Corporation Commission, upon complaint of the said ice and coal company, made an order requiring the Southern Railway within 48 hours after service of said order to place four cars of coal consigned to the Greensboro Ice & Coal Company on the private siding or spur track of the Greensboro Ice & Coal Company at Greensboro, N. C. One of said cars belonged to the Southern Railway Company, two were the property of the Norfolk & Western Railway Company, and one the property of the Chesapeake & Ohio Railway Company. On all of said four cars, except the one belonging to it, the Southern Railway Company was obliged to pay the railway companies owning the cars a per diem of 20 cents per day for each day such car remained on its line after the expiration of the first three days subsequent to the receipt of the car on the rails of the Southern Railway Company. Each foreign car which remains on the rails of another railroad company exceeding 30 days subjects the delinquent road to a penalty of a dollar per day until the car is returned to the road owning it. Three of the cars—those not owned by it—were on the rails of the Southern Railway Company exceeding three days from the time they were received, and a per diem of 20 cents per car had to be paid by the Southern Railway Company. The four cars comprehended by the said order of the North Carolina Corporation Commission were loaded with coal in the states of Pennsylvania, West Virginia, and Tennessee, respectively, and each of said cars of coal was transported over lines of the Southern Railway Company and connecting lines as one continuous uninterrupted journey through several different states to Greensboro, N. C. At the time said order of said North Carolina Corporation Commission was made, and both prior and subsequent thereto, the said coal remained loaded on the cars in the original unbroken package in which it began its continuous uninterrupted journey from the states of Tennessee, West Virginia, and Pennsylvania, and said coal and said cars were still in the possession of the Southern Railway Company, undelivered to consignee.

It is admitted in the answer, and also upon the taking of testimony, that said four cars loaded with coal as aforesaid, and transported as above mentioned, were and are interstate commerce.

The Southern Railway Company declined to switch these cars upon the private siding or trestle of the ice and coal company because it was claimed the latter company had refused to comply with the rules of the North Carolina Car Service Association, adopted by the Southern Railway Company to expedite the use of equipment in the public interest. The general rules adopted by the Southern Railway Company, known as "Rules of the North Carolina Car Service Association," are reasonable, and their object is,

not to produce revenue, but to facilitate the distribution of equipment and the expeditious handling of freight, and to that end to enforce an equal, reasonable, and uniform charge for the detention of cars when the cars are detained over the free time prescribed in the rules. They have had this effect, and have operated and do operate to the mutual benefit of the railroads and the public, and have reduced the average time of detention of cars from five days to one and one-fifth days, and have increased the number of cars available for public service. The terms and provisions of these rules of the North Carolina Car Service Association, adopted by the Southern Railway Company, were well known to the ice and coal company, which has done business under them for some years. Among the provisions of said rules were the following:

"Sec. 1 of Rule 2. On commodities for unloading or loading forty-eight hours, two days free time will be allowed, except that Sec. 2, seventy-two hours will be allowed for unloading fertilizer, and the following commodities when in bulk only: cotton seed, cotton seed hulls, coal, coke, fertilizing material, grain, lime, tan-bark, and dressed lumber in box cars.

"Sec. 2 of Rule 2. In case consignees or consignors refuse to pay, or unnecessarily defer settlement of bills for car service charges, the railroads shall, upon notice to that effect from the manager, refuse to switch any cars for such consignees or consignors, until such charges are paid."

The Southern Railway Company, on October 12, 1903, issued a notice to the ice and coal company that commencing at 12 noon, October 17, 1903, it would only deliver cars on the public team tracks of the Southern Railway Company at Greensboro, N. C. After October 12, 1903, and subsequent to receiving said notice, the ice and coal company ordered said four cars of coal, and caused them to start from their respective points of origin, and could have countermanded said order. Said four cars of coal came on the yards of the Southern Railway Company at Greensboro, N. C., after October 17, 1903. Proper notices were sent the said ice and coal company of their arrival, and the cars were marked up to the public team tracks of the Southern Railway Company at Greensboro, and actually placed thereon, and the delivery tendered to the ice and coal company. The ice and coal company declined to receive or unload said cars at any other point whatsoever except on their private siding or trestle. The refusal to unload said cars was not because of any defect in the notices, but because the ice and coal company required and demanded that the said cars should be placed on their private track or trestle. Said four cars of coal reached Greensboro, N. C., between October 18 and October 22, 1903, and were placed on the public team tracks and there remained for the purpose of being unloaded by the ice and coal company until November 2, 1903, when they were removed because they were blocking the team tracks and interfering with the public use thereof.

According to the rules of the North Carolina Car Service Association, adopted by the Southern Railway Company, 72 free hours' time is allowed for unloading cars, and these cars remained on the team tracks much more than 72 hours from the time they arrived (October 18 to 22, 1903) and the 31st of October, the date of the commission's order, and therefore, when such order was passed, demurrage was actually due upon these four cars, "provided that the court shall hold upon the facts

that it was not the duty of the Southern Railway Company to place the said cars upon the said side track or trestle of the said ice and coal company, as it was requested to do." No demurrage has been paid by the ice and coal company. The said ice and coal company had first refused to pay freight on these four cars of coal unless the same were placed on their private siding. On October 27, 1903, upon receipt of the letter of the North Carolina Corporation Commission dated October 26, 1903, and on account of said letter, the ice and coal company paid the freight on the four car loads of coal. Said four cars having reached Greensboro between October 18 and 22, 1903, and 72 hours' free time having expired long prior to October 27, 1903, demurrage was due on said cars on October 27, 1903, the date the freight was paid, "provided the court shall hold upon the facts that it was not the duty of the Southern Railway Company to place the said cars upon the siding or trestle of the ice and coal company, as it was requested to do." The notice of October 12, 1903, declining to switch cars to the private siding of the ice and coal company, and the refusal to deliver the four cars in question was alleged to have been based upon the refusal of the ice and coal company to "comply with car service regulations," etc. The alleged refusal to comply with the said rules consisted in the refusal of the ice and coal company to pay an account for demurrage of some \$146 claimed to be due on certain 13 cars previously delivered. This claim was denied on the part of the ice and coal company. The ice and coal company was solvent, and was so known to the Southern Railway Company. When the four cars arrived, the work upon the siding and trestle had been completed, and they were in good condition for delivery and for unloading of coal, and were so known to the agents of the railway company which had control of placing cars. At that time the Southern Railway could have switched said cars on the siding within 24 hours after their arrival, and the ice and coal company could have unloaded the coal, and left them to the control of the railway company, within three hours after they were so switched respectively. It would in no way have interfered with the prompt, economical, and easy handling of this or other freight or business for the Southern Railway to have placed the four cars as requested. The trestle can, in the ordinary course of business, be used by the Southern Railway Company for unloading freight consigned to the ice and coal company with ease, and such freight can be unloaded there in less time than would be required in unloading it elsewhere. It is easier to unload coal from the trestle of the ice and coal company than from the public team tracks.

About 1890 the ice and coal company leased the property upon which its plant is situated, and which embraces its yard, of one W. D. McAdoo, who owned and now owns the same. The lease was renewed in 1899, and is still existing. At the time of the first lease the Cape Fear & Yadkin Railroad Company had a short spur track extending from its main track to within three or four feet of the yard of said ice and coal company. It could accommodate only one car so as to be conveniently unloaded. In the spring of 1891, or some time thereafter, the said track was extended within the yard of the ice and coal company, so that in 1895 it had reached a point very near the boilers of said company. The extension was made by the Cape Fear & Yad-

kin Valley Railroad Company at its own expense, and upon oral agreement, at the instance of the said ice and coal company, and for its accommodation. The terms of this agreement do not appear. In 1895 it was further extended by the ice and coal company. This was all done before the renewal of the lease of McAdoo and the purchase of the Cape Fear & Yadkin Valley Railroad Company by the Southern Railway Company. Since the extension of said track into the yard of the ice and coal company the Cape Fear & Yadkin Valley Railroad Company, and its successor, the Southern Railway Company, have been delivering cars over said track to the yard of the ice and coal company. That part of the spur track outside of the yard of the ice and coal company had also been used by the railway company for the purpose of shifting their cars, for holding dead cars, and, in some instances, unloading for persons near the said track. There has been no objection to such use of said track by the ice and coal company. The extension from the railway's right of way to the yard of the ice and coal company passes over land belonging to W. D. McAdoo and the Guilford Rolling Mills, and neither the Southern Railway Company nor the ice and coal company have any legal right to use the same, there being no written grant of easement or license; the ice and coal company having only a right, under its lease from McAdoo, to ingress and egress for ordinary vehicles. The use of said land has been by sufferance of the owners, and the said owners have made no objection, and taken no steps to prevent such use, and such use has been and now is permitted, though once or twice the secretary of the said mills has complained of it as a nuisance, and McAdoo has threatened to have compensation made him. The ice and coal company desired to construct a trestle within its yard for the more convenient unloading of cars, and this involved the raising of the existing track and the moving of it, or a part of it, a short distance—10 or 12 feet—south. There was a grade of several feet from where, or near where, the track left the railway right of way to the proposed trestle, so that the track was not only to be elevated within the yard, but also outside of it, the proposed removal still leaving the track to pass over the land of other parties above named. Application to make these changes was made to the Southern Railway Company about the 1st of September, 1903. The permission was granted, the agreement being that the ice and coal company should do the entire work at its own expense, including the grading, etc., except the removal and laying of the track, which the Southern Railway Company agreed to do or supervise, when the work was ready, using their own iron (the same which was already there), and its spikes, etc. Plans were exhibited and agreed to, and the work commenced about the 8th or 9th of September, 1903, and completed about the 29th or 30th of September, 1903. There was no written or express contract on the part of the Southern Railway Company in respect to the use of the said track, but considering all of the circumstances induces the master to find "that there was an implied agreement that said track should be adopted and treated, so far as the ice and coal company was concerned, as a track for the delivery of its cars upon its trestle, under the reasonable rules and regulations of the said Southern Railway Company; this implied agreement to continue so long as the said track was main-

tained by mutual consent." It is admitted that during the period between the commencement and the completion of the work no cars could be received or unloaded within the yard of the ice and coal company. It is the custom of the Southern Railway Company to construct private sidings for the use of shippers of large quantities of freight; but it is not the policy of the said railway to do so except under contract, the printed form of which is in evidence, such contract containing a provision securing the acquisition of necessary rights of way, etc. There was a standing order on the part of the ice and coal company that its cars should be delivered upon its yard. There appears to have been no such standing order in respect to the delivery of cars on the spur track outside of said yard, except the request in respect to 13 cars arriving after the beginning and before the completion of said work. There was no contract to deliver cars on the track outside of the yard. This standing order was given to the agent after the track had been torn up in the yard, and about the time of the beginning of the construction of the trestle. In respect to the said 13 cars it is claimed by the ice and coal company that it designated this spur track outside of the yard as a proper and accessible point of delivery, and that the complainant, failing to comply, could not claim demurrage because of the failure or refusal of the said ice and coal company to receive them at any other point. From the 9th to the 14th of September the said spur track was occupied by the Woodruff & Townsend cars—one of them from the 9th to the 11th, and the other from the 12th to the 14th. The ice and coal company did not have the exclusive right or priority to have cars placed and unloaded on said spur track. One of the thirteen cars arrived on September 9, 1903, and two of them on September 10, 1903, while the track was so occupied. The remaining ten arrived between the 14th and 19th of September, 1903. The track had been spiked down on the 14th of September by the railway company, as unsafe for their equipment, etc. After this date the preponderance of testimony establishes that no other cars were put upon said track until the completion of the work on the 29th of September; certainly it was not generally used for the purpose of delivery and unloading. The work commenced by excavating inside of the yard of the ice and coal company near the fence, and the rails were torn up inside, and also several feet outside, of the fence. After a week or more, the building of an embankment or "fill" was commenced outside of said yard, and some feet south of the existing track, preparatory to a removal of the rails on it to a greater elevation, the dirt being taken from the excavation inside of said yard. On the 14th of September the end of the track within several feet of the fence had been "jacked up," leaving the sills hanging. There was testimony tending to show that about or after the 14th the "jacking up" or removal of the dirt from under the rails extended some distance along the spur track, making it dangerous to put cars upon it. There was a fall of some feet towards the yard, necessitating the use of brakes, or "choking"; the new track, when completed, being a reversal of this grade some distance in order to meet the necessary elevation of the trestle. The work was being done by the ice and coal company, under its supervision and control, by its contractors; the Southern Railway Company having nothing to do with it, except to shift the rails

to the new track when all was ready. There was sufficient space on the track which had not been removed to accommodate two cars from where the track was first torn up several feet from the yard of the ice and coal company, and it was possible, up to within two or three days of the completion of the work, for the Southern Railway Company to have placed and unloaded cars upon it. In not using the said track for delivery and unloading of cars within that period—that is, from the 14th of September to within two or three days of its completion—the Southern Railway Company exercised a reasonable degree of prudence in respect to the safety of its equipment and the orderly conduct of its business. The ice and coal company requested the Southern Railway Company to place these cars on the spur track outside of the fence, and designated no other place for delivery. The Southern Railway Company, after such request and designation, did not actually place any of the thirteen cars, except perhaps one or two, at an accessible point of delivery. The request was not for each car, but a standing order given to an agent of the Southern Railway Company, and but once. The ice and coal company never designated any other point except upon the said spur track. There were other team tracks of the Southern Railway Company where the unloading of coal would have been feasible (and the Greensboro Gas Company and many others unloaded coal from them), though not as convenient and inexpensive as the said side track. The unloading on the team tracks would render the business of the ice and coal company unprofitable. There were several coal bins and chutes on the public tracks, but these could not always be relied upon, owing to the demands of other shippers. The bins were filled at the time covered by this controversy. The notices of the arrival of all of said cars did not contain the weight or amount of charges.

The North Carolina Corporation Commission threatened to institute suits against the Southern Railway Company for heavy penalties on account of any failure to obey the order of October 31, 1903, made by said commission. The said ice and coal company threatened to institute suit against the Southern Railway Company for heavy penalties and damages on account of failure to obey said orders. There does not appear to be any substantial conflict of testimony as to the nature of the proceedings had before the North Carolina Corporation Commission. It appears that on the 20th of October, 1903, a letter from M. W. Thompson, on behalf of the ice and coal company, addressed to the said commission, was received by them. It was in the form of a letter, and the formal requirements of the rules of practice of said commission as to sections, the numbering of the same, etc., were not observed. The commission treated the letter as a complaint, but did not serve any formal notice upon the Southern Railway Company or its agents. On the 26th of October, 1903, the commission "phoned" the manager of the Car Service Association to come to its office. The answer was that he was not in the city, and the commission then requested that he come to the office of the commission upon his return. Some days after, the first vice president of the Southern Railway Company visited the office of the commission on other business, and after this was concluded this matter (the subject of Mr. Thompson's letter) was mentioned to him. On the return of the manager of the Car

Service Association he went to the office of the commission. The letter of Mr. Thompson was read, or its contents made known to him, and the matter was discussed. Then follow conversations which took place with the Corporation Commission, which are not deemed pertinent or competent testimony. The proceedings in the Corporation Commission "were not in conformity with the rules of practice of the Commission, and the Commission did not follow them strictly except in formal matters." No witnesses were sworn in this matter, nor any issue joined by a pleading, nor any other hearing, except in a conversational way first with one and then another representative of the different corporations. On November 3d exceptions were filed to the order of the Corporation Commission. The hearing of these exceptions was had on November 12, 1903, at Greensboro, when witnesses were examined, and arguments made by counsel. On December 10, 1903, the commission made an order overruling the exceptions.

To the report of the standing master complainant filed 12 exceptions. Defendants filed no exceptions.

The fifth exception is to the finding of the master that, had the \$146 demurrage been paid, the four cars in question would, in the opinion of the master, have been delivered on the trestle of the ice and coal company as requested, and refusal to so deliver was solely on that ground. This exception is sustained.

Twelfth exception is to the findings of the master which relate in any way to the 13 cars which arrived in Greensboro between the 9th and 19th days of September, 1903. All testimony in relation to this finding was objected to and motion made to strike out said testimony, and the exception is now sustained, as the finding is irrelevant, and it is shown in the testimony that to have switched the 13 cars on the siding would have been dangerous to the equipment of the railroad company.

The \$146 demurrage is not the question at issue in this cause. It may have been the origin of the litigation, but illustrates the truism "that large oaks from little acorns grow." This was a suit to restrain threatened irreparable wrong, and a multiplicity of suits for the penalties under the North Carolina statutes for non-compliance to the orders of the Corporation Commission. These penalties are matters of statute—\$500 per day—and involve much more than \$2,000, if suit should be entered against the complainant for every day it has refused to obey the orders of the Corporation Commission made herein, and to recognize its right to interfere with interstate commerce.

The other exceptions, except as noted above, are deemed immaterial. The cause was referred to the master to find and report the facts, which order, after hearing testimony and asking counsel to signify in writing what facts they desired found, he has fully complied with in an able and satisfactory manner. It is admitted that the four cars loaded with coal, the basis of the whole controversy, were interstate commerce. This is a fact. They were interstate commerce, and there is no controversy in regard thereto. Being interstate commerce, the question naturally arises, when did these particular cars lose their character in this respect, over which

the North Carolina Corporation Commission has no jurisdiction, as recognized in the act of the Legislature creating that body? Until it ceased to be interstate commerce, Congress having legislated and assumed to regulate such commerce under the provisions of the Constitution, no state regulations can apply. *G. C. & S. F. R. Co. v. Hefley*, 158 U. S. 93, 15 Sup. Ct. 802, 39 L. Ed. 910; *G. C. & S. F. R. Co. v. Miami S. S. Co.*, 86 Fed. 407, 30 C. C. A. 142; *I. C. C. v. C. B. & Q. R. Co.*, 186 U. S. 320, 22 Sup. Ct. 824, 46 L. Ed. 1182. An article of interstate commerce remains wholly free from such state control as long as it is in the original package. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Austin v. Tenn.*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; *McGwigan v. R. R.*, 95 N. C. 428, 59 Am. Rep. 247; *Emert v. Missouri*, 156 U. S. 321, 15 Sup. Ct. 367, 39 L. Ed. 430; *Scott v. Donald*, 165 U. S. 95, 102, 17 Sup. Ct. 265, 41 L. Ed. 632; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; *Schollenberger v. Pennsylvania*, 171 U. S. 12, 22, 18 Sup. Ct. 757, 43 L. Ed. 49. In the cases cited above from 95 N. C., 59 Am. Rep., the opinion was delivered by the chief justice, in which he says:

"State interference with interstate commerce is absolutely forbidden, and the failure of Congress to take any action in the premises is an indication that such commerce shall remain unfettered and free, subject only to the common law. *Passenger Cases*, 7 How. 286 [12 L. Ed. 702]; *Hall v. De Cuir*, 95 U. S. 485 [24 L. Ed. 547].

"We do not undertake to venture upon the field traversed by the court further than to say that the consequences of an opposite view that permits interfering by state legislation would be mischievous in the extreme. If one state may interfere, so may every other through which the freight is to be carried, in respect to its own chartered companies, and a succession of hostile enactments might cripple and so embarrass the roads in carrying out the contract as almost to destroy such commerce, and deprive the country of those beneficial arrangements for transporting from distant points so general in use, and so conducive to the nation's prosperity and business. The former is therefore wisely committed to a single body, whose regulations may be harmonious and self-consistent."

But Congress has by legislation undertaken to regulate the matter by the act creating the Interstate Commerce Commission. Having so legislated, the state could not legislate on the subject.

In *Rhodes v. Iowa*, above cited, Justice White delivering the opinion of the court, it was held in an able discussion of the question:

"Moving such goods in the station from the platform on which they are put on arrival to the freight warehouse is a part of the interstate commerce transportation."

In other words, that interstate freight retains its character as such until the actual delivery to the consignee takes place.

It will be noted that many of the cases cited, as well as the well-known South Carolina Original Package Cases, are in regard to the introduction of intoxicating liquors or oleomargarine into states having prohibitory statutes, and after the delivery of the opinion in this case Congress passed the act of August 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. Stat. 1901, p. 3177], in which it was provided that intoxicating liquors should not be exempt from state statutes.

This legislation was in the interest of the police powers of the states, and conceded them the authority to regulate the introduction of intoxicating liquors, thus surrendering to the states a part of the recognized power vested in Congress; and this act has been held to be constitutional. There has been no concession of this nature in regard to other freight, such as coal, etc., and no question of the principle thus laid down that interstate commerce, except where such concession is made, retains its character as interstate commerce, and can only be regulated by Congress.

But the right of the North Carolina Corporation Commission is claimed under the police power of the state, and in the brief of counsel appears this quotation:

"The Corporation Commission then, being a constitutional body, with powers to enforce rules for the regulation of the operations of public and quasi public corporations under the laws of the state, cannot be enjoined from exercising police powers of which the execution is not in conflict with the federal Constitution, or laws made under its delegated powers. *Express Co. v. R. R. Co.*, 111 N. C. 463, 16 S. E. 393; *Bagg v. R. R. Co.*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569; *Martin v. Hunter's Lessee*, 1 Wheat. 326, 4 L. Ed. 97; *State Tax on R. R. Gross Receipts*, 15 Wall. 284, 21 L. Ed. 164; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. Ed. 1028."

It is an oversight that counsel should have overlooked *N. Y. v. Miln*, 11 Pet. 102, 9 L. Ed. 648, the original and leading case on this subject, and the numerous cases citing and affirming the same; what is known as the "Passenger Cases," 7 How. 286, 12 L. Ed. 702; and to have noted the exception stated in the brief "is not in conflict with the federal Constitution or laws made under its delegated powers." An examination of all the authorities cited show that this exception is uniformly made, and it seems the case at bar, conceding the principle laid down in authorities cited to be correct, falls under the exception. In the original case in 11 Pet., 9 L. Ed., which is cited in most of the other cases, and the cases cited thereunder in *Russell & Winslow's Syllabus Digest*, the exception stated in the brief is uniformly made, and, Congress having legislated upon this subject of interstate commerce, the state cannot legislate thereon. To do so would be in conflict with both the Constitution of the United States and the acts of Congress passed in pursuance thereof. The police power applies more particularly to passengers and to other matters which affect public health, convenience, and morality; neither of which seem to be involved in the delivery of four cars of coal brought from one state into another.

The defendant coal and ice company was not without its remedy. The Interstate Commerce Commission hears and decides just such questions as were involved in this controversy. Lawyers frequently make mistakes as to what courts have jurisdiction, which gives rise to the numerous decisions on the subject of the jurisdiction of the courts, of which the books are full. This defendant has made the common mistake of getting into the wrong tribunal, as Congress has by constitutional enactment placed in the hands of the Interstate Commerce Commission the regulation of interstate

commerce, as it has full authority to do under the Constitution of the United States.

In the case at bar the jurisdiction of this court is strenuously questioned, and was ably argued by the counsel on both sides. It is contended by defendants that this is a suit against the state, and, the state being a necessary party, the bill should be dismissed; and it should further be dismissed because the amount involved does not exceed \$2,000, exclusive of interest and cost. Numerous authorities are cited for the positions taken by opposing counsel. As to the contention of McNeill, Rogers, and Beddingfield that this is a suit against the state of North Carolina, the case of *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648, in which a great many of the authorities are collated, seems to be decisive of this question. At page 112, 165 U. S., page 263, 17 Sup. Ct., 41 L. Ed. 648, the court says:

"The objections to proceeding against state officers by injunction are that it is, in effect, a proceeding against the state itself, and it interferes with the official discretion vested in the officers. The answer to such objections is found in a long line of decisions of this court. *Osborn v. Bank of U. S.*, 22 U. S. (9 Wheat.) 739, 6 L. Ed. 204; *Dodge v. Woolsey*, 59 U. S. (18 How.) 331, 15 L. Ed. 401; *Louisiana Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903; *Memphis & L. R. R. Co. v. Berry*, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837; *Poindexter v. Greenhow* (Va. Coupon Cases) 114 U. S. 295, 5 Sup. Ct. 903, 29 L. Ed. 194; *Allen v. Baltimore & O. R. Co.*, 114 U. S. 315, 5 Sup. Ct. 925, 29 L. Ed. 201; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599, 602.

The opinion in the original case on this subject—*Osborn v. Bank of U. S.*, supra—was delivered by Chief Justice Marshall, the eighth syllabus of which is:

"As the state itself cannot, according to the eleventh amendment of the Constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the state, who are intrusted with the execution of such laws."

The chief justice said in the above case:

"The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agent of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal—the person who is the true source of the mischief, by whose power and for whose advantage it was done—be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

The principle enunciated has been cited and affirmed in a number of cases, too numerous to cite. There have from time to time been dissenting opinions, but the Supreme Court has held strictly to the principle laid down by the chief justice.

It is not unnatural that a body having the powers of a corporation commission should imagine itself the state, but it is in reality

a mere agency of the state, and may, under the authorities, be restrained from executing an unconstitutional act, or doing an unconstitutional thing under a constitutional act.

The purpose of this suit is stated in the opening of defendant's brief as follows:

"The purpose of the bill is to properly enjoin the defendants the Greensboro Coal & Ice Company, McNeill, Rogers, and Beddingfield, acting as the North Carolina Corporation Commission, from bringing suits for penalties or damages against complainant because of its failure to comply with its order of the said Corporation Commission as to placing four car loads of coal transported from other states upon the spur track and trestle of the defendant company at Greensboro."

This purpose of the bill is properly stated in part. The suits were threatened, though denied in the verified answers, as shown in the evidence by a letter from the counsel of the coal and ice company, and by a letter or telegram from the chairman of the Corporation Commission, and as found by the master. These suits would involve more than \$2,000. It should be added the purpose of the bill was also to enjoin the Corporation Commission from compelling the complainant to switch to a consignee's private side track irrespective of the rules and regulations of the Southern Railway Company, and deny to it the right to conduct its business, both state and interstate, which the master finds would entail a loss to the Southern Railway Company much in excess of \$2,000, the right of the complainant railway company to conduct its interstate business at Greensboro, to dispose of its rolling stock and distribute it, to refuse to permit its cars to be placed on private sidings, according to its reasonable rules. The amount involved amounts to many thousand dollars, far in excess of \$2,000 as found by the master.

True, the Corporation Commission of North Carolina is, in words, made a court of record, and it is conceded the Circuit Court of the United States cannot restrain a state court, but the Corporation Commission is vested with powers not judicial, some of which have been held to be legislative, some executive, and the restriction on the injunction of this court as to state courts does not apply, especially inasmuch as the acts complained of and asked to be enjoined are not judicial acts. As to these acts it is a state agency, not acting judicially.

Many interesting questions were discussed in the argument and in the briefs, which it is not deemed necessary to consider for the decision of the case at bar. From what has been said there appears all the elements necessary to give the Circuit Court of the United States jurisdiction.

The questions discussed in the argument are ignored without prejudice, and it is considered, ordered, and decreed that the restraining order heretofore entered be made perpetual. A decree will be drawn accordingly.

In re CLYDE S. S. CO.

In re OLD DOMINION S. S. CO.

(District Court, S. D. New York. December 7, 1904.)

1. COLLISION—STEAMSHIPS—EXCESSIVE SPEED IN FOG.

Six knots is an excessive speed for a steamship in a thick fog in a frequented part of the ocean, and charges the ship with fault where a collision occurs.

2. SAME—NAVIGATING IN FOG—VIOLATION OF SIXTEENTH ARTICLE OF INTERNATIONAL RULES.

A steamship must be held in fault for a collision with another in a fog, notwithstanding the clear fault of the latter in running at an excessive speed, where she was likewise maintaining an excessive speed, and also violated article 16 of the international navigation rules (Act Aug. 19, 1890, c. 802, 26 Stat. 326 [U. S. Comp. St. 1901, p. 2868]) by failing to stop her engines on hearing the fog signals of the other vessel apparently forward of her beam.

3. ADMIRALTY JURISDICTION—DEATH BY WRONGFUL ACT ON HIGH SEAS—ENFORCEMENT OF STATE STATUTE.

A suit may be maintained in a court of admiralty to recover damages from a vessel at fault for a collision on the high seas for loss of life resulting from the sinking of the other vessel, where a right of recovery for wrongful death is given by the statutes of the state in which both vessels belonged, both being a part of the territory of such state and subject to its laws.

In Admiralty. Petitions for limitation of liability for collision.

Wing, Putnam & Burlingham, for Old Dominion S. S. Co.

Robinson, Biddle & Ward, for Clyde S. S. Co.

Convers & Kirlin, Hunt, Hill & Betts, Wing, Putnam & Burlingham, Butler, Notman, Joline & Mynderse, Robinson, Biddle & Ward, Francis D. Winston, Arthur L. Fullman, John R. McMullin, Norman B. Beecher and A. Leo Everett, for various claimants.

ADAMS, District Judge. These petitions for limitation of liability on the part of the Old Dominion Steamship Company and the Clyde Steamship Company, were the result of a collision which occurred in the Atlantic Ocean near the Winter Quarter Shoal Lightship, off the coast of Virginia, about 7 miles at sea, on the 5th day of May, 1903, in the early morning, between the steamships Hamilton and Saginaw, owned by the respective petitioners. As usual in such cases, it was sought, in the beginning, to contest, as well as to limit, liability, and each vessel charged the other with faults alleged to have produced the collision. A dense fog prevailed at the time.

The Hamilton, about 300 feet long and 40 feet beam, left New York on the 4th day of May, 1903, about 3 o'clock P. M. bound for Norfolk, Virginia. At the time of leaving the weather was fine, but about 8 o'clock a thick fog set in, and she reduced her speed slightly. At practically the same time she started her automatic electric whistle, which was blown at intervals of about 54 seconds. When the Delaware Lightship was passed at 11:35 P. M., the fog was dense and it continued so until after the collision.

The Saginaw, 238 feet long and 38 feet beam, left Norfolk, Virginia, the 4th day of May about 6:30 o'clock P. M. bound for Philadelphia. She ran into the fog about 1 A. M. of the 5th and continued her full speed of about $9\frac{1}{2}$ knots until a few minutes after 4 o'clock when, according to her contention, the fog first became dense. She then reduced her speed to some extent, not by orders by means of the Telegraph but by verbal directions through the speaking tube, running from the pilot house to the engine room, to slow the engine and let her steam run down. These orders were obeyed and she contends that they had the effect of reducing her headway at the point of collision to between 5 and 6 knots per hour.

The collision occurred at 4:44 or 4:45 o'clock A. M. about $2\frac{3}{4}$ miles S. S. E. of the Winter Quarter Lightship, the stem of the Hamilton striking the port side of the Saginaw about 30 feet from the stern and cutting off a portion of the stern, the direction of the blow extending aft. The course of the Hamilton prior to reaching the immediate vicinity of the collision was about South-west $\frac{1}{2}$ South and that of the Saginaw North-east by North. Both vessels had for some time been sounding fog whistles and, prior to the collision, had heard the other's blasts. The Saginaw sank almost immediately and became a total loss, with some loss of life, personal injuries and damage to cargo. The Hamilton's stem was twisted slightly to port but she was not materially injured and after picking up such of the survivors as could be found, after due search, proceeded on her voyage.

The Hamilton was proceeding down the coast in a fog at about two-thirds of her full speed of 14 knots and candidly admits that she was in fault for excessive speed.

The other faults charged against her of not sounding the signals required by law; not having any competent lookout; having a defective reversing gear; and in not stopping and backing seasonably before the collision are not, apparently, sustained by the evidence but her excessive speed is enough to condemn her and consideration of the other alleged faults is not required.

The charges of fault against the Saginaw are: in not sounding the signals required by law; at proceeding at an immoderate speed in fog; in not having any competent officers in charge or any sufficient lookout; in not slowing, stopping and backing when the whistles of the Hamilton were heard; in not keeping her proper course; in porting her helm, and not taking any timely or seasonable precautions to prevent the collision.

The Saginaw strenuously contends that her own speed was not excessive, but if it was so, it was not contributory to the collision, which can be fully accounted for by the Hamilton's fault in that particular, citing *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053, where it was held in a collision case between that vessel and the *Iberia*, that the faults of the *Umbria* were so gross that the rule regarding any doubt as to the management of the other vessel, should be resolved in her favor.

The facts here appear to be that prior to the collision the Saginaw had been running for more than 30 miles in a dense fog under full speed bells and that, while so continuing, there was some reduction of

speed, when near the point of collision, by the said directions to that effect through the speaking tube. She was probably going 6 knots, at least, at the time of contact. That rate of speed or even less in thick fogs in a frequented part of the ocean, as this was, has been frequently condemned. *The Pottsville* (D. C.) 12 Fed. 631; *The Luray* (D. C.) 24 Fed. 751; *The Oregon* (D. C.) 27 Fed. 751; *The Magna Charta*, 1 Asp. Mar. Cas. 153; *The Raleigh* (D. C.) 41 Fed. 527; *Id.* (C. C.) 44 Fed. 781; *The Martello* (D. C.) 34 Fed. 71; *Id.* (C. C.) 39 Fed. 507; *Id.*, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637; *The Colorado*, 91 U. S. 692, 23 L. Ed. 379; *The Michigan*, 63 Fed. 280, 11 C. C. A. 187; *The City of New York*, 8 Blatchf. 194, Fed. Cas. No. 2,759; *The Alberta* (D. C.) 23 Fed. 807, 813; *Watts v. U. S.* (D. C.) 123 Fed. 105, 112.

Moreover, she failed to observe the 16th Rule for preventing collisions at sea, providing:

"A steam vessel hearing apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

Prior to the Act, containing this rule (Act Aug. 19, 1890, c. 802, 26 Stat. 326 [U. S. Comp. St. 1901, p. 2868]), going into effect, under the general rule relative to vessels meeting in fog, with risk of collision, it was held that when a whistle was heard a few points on either bow, a steamer should stop and, if necessary, reverse, until the exact position and course of the other vessel could be ascertained. *The North Star*, 62 Fed. 71, 10 C. C. A. 262, and cases cited. Under the Act now in force, a failure to observe this precaution creates a presumption of fault. *The Bernard Hall*, 9 Asp. Mar. Cas. 300; *The Koning Willem I.*, *Id.* 425. In the latter case, it was said by Bucknill, J. (427):

"The question remains whether the *Koning Willem I.* is also to blame. The reason given by her master for not stopping his engines when he first heard the whistle of the *Bittern*, or at the second or third whistle, was this—that his ship was going so slow, and the signal seemed to be so far off that he thought it better to wait until he heard it again, and that so soon as he heard it more ahead—that is, finer on the bow—he stopped his engines immediately. Not having ascertained the position of the *Bittern* when her signals were first heard, in my opinion the engines should have been stopped, apart altogether from art. 16, but certainly in accordance with that article. I think, and the Elder Brethren of the Trinity House who assist me agree, that it was in that weather impossible to have ascertained with any degree of certainty the position of the *Bittern*—that is, the bearing and distance of the *Bittern* from the *Koning Willem I.*—when her whistle was first heard, and the master of the *Koning Willem I.* admits as much himself. I think his duty was, clearly, to have stopped his engines then. With regard to what has been said about signals in a fog, I think I may usefully read part of a paragraph in art. 18 of the *Channel Pilot*, part 1, 9th edit.: 'Sound is conveyed in a very capricious way through the atmosphere. Apart from wind, large areas of silence have been found in different directions and at different distances from the origin of a sound, even in clear weather. Therefore too much confidence should not be felt in hearing a fog signal.' Now I will refer to the judgment of the President in the case of *The Bernard Hall* (ubi sup.), the language of which I adopt. The learned President said: 'The Elder Brethren point out that there would be extreme difficulty in knowing how far off the vessel would be in a fog, and therefore they do not think there was any such ascertainment as to justify the *Holyrood*'—in this case the *Koning Willem I.*—'in not complying with the clear terms of art. 16, by

stopping her engines when she first heard the whistle of the Bernard Hall; and that it is impossible to say that it would not have been a material matter if she had done so.' Each case must, no doubt, be considered on its own facts; and in this case I hold without doubt that the master of the Koning Willem I., a man of great experience, should have grasped the fact that, as it was impossible for him to locate with any certainty in that dense fog the bearing of the Bittern or her distance away, he should have stopped his engines on first hearing her whistle. Instead of that, he waited until he found that the whistles indicated danger, because he heard them drawing ahead, proving that the Bittern was crossing his bows. So, in this part of the case, there has been a breach of the second part of art. 16. As has been pointed out to me by the Elder Brethren, if you stop your engines you can hear better than you can when the noise of the engines and propeller is going on. If you stop your engines you lessen the danger and give yourself better information than if you go on with engines moving, as was done in this case; and it may be that if the master of the Koning Willem I. had stopped his engines when he first heard the whistles, which he thought were far off, he might have come to the conclusion that the whistles were nearer than he thought they were—and I suspect they were nearer. I think it was negligent navigation on his part not to have stopped his engines when he first heard the whistle of the Bittern and to have waited so long as he did."

The Saginaw did not stop when the whistles of the Hamilton were heard nearly ahead, or not more than a half a point on her own port bow, but she kept going ahead under the same speed. The master left the pilot house and went forward to be able to see better as the vessel was high out of water at the stem, on account of having only a part of a cargo, which caused the bad trimming. When then the Hamilton appeared slightly over the port bow of the Saginaw, the master of the latter ordered the helm to be ported in the hope of escaping the collision.

The case now under consideration is readily distinguishable from *The Umbria*. There the principal fault was clearly with the *Umbria* and the only question to be determined with respect to the *Iberia* was, whether she was guilty of a legal fault contributory to the collision. It was held to be doubtful, in view of the *Umbria's* movements, and, under the rule adverted to in that case, the *Iberia* was discharged. Here, the faults of the Saginaw are, at least, equal to those of the Hamilton and would seem to be greater in that the Saginaw's speed was also excessive and she violated the 16th rule of navigation after the presence of the other vessel was discovered. The Hamilton in such respect was apparently without fault, as she stopped her engines when the other's whistles were heard and reversed, although without much effect in view of her previous speed.

The right of the petitioners to limit their liability is not seriously contested. The interest of the Old Dominion Steamship Company, with pending freight and passage money, has been reported to be \$318,-373.78, and of the Clyde Steamship Company to be \$531.90. A reference will be necessary to ascertain how the aggregate of these funds should be distributed among the various claimants. In that connection, a question has arisen with respect to the legal right of recovery of damages for loss of lives of several persons on the Saginaw, who were said to have been drowned in consequence of the collision. Such right has been vigorously disputed by the claimants of the vessels and before the cases go to a commissioner, it is necessary to determine the question. These persons were: Mary Eliza Jones, passenger; Alfred

Gilmore, passenger; Edward S. Goslee, Chief Officer; Mary Hawley, passenger; Laura Hawley, passenger; William Morris, steward; Edmund Page, second cook; Peter Swanson, passenger.

The question of liability for loss of life on the high seas is admittedly a new one. I have been referred to a number of cases bearing indirectly upon it, but to none which can be regarded as an authority for the determination of the controversy. The general principle undoubtedly is that without the aid of a statute there can be no recovery in such cases (*The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; *The Alaska*, 130 U. S. 201, 9 Sup. Ct. 461, 32 L. Ed. 923), but to meet that objection the claimants invoke the aid of the Delaware statute providing:

"Section 1. That no action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction.

Section 2. Whenever death shall be occasioned by unlawful violence or negligence, and no suit be brought by the party injured to recover damages during his or her life, the widow of any such deceased person, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned.

Passed at Dover, January 26, 1886."

13 Del. Laws 1866-67, pp. 28, 29, c. 31.

That act was amended March 9, 1901, as follows:

"Section 1. That Section 2 of Chapter 31, Volume 13, of the Laws of Delaware, entitled 'An act in relation to injuries or death occasioned by unlawful violence or negligence,' passed at Dover, January 26, 1866, be and the same is hereby amended by striking out all that part of said Section after the word 'Widow,' in the third line, and inserting in lieu thereof the following 'or Widower of any such deceased person, or if there be no widow or widower the personal representatives may maintain an action for and recover damages for the death and loss thus occasioned.'

Approved March 9, A. D. 1901."

31 Del. Laws 1901, p. 500, c. 210.

It appears that the owners of the vessels were corporations existing under the laws of the State of Delaware and the contention is that the steamships are, therefore, portions of the territory of that State and subject to its laws. *The Scotia*, 14 Wall. 170, 184, 20 L. Ed. 822; *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430; *Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 234; *The Lamington (D. C.)* 87 Fed. 752, 754; *International Nav. Co. v. Lindstrom*, 123 Fed. 475, 60 C. C. A. 649.

On the other hand the claimants contend that the question presented is, can there be a recovery in admiralty for loss of life upon the high seas where there is no element of contract involved, and argue that the actions having been brought against the *Hamilton* alone, any recovery must necessarily rest upon the theory of a maritime tort, committed by an outside colliding vessel and that the court is without jurisdiction in the premises. The argument made is ingenious and receives some support from the authorities cited: *Rundell v. La Compagnie Generale Transatlantique (D. C.)* 94 Fed. 366, affirmed 100 Fed. 655, 40 C. C. A. 625, 49 L. R. A. 92. It is urged that the fiction of a merchant ship being regarded as a floating portion of the country to which she be-

longs, should not be unduly extended, citing Hall's Treatise on International Law, 1904, pp. 249, 250 and that the theory applicable to merchant vessels must be one of contract. *Lloyd v. Guibert* (1865) 1 Q. B. 115; *The Gaetano and Maria*, L. R. 7 P. D. 137-146. It is further urged that in England admiralty has no jurisdiction for loss of life (notwithstanding Lord Campbell's Act). *The Vera Cruz*, 10 App. Cas. 59. Many authorities are cited to establish that in cases of tort upon the high seas, the admiralty courts of the United States will be governed by the general maritime law, which must be uniform, and it is further urged that uniformity in admiralty will be destroyed if the various state statutes are enforced. *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *The Brantford City* (D. C.) 29 Fed. 373; *Benedict's Admy.* §§ 74, 111; *The Vera Cruz*, supra; *The Harrisburg*, supra; *Crapo v. Allen*, 6 Fed. Cas. 763; *The Manhasset* (D. C.) 18 Fed. 918; *Workman v. Mayor*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314.

There can be no doubt that natural justice requires that compensation should be made for loss of lives through negligence upon the high seas as well as upon land, where it is generally obtainable. In the *Lindstrom Case* (C. C.) 117 Fed. 170, Judge Thomas gave the matter careful consideration and concluded that there was jurisdiction in the United States Circuit Court to grant compensation for an injury causing death on the high seas. He held that the steamship there, though without the actual limits of the state, was nevertheless a part of the territory of the state of New York and that all civil rights of action were determined by the laws of such state. This was reversed by the Circuit Court of Appeals on the ground that the vessel belonged in New Jersey, and as under the law of that state, the action was not brought within a year, as there provided for, no recovery could be had. Judge Wallace, in writing for the Circuit Court of Appeals, said (123 Fed. 475, 476, 60 C. C. A. 649, 650):

"The territorial sovereignty of a state extends to a vessel of the state when it is upon the high seas, the vessel being deemed a part of the territory of the state to which it belongs; and it follows that a state statute which creates a liability or authorizes a recovery for the consequences of a tortious act operates as efficiently upon a vessel of the state when the vessel is beyond its boundaries as it does when it is physically within the state. The inquiry in the present case, therefore, is whether a recovery was authorized by the statute of the state whose territorial sovereignty embraced the steamship. The action was brought upon the theory that the steamship was a vessel of New York, and seems to have been decided at the trial upon that theory. The complaint alleged that the death of the intestate and the negligence occurred upon a vessel of that state, and that the plaintiff was entitled to recover by virtue of the statute of New York in such case made and provided. Upon the trial the plaintiff was granted leave to amend the complaint by alleging that a statute of New Jersey provides that the administrator may recover for the benefit of next of kin 'in practically the same manner as the statute of New York,' but leave was not granted to amend by alleging that the steamship was a vessel of New Jersey. The complaint was not formally amended, and the trial judge treated the case as founded on the statute of New York."

In the case of *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664, a question arose as to liability for a death upon the high seas and in sustaining the jurisdiction of the court, the question was fully discussed

by Rapallo, J. Inter alia, he said (page 553, 77 N. Y., 33 Am. Rep. 664):

"The facts alleged by the complaint, and admitted by the demurrer, present a strong case for the application of the rule that the laws of the State to which the vessel belongs follow her until she comes within some other jurisdiction. The defendants, by whom the wrong is alleged to have been committed, were, at all times up to its final consummation by the death of the plaintiff's intestate, citizens and residents of this State, and subject to its laws, and the deceased was also a citizen of this State. The death was caused either by the illegal and negligent act done in this State of lading the dangerous and prohibited article on board the vessel and sending the deceased to sea in her thus exposed, or by the negligence or wrongful acts of the defendants committed at sea through their agents. The complaint does not distinctly specify which, but it must have been one or the other. If the latter, then at the place where the injury was consummated there was no law by which to determine whether or not it rendered the defendants liable to an action, unless the law of the State to which the vessel belonged followed her. In the present case the defendants were, at the time of the wrongful act or neglect, and of the injury, within this State and subject to its laws, and none of the objections, suggested in the various cases which have been cited, to subjecting them to liability under the Statute, for acts done out of the territory of the State, can apply. There can be no double liability, as suggested by Denio, J. in [Whitford v. Panama R. Co.] 23 N. Y. 467, 471, for the locus in quo was not subject to the laws of any other country; nor can it be said that the deceased or his representatives were under the protection of the laws of any other government, as is said in some of the other cases cited. It is a case where no confusion or injustice can result from the application of the principle declared by the Supreme Court," (referring to *Crapo v. Kelly*) "that the laws of the State as well as of the United States enacted within their respective spheres, follow the vessel when on the high seas."

Both vessels in the case at bar were a part of the territory of Delaware and as the law of that State gives a right of recovery, I see no sound reason why it should not apply and be enforced in these proceedings, and so hold, notwithstanding the ingenious argument presented to the contrary.

There will be decrees of limitation of liability and a reference to fix the amount of damages, with a provision for a proper distribution of the fund.

In re MERTENS et al.

(District Court, N. D. New York. January 17, 1905.)

1. BANKRUPTCY—SECURED CLAIMS—INSURANCE POLICIES—OWNERSHIP.

Where it appeared on the face of one of the notes secured by insurance policies on the life of one of the members of a bankrupt firm that the firm pledged the policies, it would not be assumed, in determining the validity of the claim on the notes, that the firm had no interest in the policies.

2. SECURITIES—FRAUDULENT SALE.

Bankr. Act July 1, 1898, c. 541, § 57, subd. "h," 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], provides that the value of securities held by secured creditors shall be determined by converting them into money according to the terms of the agreement, or by arbitration, compromise, or litigation, as the court may direct, and that the amount of such value shall be credited on the claims, and a dividend paid only on the unpaid balance. *Held*, that where a creditor of a bankrupt firm held insurance

policies on the life of one of its members of the face value of \$60,000 as security, it had no authority to sell the same to itself at a pretended sale at auction for \$10,250, after a petition in bankruptcy had been filed against the firm, but before adjudication, without other authority than the contract of pledge, and without notice to the pledgors or other parties in interest.

3. SAME—CLAIMS—DISALLOWANCE.

A sale so fraudulently made warranted the disallowance of the creditor's claim secured by the policies.

In Bankruptcy. See 131 Fed. 507, 972.

This is the review of orders of C. L. Stone, Esq., referee in bankruptcy, refusing to allow two certain amended claims presented by the Varick Bank, of the city of New York—one for \$27,564.47, against the firm or copartnership of J. M. Mertens & Co.; and the other for \$9,118.37 against J. M. Mertens, a member of said copartnership, individually. The claim of said bank against the firm is founded in the main on the notes of said company indorsed by said J. M. Mertens, and notes given to said firm by different parties and indorsed by the firm and said J. M. Mertens (second indorser), all discounted at said Varick Bank by said firm. The claim against J. M. Mertens individually is founded on his liability on said indorsements and his liability as signer of one or more of the notes as maker with the company. The bank held certain collateral, which it claims to have converted into cash, and applied to the payment of the claim against J. M. Mertens. Six thousand dollars of this collateral was a deposit in said Varick Bank standing to the credit of J. M. Mertens individually. The balance of the collateral consisted of two life insurance policies upon the life of said J. M. Mertens—one for \$50,000 and the other for \$10,000. The bank claims that it lawfully disposed of such policies for \$10,221, pursuant to the contract under which held, and applied the proceeds, with such deposit of \$6,000, on the claim against said J. M. Mertens (asserting that he owned and pledged the collateral), and that they may prove and have allowed the debt arising on these notes to the full amount against the firm or copartnership, and for the full amount, less such credits (\$6,000 and \$10,221), against the indorser, J. M. Mertens. Objections having been filed by the trustee to the allowance of each claim, mainly on the ground that the value of such collateral had not been properly ascertained or credited, that the value of the policies has not been ascertained as provided by subdivision "h," § 57, Bankr. Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], the referee disallowed both claims as matters stand, and made an order prescribing a method for ascertaining the value of such policies.

Fried & Czaki, for claimant Varick Bank.
Lewis & Crowley, for trustee.

RAY, District Judge (after stating the facts). It is insisted by the Varick Bank that the policies of insurance were the property of J. M. Mertens individually, the copartnership having no interest therein, and that hence the claim against J. M. Mertens & Co. was not a secured claim. The trouble with this contention is the amended claim does not so show or state, and in one note at least the policies are pledged in writing by the firm as well as by J. M. Mertens as owner. As such policies were assignable, this court will not assume they were owned solely by J. M. Mertens individually. By subdivision 23, § 1 of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898 (30 Stat. 545, c. 541 [U. S. Comp. St. 1901, p. 3419]), it is provided:

"'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this

act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt, has such security upon the bankrupt's assets."

It does not appear, and this court will not assume, that the firm did not own at least an interest in these policies, when, upon the face of one of the notes it appears that the company pledged them as security for one of the notes in question. If the Varick Bank relies upon the assignments made by Jacob M. Mertens and Jacob M. Mertens and wife of the policies in question, then we find in such assignments no agreement for the sale of such policies in the mode and manner they were disposed of by the bank. But, however this may be, it is evident to the court that the referee was correct in refusing to allow these claims. Between the date of the filing of the petition and the date of the adjudication the Varick Bank, without notice to any one, delivered these policies to one of its agents or attorneys, with instructions to sell the same at public auction at the New York Real Estate Sales Rooms in the city of New York, and on the same day that said policies were thus delivered to the attorney or agent the designated attorney offered said policies for sale at said place to the highest bidder. No notice of said proposed sale was given to any person except the bank, and, as it was doing the selling, no notice to the bank was required. Only one bid was made, which was for the sum of \$10,250, made by an attorney for the bank in the name of another representative of the bank, and payment was made to the auctioneer by this purchaser with money furnished by the Varick Bank prior to his going to the sales rooms, and, strange to say, the bank had furnished the attorney the exact amount of money for which the policies were sold. This attorney of the bank took the policies into his possession, but it is conceded that he was acting for the bank, used the money of the bank to pay for the policies, and thenceforth held the policies for the bank, except that he procured a loan of the Knickerbocker Trust Company upon the strength of said policies for \$10,250, and subsequently for the further sum of \$2,622.75. The loan procured of the Knickerbocker Trust Company for \$10,250 was delivered to the Varick Bank, and was evidently procured for that bank. I find no statement as to what was done with the \$2,622.75 since loaned on the strength of said policies by the Knickerbocker Trust Company.

It is evident that the Varick Bank, on learning of the filing of the petition in bankruptcy, took advantage of the situation to get possession of these policies as owner without making a fair, honest, open, public sale, if it purposed to sell at public sale, and without any attempt to make a fair, honest, private sale of the policies. The bank made no effort whatever to ascertain the true value of these policies. It did not attempt to sell them to any person at private sale. It purported to sell at public auction. There is no pretense that at this sale, made at the Real Estate Sales Rooms, any information was given to the bystanders, if any there were, as to the age or situation of the insured or the nature or character of the policies. It does not appear that even the amount was stated.

A public sale, under the agreement contained in the notes, presupposes a fair, honest, public sale; a sale under such conditions that persons present, who might desire to purchase, would have some understanding of the nature or character and value of the property offered. There was no bidder except the Varick Bank, and it took the policies at the precise sum it had handed its attorney when the direction was given for the sale to be made. This court has no hesitancy in declaring this transaction fraudulent. The purpose of the bank in carrying through this sham sale was to get possession of these policies as absolute owner at its own price, if possible, under the pretense of a sale, the effect of which would be to defraud the creditors of the bankrupts, J. M. Mertens and J. M. Mertens & Co. Such a transaction ought not to be sanctioned, and this court refuses to sanction or approve it. The referee states, in substance, that the transaction was the same as if the Varick Bank had said, "we will take these policies at a certain sum of money, and credit that sum on the indebtedness." This is putting the case mildly. While it is true that it was a fixing of the sum by the bank that the bank was willing to credit on the indebtedness for the policies, which would have been an honest transaction even if not a legal sale of the policies or a compliance with the terms of the agreement under which it held, the transaction as it actually occurred was more than that, and was intended to be more. It was intended to be a mere formal compliance with the terms of the agreement under which the policies were pledged as collateral security without being in fact a compliance therewith. The intent and purpose was to transfer the absolute title to the bank, and cut off all right of redemption without notice to any of the interested parties under the mere form and pretense of a public sale. The bank knew, and the attorneys conducting the proceedings must have known, that the transaction did not measure the value of the policies by a public sale thereof. This transaction did not constitute a compliance with the terms of the agreement under which the bank held the policies as collateral.

There is still another view to be taken of this transaction. As between the bank and J. M. Mertens, it is conceded that the bank was a secured creditor. Subdivision "h" of section 57 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], provides:

"The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

It is evident that the act contemplates a determination of the value of securities held by secured creditors in one of two ways—either by converting the same into money, according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by the joint action of the creditors and trus-

tee pursuant to an agreement, arbitration, compromise, or litigation entered into by them; and that the court may direct the ascertainment of the value of such securities in either manner. It does not lie with the secured creditor to dispose of the securities to himself at a price fixed by himself under the pretense of a sale, public or private, and then say the value has been fixed by a public or private sale to himself, and the court has nothing further to say regarding the transaction. The court thinks the bank is in error, and that the referee was right, and that the court has power to direct the determination of the valuation of these policies by either a public or private sale under such circumstances and after such inquiry and notice as shall guaranty to some extent at least, that a fair valuation has been arrived at.

This pretended sale took place between the filing of the petition and the date of the adjudication. The filing of a petition in bankruptcy is a caveat to all the world, and operates as an attachment and an injunction. From the filing of the petition until the adjudication the property rights of the debtor are in abeyance. *Bank v. Sherman*, 101 U. S. 406, 25 L. Ed. 866; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. Suits against a bankrupt, if founded on a claim from which a discharge would be a release, are to be stayed until after the adjudication; and in *Bank v. Sherman*, supra, the court said:

"The filing of the petition was a caveat to all the world. It was, in effect, an attachment and injunction. Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. * * * Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril."

The provisions in the notes giving the bank the right to sell at public or private sale without notice, etc., were intended to furnish a remedy to the bank. Without impairing the obligation of the contract, it was perfectly competent for the act to suspend the exercise or enforcement of these remedies until after the adjudication. The act has done this, and hence these acts of the Varick Bank constituting the pretended sale of the policies in question were in violation of the act, and void. Conceding, for the sake of argument, that the bank might sell at public or private sale after adjudication, even without notice, it could not so sell before adjudication.

In the opinion of the court the exercise of the power of sale by the bank was and is subject to the supervision and control of the court. While it would not deprive the bank of its right to have the value of these policies determined under the provisions of the contract, it has the power and should see to it that the bank exercises those powers honestly, fairly, justly, and in such a manner as to honestly determine with reasonable certainty the actual value of the securities in question.

The orders of the referee disallowing the claims are approved and affirmed.

STATE OF ARKANSAS v. CHOCTAW & M. R. CO. et al.

(Circuit Court, E. D. Arkansas, E. D. January 13, 1905.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION—WHAT CONSTITUTES.

To entitle a party to remove a cause from a state to a federal court upon the ground that a federal question is involved, it is necessary (1) that that fact appear from the plaintiff's statement of facts in the complaint; (2) that that allegation is real and substantial, and not without color or merit; (3) that it appear from the complaint that, in some aspect which the case may assume, a federal question may really be involved, and that it is set up in good faith; (4) that, if there is a doubt as to the right to remove, the doubt must be resolved against jurisdiction.

2. SAME.

When the proposition claimed to raise the federal question has been definitely determined by the Supreme Court of the United States, it ceases to be a federal question, within the meaning of the removal acts of Congress.

(Syllabus by the Court.)

In Equity.

The state of Arkansas, by its Attorney General, filed its bill in the chancery court of Pulaski county, state of Arkansas, praying for a decree that any lease or sale by the defendant Choctaw & Memphis Railroad Company of its railroad property and franchises to its codefendant the Choctaw, Oklahoma & Gulf Railroad Company, and any lease of said property by the Choctaw, Oklahoma & Gulf Railroad Company to the other defendant, Chicago, Rock Island & Pacific Railway Company, be declared void, canceled, and held for naught, and that by mandatory order of the court the Choctaw, Oklahoma & Gulf Railroad Company and its lessees or grantees be required to surrender into the possession and control of the Choctaw & Memphis Railroad Company the said road, property, and franchises, and the said Choctaw & Memphis Railroad Company be required to assume possession and control of, and enter upon the actual management and operation of, the said road, property, and franchises, and, in default thereof, that the franchises of the Choctaw & Memphis Railroad Company be vacated and declared forfeited, and for such other relief as complainant may be entitled to.

The defendants, after having entered their appearance in the state court, filed their petition and bond for removal to this court, upon the ground that, as shown by the bill of complaint, a federal question was involved. Complainant filed a motion to remand; denying that there is any federal question involved, within the meaning of the acts of Congress.

The material allegations of the bill, which it is claimed show that the relief demanded raises a federal question, are: That the defendant Choctaw, Oklahoma & Gulf Railroad Company is a corporation organized and existing under an act of Congress; that, in pursuance of section 3 of an act amending its original charter, approved March 28, 1900, c. 111, 31 Stat. 52, it claims to have made a purchase of all the property, rights and franchises of the Choctaw & Memphis Railroad Company. This provision of the supplemental act under which that company acted is as follows: "That it shall and may be lawful for the Choctaw, Oklahoma & Gulf Railroad Company to purchase the franchises, railroad and other property of, or consolidate with, any other railroad company incorporated under the laws of any state or territory of the United States whose lines may now or hereafter form a continuous line of railroad with it, either directly or by means of an intervening railroad, upon complying with the regulations and requirements of the laws of the state or territory in which such road is located applicable to such purchase or consolidation." That the Choctaw & Memphis Railroad Company is a corporation organized and existing under the general laws of the state of Arkansas for the incorporation of railroad companies, and among the powers conferred upon such railroad corporations organized under such general

laws are those contained in section 2, p. 43 of the act of the General Assembly of said state of March 13, 1889, which provides: "Any railroad company in this state existing under general or special laws may sell its road, property and franchises to any railroad company duly organized and existing under the laws of any other state or territory whose line of railroad shall so connect with the leased or purchased road by bridge, ferry or otherwise as to practically form a continuous line of railroad." That the Choctaw & Memphis Railroad Company had authority, under its articles of incorporation, to acquire, construct, operate, and own a line of railroad from a point in Crittenden county opposite Memphis, Tenn., westwardly to the Indian Territory border, at a point in Sebastian county. It is further charged that the Choctaw, Oklahoma & Gulf Railroad Company is now in the possession of and is operating the line of the Choctaw & Memphis Railroad Company under claim of ownership, and that the other defendant, the Chicago, Rock Island & Pacific Railway Company, is its lessee. It is then charged that any lease or sale of the road, property, and franchises by the defendant Choctaw & Memphis Railroad Company to the Choctaw, Oklahoma & Gulf Railroad Company is wholly unauthorized and void, for want of power of a railroad corporation existing under the laws of the state of Arkansas to sell or lease its property and franchises to a corporation existing under the laws of the United States.

G. W. Murphy, Atty. Gen., and James P. Clarke, for the state of Arkansas.

E. B. Peirce and John M. Moore, for defendants.

TRIEBER, District Judge (after stating the facts). To justify the assumption of jurisdiction by a federal court, either originally or on removal from a state court, upon the ground that a federal question is involved, the fact that the cause is one arising under the Constitution, laws, or treaties of the United States must appear from plaintiff's statement of facts in the complaint, and cannot be aided by the allegations in the petition or answer. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Arkansas v. K. & T. Coal Co.*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144; *Filhiol v. Torney*, 194 U. S. 356, 24 Sup. Ct. 698, 48 L. Ed. 1014; *Fergus Falls Water Co. v. Fergus Falls*, 72 Fed. 873, 19 C. C. A. 212, *Joy v. St. Louis (C. C.)* 122 Fed. 524; *St. Louis, Iron Mountain & Southern Railway Co. v. Davis (C. C.)* 132 Fed. 629. The mere fact that the bill alleges constitutional questions is not sufficient, if it plainly appears that such averment is not real and substantial, but is without color or merit. *Arbuckle v. Blackburn*, 191 U. S. 358, 24 Sup. Ct. 148, 48 L. Ed. 239; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; *Underground Railroad v. City of New York*, 193 U. S. 416, 24 Sup. Ct. 494, 48 L. Ed. 733; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 24 Sup. Ct. 553, 48 L. Ed. 795.

If it appears from the bill that, in any aspect which the case may assume, it is shown that a federal question may really be involved, and that it is set up in good faith and not wholly destitute of merit, jurisdiction will attach. *Illinois Central R. Co. v. Chicago*, 176 U. S. 646, 20 Sup. Ct. 509, 44 L. Ed. 622; *St. Paul, etc., Ry. Co. v. St. Paul & M. P. Ry. Co.*, 68 Fed. 2, 15 C. C. A. 167.

In determining these questions, the fact must not be lost sight of that the judiciary act of 1887 is intended to limit the jurisdiction

of the national courts, and that any doubt as to jurisdiction must be resolved against it.

Applying these well-settled principles to the case at bar, and some other well-settled rules of law hereafter referred to, the motion to remand is easily disposed of.

As to the first proposition, it clearly appears from the bill that the Choctaw, Oklahoma & Gulf Railroad Company, to whom the Choctaw & Memphis Railroad Company sold its property, is a federal corporation, having been created by an act of Congress, and that whatever authority it possesses is derived from those acts. That the removal sought to be made by the defendants was made in good faith, cannot be doubted; thus leaving the only question involved whether the federal question involved, viz., the construction of the powers vested in that company by section 3 of the supplemental act of Congress of March 28, 1900, c. 111, 31 Stat. 52, quoted in full in the statement of facts herein, is real and substantial, within the meaning of the law. The only question under that act involved in this case is whether the authority vested in that company not only authorized the Choctaw, Oklahoma & Gulf Railroad Company to acquire the road, property, and franchise of any connecting line organized under the laws of any state or territory by purchase, but also, by implication, authorized such connecting line to sell its property without such authority being granted to it by the laws of the state or territory under which it was organized and has its existence; and, if the latter, the power of Congress to so authorize a corporation created by a state.

Whatever difference of opinion may exist among the decisions of the various courts of the states on the proposition that the power to one corporation to purchase property of other corporations generally grants by implication the power to every other corporation to sell to such purchasing company, the decisions of the Supreme Court of the United States—the only court whose decisions are conclusive on all courts when the construction of an act of Congress is involved, and on this court on any proposition of general law—have uniformly held that, in order to support a proposed consolidation of two railroad corporations, the parties are bound to show not only that the purchasing company was authorized to buy, but that the selling company was also expressly vested with power to sell. *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Oregon R. Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; *Pennsylvania R. R. v. St. Louis, etc., R.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *St. Louis R. Co. v. Terre Haute R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849. If there are any decisions of the Supreme Court of the United States which hold otherwise, neither the diligence of learned counsel, nor that of the court, has been able to find them.

If, then, this question, so far as this court is concerned, is authoritatively settled, can the fact that originally it might have been

a very doubtful question be still said to be a federal question, within the meaning of the judiciary act? In *State of Kansas v. Bradley* (C. C.) 26 Fed. 289, this question came before Justice Brewer, then Circuit Judge of this circuit. The facts in that case were that the state had instituted a suit against the defendant, charging him with keeping a saloon in violation of law, and prayed an order declaring it a nuisance, and abating it and enjoining defendant from maintaining it. Upon the petition of the defendant the cause was removed to the federal court upon the ground that the proceedings instituted would deprive him of a right guaranteed to him by the fourteenth amendment to the national Constitution. But the court, in remanding the cause, held:

"When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a federal question. More correctly, it is said that there is no question, state or federal. This is the only fair starting point for consideration of a case like this."

This was since followed by the Circuit Court for the District of Montana in *Bluebird Mining Co. v. Largey* (C. C.) 49 Fed. 289, and the United States Circuit Court of Appeals for the Ninth Circuit, in *Montana Ore Purchasing Co. v. Boston, etc., Mining Co.*, 85 Fed. 867, 29 C. C. A. 462, and also in *Inez Mining Co. v. Kinney* (C. C.) 46 Fed. 832, and *People v. Brown's Valley Irrigation District* (C. C.) 119 Fed. 535; *Foster, Federal Practice*, § 17.

Whether the laws of the state of Arkansas authorized the *Choc-taw & Memphis Railroad Company* to make this sale depends solely upon the construction of the state law, and, of course, cannot raise a federal question.

For these reasons, the motion to remand must be sustained.

IN RE HESS.

(District Court, E. D. Pennsylvania. January 16, 1905.)

No. 1,993.

1. BANKRUPTCY—BANKRUPT'S BOOKS AND PAPERS—TITLE.

Under the express provisions of Bankr. Act July 1, 1898, c. 541, § 1, cl. 13, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], and section 70, cl. 1, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3452], the bankrupt's trustee is vested by operation of law with title to all the bankrupt's books, papers, contracts, securities, etc., relating to his business.

2. SAME—INCRIMINATION—REFUSAL TO TESTIFY—PRIVILEGE.

Const. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself, is not limited to proceedings actually brought, but applies as well to criminal proceedings which might be brought against the witness in the future.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1011.]

3. SAME—BANKRUPTCY—EXAMINATION—INCRIMINATING EVIDENCE—USE.

Bankr. Act July 1, 1898, c. 541, § 7, cl. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], providing for a bankrupt's oral examination at the first meeting of his creditors, declares that no testimony so given by him shall be offered in evidence against him in any criminal proceeding; and Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], provides that no answer or other

pleading of any party, or any discovery of evidence, obtained by means of any judicial proceeding from any party or witness, shall be given in evidence or in any manner used against the party or witness, in any court of the United States. *Held* that, since neither of such sections fully protected a bankrupt against the use of incriminating evidence alleged to be contained in his books of account, he was entitled to plead his constitutional privilege against an application to compel him to produce such books, etc., for examination, in so far as they, in fact, contained incriminating evidence.

4. SAME—INCRIMINATION—DETERMINATION.

Where a bankrupt pleaded his constitutional privilege against a production of books of accounts, alleged to contain incriminating evidence, he should be required to bring such books and papers either before the court or referee in bankruptcy, for determination of the question whether the plea was well founded in fact, and for the making of an order for the protection of the bankrupt from the discovery of such evidence, and, if possible, to enable the trustee to obtain other necessary information from such books.

In Bankruptcy. Motion to show cause why bankrupt should not produce books and pay over funds in his hands referred to a referee.

Charles Biddle and Samuel P. Tull, for trustee.
Julius C. Levi, for bankrupt.

HOLLAND, District Judge. Upon the petitions filed by Louis Behal, trustee in this estate, orders were granted upon Edward Hess, the bankrupt, to show cause (1) "why he should not forthwith make discovery of his books, their number and character, and make forthwith delivery of possession of the same to the trustee"; and (2) "why he, the said Edward Hess, should not be committed for contempt for failure to deliver to the trustee certain assets alleged to be in his hands, for which he had not accounted."

The bankrupt's answer to the first rule avers that the Tradesmen's National Bank contemplates instituting criminal proceedings against him for obtaining money from it by false pretenses, or false and fraudulent representations regarding his financial condition at the time certain notes were discounted for him, and that the books contain evidence that may tend to incriminate him; and, second, that he has not in his possession or under his control any assets which he is concealing or has concealed from his trustee in bankruptcy.

While there may be some doubt about the question as to whether a bankrupt can plead this privilege to a demand for his books and papers, or to fully answer as to his property, in cases of voluntary bankruptcy (In re Sapiro, 1 Am. Bankr. Rep. 296), this being an involuntary petition this question need not be considered. Here the question is squarely raised as to whether or not the bankrupt is compelled to deliver his books and papers to his trustee, and fully answer all questions that may be propounded to him concerning his assets, even though either or both may tend to incriminate him. There is no criminal case or prosecution pending against the bankrupt at this time, and the only allegation is that the Tradesmen's National Bank contemplates instituting criminal proceedings against the bankrupt, and that the books demanded to be turned over to the trustee contain evidence that may tend to incriminate him.

Under section 70, cl. 1 (Bankr. Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3452]), the trustee of a bankrupt is vested by operation of law with the title to all "documents relating to the bankrupt's property." Section 1, cl. 13 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), defines a "document" to include any books, deed, or instruments of writing, and includes deeds, all other muniments of title, contracts, securities, bills receivable, notes, bankbooks, bills of exchange, account books, and all papers and books relating to his business. These books and papers of the bankrupt, which come within the designation of documents, are regarded by the bankrupt act as personal property, the title to which, by operation of law, is vested in the trustee. They are valuable not so much as an asset that can be converted for the purpose of meeting the demands of creditors, as they are for their importance as evidence by which assets can be discovered by the trustee. Can he, then, be compelled to deliver their possession for this purpose, if, perchance, they contain evidence that may tend to incriminate him, and which might subject him to a successful criminal prosecution either in the federal or state courts? The privilege here invoked is found in the fifth amendment to the Constitution of the United States, in these words: "No person shall be compelled in any criminal case to be a witness against himself." It has been held by the Supreme Court of the United States, in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, that "the compulsory production of a man's private papers, to be used in evidence against him, is equivalent to compelling him to be a witness against himself in a prosecution for a crime, penalty, or forfeiture, and is equally within the prohibition of the fifth amendment."

The fact that no prosecution is now pending against the bankrupt is no answer to his right to claim this constitutional privilege. The meaning of the constitutional provision is not simply that he shall not be compelled to produce books and papers which may contain evidence tending to incriminate him in a pending prosecution for a criminal offense against him, but its object is to insure him against such compulsory production of his books and papers containing incriminating evidence in any proceeding or investigation, whether such compulsory disclosure is sought directly to establish his guilt, or indirectly and incidentally for the purpose of proving facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against him as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending or that might be brought against him thereafter, such disclosure would be an accusation of himself, within the meaning of the constitutional provision. *Counselman v. Hitchcock*, 142 U. S. 573, 12 Sup. Ct. 195, 35 L. Ed. 1110; *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22.

Does, then, the provision in the bankrupt act (section 7, cl. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), which provides for the oral examination of the bankrupt as to the conduct of his business, and whereabouts of his property, and all matters which may affect the administration and settlement of his estate, and further provides that "no testimony thus given by him shall be offered in evidence against him in any criminal proceeding," or section 860 of the Revised Statutes [U. S.

Comp. St. 1901, p. 661], which provides that "no answer, or other pleading of any party, or any discovery of evidence obtained by means of any judicial proceeding from any party or witness * * * shall be given in evidence, or in any manner used against said party or witness, or his property, or his estate, in any court of the United States," either separately or together, afford an absolute immunity against prosecution, federal or state, for any offense to which the alleged incriminating evidence contained in the books and papers may relate? If such immunity is afforded by these provisions in the law, he must deliver his books and papers, without regard to whether they contain evidence tending to incriminate him. *Brown v. Walker*, 161 U. S. 616, 16 Sup. Ct. 644, 40 L. Ed. 819.

It will be noted that the immunity granted to the bankrupt by section 7, cl. 9, is that no testimony given by him at the first meeting of the creditors, where he shall be examined as to his dealings with his creditors and other persons, the whereabouts of his property, and all matters which may affect the administration and settlement of his estate, shall be offered in evidence against him in any criminal proceeding. There is nothing either in this section or any other in the bankrupt act which protects him from the use of evidence in a criminal prosecution, either in the federal or state courts, that may be obtained from books and documents which the seventieth section, cl. 1, of the act, passes to the trustee. Section 860 of the Revised Statutes only prohibits the use of evidence that may be obtained from the bankrupt's books in prosecutions in the federal courts. There is nothing in this section which extends that immunity to the use of such evidence in the state courts, and there is nothing to prevent the trustee from making use of the bankrupt's books in a criminal prosecution against him instituted in the state courts. Obviously, therefore, if section 7, cl. 9, of the bankrupt act, does not protect him against the use of the evidence which he alleges is contained in his books, of an incriminating nature, in either the state or federal courts, and section 860 of the Revised Statutes extends the immunity only to federal courts, and not to state courts, it is plain that whatever incriminating evidence the books may contain could be used without restriction in the state courts for the purpose of convicting him of any crime for which he might be indicted there, and, in consequence of this danger to him, the plea of his constitutional privilege must prevail. But who is to be the judge whether or not the books and papers do actually contain evidence of an incriminating nature, as alleged by the bankrupt? Can it be that, upon the filing of an involuntary petition in bankruptcy, the bankrupt can refuse to deliver possession of his books and papers to the trustee, when called upon to do so, by answering that they contain incriminating evidence? He may desire to retain possession of his books for the purpose of concealing assets, or he may honestly be mistaken as to the effect of the evidence alleged to be incriminating. The transactions which, in his judgment, are incriminating, may not be acts or transactions of an incriminating nature, and, if established, may not constitute an offense. The statute of limitations may bar a prosecution. All these matters must be considered in passing upon the question as to whether or not the books do contain evidence of an incriminating nature.

When a witness is before the court in a proceeding, and a question is propounded, it must appear to the court, from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from being compelled to answer, to entitle him to the privilege of silence; and, when the fact of the witness being in danger be once made apparent to the court, great latitude should be allowed to him in judging for himself of the effect of any particular question. *Brown v. Walker*, 161 U. S. 599, 16 Sup. Ct. 648, 40 L. Ed. 819. "The object of the law is to afford to a party called upon to give evidence in a proceeding, *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice." *Brown v. Walker*, *supra*. This being the practice when witnesses are called to testify and claim their privilege, it is equally important, under the bankrupt law, that the court should pass upon the probability of danger to the bankrupt when he pleads his constitutional privilege, upon a demand made by a trustee in bankruptcy for him to deliver his books and papers as required by that act. Where, under these circumstances, a bankrupt pleads this privilege, he should be required to bring the books and papers which he alleges contain the incriminating evidence before either the court or referee in bankruptcy; and, when it is made to appear that his plea is well founded, the court can make such order in the case as will fully protect him from discovery of such evidence, and at the same time, if possible, enable the trustee to obtain such information from the books as is always necessary and indispensable in the settlement of bankrupt estates.

It is therefore ordered, adjudged, and decreed that the petitions, rules, and answers be referred back to Edward T. Hoffman, referee, to take such testimony as the bankrupt may offer to show his answer that his books and papers contain evidence which may tend to incriminate him is made in good faith to protect him against a criminal prosecution that has been instituted or which will probably be brought against him, and report such evidence and his conclusions thereon to this court; specifying which of said documents, if any, do or do not contain such alleged incriminating evidence. The referee is also directed to take testimony to ascertain whether or not the said Edward Hess, bankrupt, now has in his possession or control any property belong to the estate which should be turned over to Louis Behal, trustee, and to report such evidence to this court, together with his conclusions of law thereon.

UNITED STATES v. EDDY.

(Circuit Court, D. Montana. January 9, 1905.)

No. 526.

1. PERJURY—INDICTMENT—WILLFULNESS—STATUTES.

It is essential to the sufficiency of an indictment for perjury under Timber and Stone Act, § 2 (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), providing that if any person, taking the oath prescribed, shall swear falsely in the premises, he shall be subject to all the penalties of perjury, etc., that it should allege that the act of false swearing was "willfully" done.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Perjury, § 67.]

2. SAME.

An indictment for perjury, consisting of an alleged false statement sworn to by defendant for the purpose of purchasing lands as required by Timber and Stone Act, § 2 (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), set out an exact copy of the statement, including the oath, and after directly alleging that the application was made to purchase the land for speculation, and not for defendant's exclusive use and benefit, as testified by him, and directly alleging the existence of a contract to transfer the title, and that defendant's sole purpose was to procure the title for the benefit of another, charged that defendant on the date specified, etc., in and by said statement in writing, verified upon his oath, before the receiver of the land office, "willfully, corruptly, feloniously, and contrary to the same oath of him," the said defendant, etc., subscribed material matters contained in the statement, which he did not then believe to be true, and which he knew were not true, in a case where a law of the United States authorized an oath to be administered, etc. *Held*, that such allegation of "willfulness" should be construed as a part of the charge in the indictment, and not merely as a conclusion of the pleader, within Rev. St. § 1025 [U. S. Comp. St. 1901, p. 720], providing that no indictment, etc., shall be found insufficient by reason of a defect in matter of form only, the indictment further concluding with an allegation that defendant did willfully commit perjury, against the peace and dignity of the United States, etc.

3. SAME—AUTHORITY OF OFFICER.

Under Timber and Stone Act, § 2 (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), requiring entry statements to be verified by oath of the applicant before the register or receiver of the land office within the district where the land is situated, and section 2246, Rev. St. [U. S. Comp. St. 1901, p. 1371], authorizing such receiver or register to administer any oath required by law in connection with the entry or purchase of any tract of public lands, the courts will take judicial notice of the qualification of the receiver of the land office to administer an oath, and hence an averment of the fact is not essential to the validity of an indictment for perjury committed by false swearing in an entry statement verified before him.

Fred A. Maynard, Special Asst. U. S. Atty.
Marshall & Stiff and T. J. Walsh, for defendant.

HUNT, District Judge. The records of the court show that the defendant was indicted for swearing falsely by indictment presented and filed in the District Court June 26, 1901. Thereafter, on motion of the United States, the case was transferred to this court. The crime charged is a violation of the timber and stone acts of the United States. The material parts of the indictment are as follows:

"That one Herbert Eddy, late of the district of Montana, on the 19th day of August, A. D. 1899, at and within the county of Missoula, state and district of Montana, did then and there appear in his own proper person before William Q. Ranft, who was then and there the receiver of the United States land office, within the district where the land hereinafter described is situated, and the said Herbert Eddy then and there so being before the said William Q. Ranft, receiver, as aforesaid, was in due manner sworn by the said receiver, who was then and there authorized by the laws of the United States to administer said oath, and said Herbert Eddy did thereby verify, by his said oath, the matters contained in a certain statement in writing, which statement, so verified by the said Herbert Eddy, he did then and there file with said receiver, and was and is of the tenor and effect following, to wit:

"Land Office at Missoula, Montana.

"(Date) August 19, 1899.

"I, Herbert Eddy, of (town or city) Victor, County of Ravalli, State of Montana, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada, and Washington Territory," as extended to all the Public Land States by act of August 4, 1892, for the purchase of the E. 2/ E. 4/, & E. 2/ SE. 4/ of Section 28, Township 15 N. of Range 16 W., in the district of lands subject to sale at Missoula, Montana, do solemnly swear that I am a native citizen of the United States of the age of 37 years, and by occupation Farmer, that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor as I verily believe, any valuable deposit of gold, silver, cinnabar, copper or coal; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; and that I have not, directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure, in whole or in part, to the benefit of any person except myself, and that my post-office address is Herbert Eddy, Victor, Ravalli County, Montana.

Herbert Eddy.

"I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by _____), and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this 19th day of August, 1899.

Wm. Q. Ranft, Receiver.'

"Whereas in truth and in fact the said Herbert Eddy did make application to purchase the land named and described in said statement for speculation, and with no purpose of appropriating said land to his own exclusive use and benefit; and whereas in truth and in fact the said Herbert Eddy had before the filing of said statement as aforesaid made and entered into a certain agreement and contract by which the title he was to acquire from the government of the United States in and to the lands named and described in said written statement was to inure, in whole, to the person with whom he had made such contract and agreement; and the sole purpose of the said Herbert Eddy in making and filing said written statement with said receiver, and in making oath to the same, was to obtain title to the lands named and described therein in order to benefit the person for whom by said contract and agreement he was acting; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Herbert Eddy, on the said 19th day of August in the year of our Lord 1899 within the county and district aforesaid, in and by his said statement in writing, verified upon his oath aforesaid, before the said receiver, willfully, corruptly, feloniously, and contrary to the same oath of him, the said Herbert Eddy, did state and subscribe material matters in said statement contained which he did not then believe to be true, and which he knew were not true, in a case where a law of the said United States authorized an oath

to be administered, and did commit willful, corrupt, and felonious perjury, against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided."

Defendant filed pleas in abatement, upon which testimony was heard, and thereafter the court, by Judge Beatty, then presiding judge in this judicial district, overruled the pleas. Defendant then filed a general demurrer, and argued the same orally before me in October, 1904. Counsel for the government waived oral reply, and obtained leave to make written argument, which was filed on November 21st last.

The principal question presented for decision is whether or not the indictment sufficiently charges that the oath made by the defendant before the receiver of the United States land office at Missoula, Mont., was willfully falsely taken. Section 2 of the timber and stone act referred to (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]) provides—

"That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber and stone; that it is uninhabited, contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself, which statement must be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same."

In the statement of the question for determination I have assumed that it is necessary, in a charge of swearing falsely under the particular statute of the United States known as the timber and stone act, to allege that the act of swearing falsely was willfully done. This assumption has its foundation in a reluctance to depart from those general rules of criminal pleading which require technical accuracy in charging perjury, and rests upon the opinion that willfulness is part of the substance of the crime of swearing falsely, and therefore that it is necessary that defendant be told in exact language of the offense with which he is charged.

It may be that an indictment which charges false swearing under the act of Congress referred to can be properly sustained without allegations other than that the defendant falsely took the oath prescribed to be taken by an applicant who makes the statement required to be made before a register or receiver of the land office, upon the ground that it is sufficient for the pleader to use the exact words, and those only of the particular statute violated, even though the element of willfulness is involved in the substantive crime charged. The steady tendency

of the courts of the United States undoubtedly is to disregard forms, even though they be mistaken in expressing the substance of crimes in indictments, if the meaning can be understood, and if the bill charges the offense in such a way as clearly to inform the person of the violation of the law with which he is charged, and protect him, in the event of acquittal or conviction, against a second trial for the same offense. *U. S. v. Jackson* (C. C.) 2 Fed. 502; *Wright v. U. S.*, 108 Fed. 810, 48 C. C. A. 37.

But in the crime of perjury the element of willfulness is so vitally essential, as of the substance, that in every case a careful pleader should be cautious to have it appear by appropriate legal words that the oath taken was willfully falsely taken. I shall hold, therefore, that it is not too strict a construction of the law pertinent to this cause to require that, where a charge is brought against one for its violation by swearing falsely, it is necessary to allege that the person, charged to have taken the oath required, willfully swore falsely in the premises.

Now, when we come to apply these rules carefully to the indictment under examination, is it sufficient to compel the defendant to answer thereto? It charges that "one Herbert Eddy * * * did then and there appear in his own proper person before William Q. Ranft, who was then and there the receiver of the United States land office, * * * and the said Herbert Eddy then and there * * * was in due manner sworn by the said receiver, who was then and there authorized by the laws of the United States to administer said oath, and said Herbert Eddy did there verify, by his said oath, the matters contained in a certain statement in writing * * * of the tenor and effect following, to wit: * * *." The application of the defendant Eddy is then set forth. Reference to it shows that in the statement made by Eddy the locality of the land office appears. So, too, does the date upon which the sworn statement was made, the name of the applicant, etc. Included also in the statement as pleaded in the indictment are these words:

"I do solemnly swear that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; that I have not, directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure, in whole or in part, to the benefit of any person except myself."

Then follows the certificate of the receiver of the land office to the effect that the affidavit was read to the affiant before he subscribed the same. The indictment then continues:

"Whereas in truth and in fact the said Herbert Eddy did make application to purchase the land named and described in such statement for speculation, and with no purpose of appropriating said land to his own exclusive use and benefit; and whereas in truth and in fact the said Herbert Eddy had before the filing of such statement aforesaid made and entered into a certain agreement and contract by which the title he was to acquire from the Government of the United States in and to the lands named * * * in such statement was to inure, in whole, to the person with whom he had made such contract and agreement; and the sole purpose of the said Herbert Eddy in making and filing said written statement with said receiver, and in making oath to the same, was to obtain title to the lands made and described therein in order to benefit the person for whom by said contract and agreement he was acting."

Here is a specific charge against Eddy of doing those specific acts which he had sworn he would not do and was not doing and had no purpose of doing. There is force in the argument that the charge against the defendant that when he made his application to purchase the land named and described in his sworn statement he had, before the filing of the same, made and entered into a contract by which his title would inure to the benefit of another, and that his sole purpose in making his statement was to obtain title in order to benefit another person, is one of acts done in a manner which reasonably imply that the taking of the oath was a willful false swearing, and that as the elements of willfulness are averred by stating the acts themselves the omission of the technical word becomes immaterial, and ought not to vitiate the indictment.

But continuing to hold that the rule of liberality of construction ought not to be invoked to supply the use of the word "willfully" or plainly equivalent words in false swearing, I pass the further discussion of this point, and proceed to inquire whether there is an allegation in this indictment which does directly and technically charge willful, corrupt, and false swearing.

After setting forth by exact copy the statement made by the applicant Eddy, including the oath to the several matters contained therein, and after direct allegations which state the truth and fact to be that the application was made to purchase the land described for speculation and with no purpose of appropriation for his own exclusive use and benefit, and after direct allegations of a pre-existing contract for the transfer of title, and after direct averment that the sole purpose of the defendant in making and filing said written statement with the receiver, and in making oath to the same, was to obtain the lands described therein for the benefit of another person for whom by contract defendant was acting, the language of the indictment is as follows:

"* * * And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Herbert Eddy, on the said 19th day of August in the year of our Lord 1899, within the county and district aforesaid, in and by his said statement in writing, verified upon his oath aforesaid, before the said receiver, willfully, corruptly, feloniously and contrary to the same oath of him, the said Herbert Eddy, did state and subscribe material matters in said statement contained which he did not then believe to be true, and which he knew were not true, in a case where a law of the United States authorized an oath to be administered. * * *"

This language contains a direct charge that the defendant, at the time and place given in and by his said statement in writing verified upon oath before the receiver, willfully, corruptly, feloniously, and contrary to his oath did state and subscribe material matters contained in the statement which he did not then believe to be true, and which he knew were not true, in a case where the laws of the United States authorized an oath to be administered; and by so charging the pleading meets every objection that can be urged on account of material defects in not alleging that the oath was willfully taken falsely, provided these allegations just referred to are part of the charge contained in the indictment, and are not merely the conclusion of the pleader. Upon this question I think it very safe to say that, had the framer of the in-

dictment placed the substance of the words just heretofore quoted at the beginning of the bill, there could have been no possible doubt of the sufficiency of the averment that the oath was willfully and corruptly taken, and if the pleading had been so drawn the language referred to would at once have been accepted as a prefatory and appropriate statement of the legal characteristics of the crime charged. But, being put near the close of the indictment, it has not been as easy to define their proper relation, whether they are part of the charge or merely inferential in the whole instrument. Such a difficulty, however, may arise in many instances in criminal pleadings where the general charging part of the indictment follows and does not precede the particular facts stating the mode in which the crime has been committed. Yet precedents and forms approving such a pleading as this are not lacking (Loveland's Forms Federal Practice, vol. 1, pp. 1161-1166); and if, without doing violence to the substance of the whole bill, it can be ascertained that a charge is directly made, the court should sustain the indictment, because the matter of putting it together is really one of form only, and in no way tends to prejudice the material rights of the defendant. After examining a great many decisions of the federal courts, I am satisfied that it is to such a case as this that section 1025, Rev. St. [U. S. Comp. St. 1901, p. 720], applies; and in accord with this statute, and the very liberal application made of it where questions of form are involved, it is the duty of the court to uphold the indictment as a sufficient charge of willful false swearing. *Price v. U. S.*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727; *U. S. v. Jolly* (D. C.) 37 Fed. 108; *U. S. v. Rhodes* (C. C.) 30 Fed. 434; *McDaniel v. U. S.*, 87 Fed. 324, 30 C. C. A. 670.

This ruling does not make it necessary to draw the conclusion of this indictment into the charge itself, for the pleader has closed the bill in other appropriate formal words, as follows:

"* * * And did commit willful, corrupt, and felonious perjury, against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided."

Thus has he made the final deduced statement of the law following the charging allegations of law and fact.

The defendant's next objection is that it is not averred in the indictment that Ranft had competent authority. But it is alleged that defendant appeared before Ranft, who was then and there the receiver of the United States land office within the district where the land described in the indictment is situated, and the said Herbert Eddy, then and there so being before the said Ranft, receiver as aforesaid, was in due manner sworn by the said receiver, who was then and there authorized by the laws of the United States to administer said oath, etc.

Section 2 of the stone and timber act requires statements to be verified by the oath of the applicant before the register or receiver of the land office within the district where the land is situated. Section 2246, Rev. St. [U. S. Comp. St. 1901, p. 1371], provides that the receiver or register is authorized to administer any oath required by law in connection with the entry or purchase of any tract of public lands. The courts will take judicial notice of the qualification of the receiver of

the land office to administer an oath, and an averment of the fact is unnecessary. *Babcock v. U. S. (C. C.)* 34 Fed. 873.

My judgment, therefore, is that when this indictment is analyzed its seeming defects are due to some confusion in its form only, and that its plain meaning should prevail, the pleading being good in substance and sufficient to notify the defendant of what charge he must be ready to meet.

The demurrer is overruled, and the defendant must plead.

CUDABACK v. HAY et al.

(Circuit Court, S. E. D. Pennsylvania. January 17, 1905.)

No. 4.

1. MORTGAGES—CONTRACT TO PAY—INDEMNITY—JUDGMENTS.

Defendants, having purchased certain real estate in the name of plaintiff's assignor, as trustee, executed to him a contract agreeing to furnish him all money necessary to pay taxes on the land and the interest and principal on certain bonds and mortgages thereon which had been executed by such trustee as they became due, and to indemnify and save him harmless from all costs, charges, and expenses thereon, whereupon he agreed to hold the property in trust for defendants, and to convey the same, subject to such incumbrances, only on their demand. *Held*, that such contract was an agreement to pay the mortgages, etc., and not merely a contract of indemnity, so that defendants' liability thereon was fixed on the rendition of a deficiency judgment in foreclosure proceedings against the trustee, defendants having failed to pay or defend the same after notice.

2. SAME—ASSIGNMENT—TIME—EXECUTION.

It was immaterial that the trustee assigned his rights under the contract to plaintiff on the same day the deficiency judgment was rendered, and before an execution had been issued thereon.

Motion by Defendant for Judgment Notwithstanding the Verdict.

John A. McCarthy and Bayard Henry, for plaintiff.

Edward J. Fox, for defendants.

J. B. McPHERSON, District Judge. The undisputed facts of this case, as they appeared at the trial, are as follows: In August, 1894, the defendants, Hay and Fisler, agreed to buy some lots in the city of Niagara Falls from Francis Belden. Hay and Fisler lived in Easton, Pa., and for the sake of convenience, and perhaps for other reasons, decided to have the title put in the name of a resident of Niagara Falls. Accordingly, they chose I. J. Forbes King, who was Belden's partner, and the deed was made to him. At or about the same time King and the defendants entered into a written agreement, which recites the conveyance to King, goes on to state that he has given three purchase-money mortgages for \$2,400, \$1,200, and \$2,400, respectively, and then provides as follows:

"And whereas said purchase was made and such conveyance taken by said party of the first part in behalf of and in trust for the parties of the second part hereto, and the sum of \$3064.80 paid in cash therefor on receiving such conveyance was made by the parties of the second part hereto.

"Now therefore this agreement witnesseth, that the parties of the second part, in consideration of the premises and of the agreements hereinafter contained on the part of the party of the first part, agree to furnish all sums of money necessary from time to time to pay the taxes on said lots and the interest and principal on said bonds and mortgages as the same become due and payable, and to indemnify and save harmless said party of the first part from all costs, charges and expenses by reason of his executing said bonds and mortgages, or any of them.

"And the party of the first part, in consideration of the premises and of the agreements hereinbefore contained on the part of the parties of the second part, agrees to hold title to said lands in trust for the parties of the second part, and to convey the same, or any parcel thereof, to such party or parties as he may be directed by said parties of the second part hereto, subject to all the terms and conditions of said mortgages, and free from all other incumbrances excepting only all taxes levied or assessed upon said premises from and after the date hereof."

The mortgages fell due in August, 1897, and August, 1899, and the defendants did not furnish all the money that was needed to pay them off. One seems to have been paid in full, but the other two received only payment on account. In consequence of this default, William Cudaback, the present plaintiff, to whom the mortgages had been assigned, began foreclosure proceedings in November, 1900, naming Hay, Fisler, King, and some other persons, as defendants. On February 27, 1901, King caused the following notice to be served upon Hay and Fisler:

"You will please take notice, that I have been served with summons and complaint in the above-entitled action, which is an action brought to foreclose a mortgage of two thousand four hundred dollars (\$2,400.00), made by me to Francis C. Belden, on or about the 10th day of August, 1894, and that in said action a judgment is demanded against me for the amount of any deficiency which may remain after the sale of the property described in said mortgage, by reason of the bond executed by me to said Francis C. Belden and accompanying said mortgage.

"Also please take notice, that the mortgage sought to be foreclosed is the same mortgage, for two thousand four hundred dollars (\$2,400.00), dated August 10, 1894, mentioned in a certain agreement made by you with me, dated August 13, 1894, in and by which agreement you covenanted and agreed with me to furnish all sums of money necessary from time to time to pay the taxes on the lots described in said mortgage, and the interest and principal of said bond and mortgage, as the same became due and payable, and to indemnify and save me harmless from all costs, charges, and expenses by reason of my executing said bond and mortgage.

"You will also please take notice, that I require you to defend said action against me and to indemnify and save me harmless from all costs, charges, and expenses therein. And I hereby demand that you do now furnish all sums of money for taxes on said lots or pay said taxes, and that you also furnish all sums of money necessary for me to pay the interest and principal on said bond and mortgage or that you pay all principal and interest thereon; and that in case of your failure to pay said taxes, interest and principal, and to indemnify and save me harmless from such costs, charges, and expenses, I shall hold you personally responsible to me under said agreement for all sums required to be paid by me and for the amount of any judgment for deficiency which may be obtained against me in this action."

A similar notice was given at the same time as to the other mortgage. The defendants did not appear, made no defense, and paid no money, the result being that on May 27, 1901, the Supreme Court of New York entered a decree of foreclosure, adjudging the sum due upon each mortgage, and directing the premises to be sold by a referee

named in the order. On June 17, 1901, King caused the following notice to be served on Hay and Fisler:

"Please take notice that a judgment of foreclosure was entered in the above-entitled action in the county clerk's office of the county of Niagara on the 27th day of May, 1901, for \$1,398.80, the amount found due the plaintiff upon the mortgage described in the complaint, and for \$131.64, plaintiff's costs and disbursements in this action; that in said action a judgment is demanded against me for the amount of any deficiency which may remain after the sale of the property described in said mortgage by reason of the bond executed by me to Francis C. Belden, and accompanying said mortgage; and that the property described in said mortgage has been advertised for sale by Eugene Cary, Esq., the referee appointed in said action to sell said property, and the same will be sold on the 20th day of June, 1901, at 10 o'clock in the forenoon, at the law office of Devereux & Knox, No. 2009 Main street in the city of Niagara Falls, county of Niagara, state of New York.

"Also please take notice that the mortgage sought to be foreclosed is the same mortgage for \$1,200.00, dated August 10th, 1894, mentioned in a certain agreement made by you with me, dated August 13th, 1894, in and by which agreement you covenanted and agreed with me to furnish all sums of money necessary from time to time to pay the taxes on the lots described in said mortgage, and the interest and principal of said bond and mortgage as the same became due and payable, and to indemnify and save me harmless from all costs, charges, and expenses by reason of my executing said bond and mortgage.

"You will also please take notice that I require you to protect said property upon such sale and prevent any sacrifice of the same, and to save me harmless from all costs, charges, and expenses in this action, and from any judgment against me for deficiency upon the sale of said property; and I hereby demand that you do now furnish all sums of money for taxes on said lots or pay said taxes which are now in arrears, and that you also furnish all sums of money necessary to pay the interest and principal on said bond and mortgage, or that you pay such principal, interest and taxes, and said sum of \$1398.80 and costs, on or before the day of said sale, and that you pay any deficiency that may remain against me after said sale; and that in case of your failure to pay said several sums and to indemnify and save me harmless from such costs, charges, expenses, taxes, principal, interest and deficiency, I shall hold you personally responsible to me, under said agreement, for all sums required to be paid by me, and for the amount of any judgment for deficiency which may be obtained against me in this action."

A similar notice concerning the sale under the other decree was served at the same time. The defendants did not bid at the sale, which was duly postponed until July 1st, and the mortgaged property was sold to William Cudaback for the sums of \$700 and \$1,500, respectively. The referee reported the sale, certifying also that "the amount of deficiency is \$1,492.62 (and \$877.62), for which the defendant I. J. Forbes King is liable under such judgment." On July 26 the Supreme Court confirmed the report in all respects, and "ordered and adjudged that the plaintiff, William Cudaback, recover from the defendant, I. J. Forbes King, the sum of \$1,492.62 (and \$877.62), the deficiency stated in said report." Upon the same day, King executed the following paper:

"For value received I hereby sell, assign, transfer and set over unto William Cudaback of the city of Niagara Falls, N. Y., the annexed contract, dated August 13th, 1894, made by Samuel L. Fisler and Thomas A. H. Hay with me, and any and all rights, claims, demands, actions, or causes of action which I have or may have against said Samuel L. Fisler and Thomas A. H. Hay, or either of them by reason thereof; and I authorize said William Cudaback, in my name or otherwise, to demand, collect, receive, sue for

and recover all damages sustained or which may be sustained by me, by reason of any breach of said contract, or of any agreement therein contained, by said Samuel L. Fisler and Thomas A. H. Hay, or either of them, including any claim, right, demand or cause of action which I have or may have against them, or either of them, by reason of their failure or refusal to furnish moneys to pay the interest or principal on the mortgage or the taxes on the lots described in said contract, such damages including the amount of two deficiency judgments entered against me in Niagara county clerk's office on the 26th day of July, 1901, in two foreclosure actions in which said William Cudaback was plaintiff and said Samuel L. Fisler, Thomas A. H. Hay and I, with others, were defendants; one of said deficiency judgments being for the sum of \$1,492.62 and the other for the sum of \$877.62, and they together amounting to the sum of \$2,370.24."

In consideration of the execution of this assignment, and upon the same day, the deficiency judgment against King was satisfied of record. No execution was issued upon it, and it does not appear whether such process would have resulted in collecting the money from him.

The present suit was brought by Cudaback in his own name, but the right which he is seeking to enforce is the right of King. It rises no higher than its source, and the source is the contract made by the defendants with King, in which they agreed to pay the mortgages, and to indemnify and save him harmless from all costs, charges, and expenses by reason of his having bound himself personally by these instruments. There is some discussion in the briefs of counsel concerning the particular law that should be applied to the construction of the defendants' agreement; but I see no reason to decide the question, since the law of Pennsylvania, the law of New York, and the law of the federal tribunals do not differ upon this subject. The rule that prevails in all of these jurisdictions is that such an agreement as was made by the defendants on August 13, 1894, is not a contract of indemnity against loss or damage, but is a contract to pay and to protect from liability, and that the party injured by a breach may sue at once, although he has not been compelled to put his hand into his pocket, and may recover the full amount agreed to be paid.

In *Wicker v. Hoppock*, 73 U. S. 94, 18 L. Ed. 752, it appeared that Wicker had promised Hoppock that, if the latter would obtain judgment against the firm of Chapin & Co., and levy upon certain chattels owned by the firm, Wicker "would bid it off for whatever the judgment and costs might be." Hoppock obtained judgment for \$2,206, and levied on the chattels, but Wicker did not bid at the sale, and Hoppock bought the property for a nominal sum. The trial court instructed the jury that Hoppock was entitled to recover the full amount of his judgment, with interest and costs, and this instruction was approved by the Supreme Court. Mr. Justice Swayne, who delivered the opinion of the court, declared that Wicker's agreement was not a contract of indemnity against loss, saying:

"If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damaged, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid."

In *Mills v. Dow*, 133 U. S. 423, 10 Sup. 413, 33 L. Ed. 717, the relevant facts were that Dow and Pratt assumed certain railroad contracts which Mills had sublet to Hill and Burgess "with the understanding and agreement that they will and shall well and truly save harmless the said Mills from any and all liability by reason of said contracts * * * and any claim by reason of said * * * Hill and Burgess * * * agreements above mentioned." Afterwards Hill and Burgess demanded payment of their account from Mills, who demanded payment in turn from Dow and Pratt, but without effect. He thereupon sued Dow and Pratt, although he had not paid Hill and Burgess, and was permitted to recover the full amount of the claim; the court saying:

"The agreement to assume the contract, in connection with the further agreement to save the plaintiff harmless from liability, was broken by a failure to pay the parties to whom the plaintiff was liable, and it was not necessary to a breach that the plaintiff should show that he had first paid those parties.

"By the instrument in question the defendants took the place of the plaintiff, and became, after the instrument was executed, principals in the work of constructing the railroad; and their acceptance of the assignment and the conditions preceding it included the subcontracts, and what was due and to become due upon them. The contract is not merely one to indemnify the plaintiff from damage arising out of his liability, but is an agreement to assume his contracts and to discharge him from his liability."

In *Johnson v. Risk*, 137 U. S. 300, 11 Sup. Ct. 111, 34 L. Ed. 683, it was shown that upon the dissolution of two partnerships, one of the partners bought the other's interest, agreeing, *inter alia*, to assume the payment of the debts and liabilities of each firm, and to protect and keep the other harmless from the payment of any part thereof. Concerning this agreement, the Supreme Court said:

"By that agreement Risk contracted to pay all the debts and liabilities of every kind of the firms, to assume the liabilities, and to save Johnson harmless. This was broken by a failure to pay the parties to whom the firms were liable, and it was not necessary to a breach that Johnson should show that he had first paid these parties. It was not an agreement merely to indemnify Johnson from damage, but to assume the indebtedness and discharge him from liability."

In *McAbee v. Cribbs*, 194 Pa. 94, 44 Atl. 1066, the Supreme Court of Pennsylvania supports the same doctrine. There Cribbs, a grantee, assumed payment of a mortgage that had been given by McAbee. This was afterwards foreclosed, and a deficiency judgment entered against McAbee, who was decided to have an immediate right of action against Cribbs without first paying the judgment. The court said:

"As a contract of indemnity it was broken as soon as the plaintiff's liability became fixed, and he could then maintain an action on it without proof of payment. That on a bond or covenant to indemnify against claims the obligee is entitled to sue as soon as his obligation to pay becomes absolute, has been settled by a long line of cases."

So, in *New York*, the Court of Appeals in *National Bank of Newburgh v. Bigler*, 83 N. Y. 62, has pointed out the distinction between a contract for indemnity against loss and a contract for indemnity against liability:

"Where the indemnity provided is against a charge for fixed legal liability, the obligee is to be saved from the thing specified, and the right of action becomes complete on the defendant's failure to do the particular thing he agreed to perform; while, on the other hand, where the covenant is for indemnity only, and against resultant damages, these must be actually suffered before an action can be maintained."

Little need be added to these citations. In my opinion, they clearly establish the proposition that King's liability became fixed when the deficiency judgment was entered against him, and that he then acquired an immediate right of action against the defendants, which he could himself have enforced for the full amount of the judgment. This right has been transferred to the plaintiff, and the fact that the transfer was made on the same day as the satisfaction of the judgment against King, and as a part of that transaction, seems to me to have no importance. His right of action was complete as soon as the judgment was entered, for by such entry the defendants' contract was broken. The judgment was a charge. It bound King because he had executed the mortgages in suit, and from this charge the defendants had not saved him harmless. The rule that ordinarily fractions of a day are not regarded in legal proceedings has no application. And there is no inequity in compelling the defendants to pay. They are only being called upon to do the precise thing which they agreed to do, namely, to pay these mortgages in full. Part of their debt has already been paid by the application of the money produced by the sale of their land, and they are now asked to pay the balance in cash. In truth, the deficiency judgment was against themselves, for King was merely their agent or trustee, and the land was theirs, and not his.

Judgment is directed to be entered on the verdict, and to this order an exception is sealed in favor of the defendants.

LONDON GUARANTEE & ACCIDENT CO., Limited, v. DOYLE & DOAK.

(Circuit Court, E. D. Pennsylvania, January 3, 1905.)

No. 37.

1. CONTEMPT—EXPLANATION—BURDEN OF PROOF.

Where defendants were ordered to produce books and papers for inspection at a certain time, and failed to properly comply with the order, the burden was on them to show facts excusing their default, in order to relieve them from punishment for contempt.

2. SAME—DEFENSES.

Where defendants contested an application to compel them to produce books and papers for inspection on the ground that plaintiff was not entitled to such examination, and made no claim that the books and papers desired were not under their control, proof in a subsequent proceeding to punish them for contempt in failing to comply with an order requiring such production that the books and papers had been accidentally or mistakenly lost or destroyed prior to the hearing of the application for production was insufficient to purge their contempt.

Motion to Punish for Contempt.

Thos. Raeburn White, for plaintiff.

John C. Bell and E. Clinton Rhoads, for defendants.

J. B. McPHERSON, District Judge. The plaintiff's cause of action against the defendants sufficiently appears in the following quotation from the court's opinion upon demurrer to a bill in equity between the same parties, reported in 130 Fed., at page 719:

"As set forth in the bill, the plaintiff corporation is engaged in the business of insuring employers of labor against loss on account of liability incurred by them through injuries incurred by their employes, or occasioned to others by their negligence. The defendants, who are contractors and builders, were so insured by the plaintiff during the year 1902-1903; several policies being issued to them on May 28, 1902, covering the various classes of risks. It is obvious that the risk assumed by the insurer is commensurate with the number and character of the employes of the insured. The premiums, therefore, are based upon a percentage of the total amount paid out in wages by the insured during the policy period. As it is impossible to accurately determine in advance what the pay roll during any particular period will be, it is customary for the insured to submit an estimated pay roll at the beginning of the policy term, pay premiums based upon the estimate, and then for an accounting to be taken at the end. At that time, if the pay roll has proved to be less than the estimated amount, the insurer returns a stipulated portion of the premium. On the other hand, if it proves to be greater than the amount estimated, the insured pays an additional premium upon the excess. Such an agreement, with mutual covenants to pay rebates and excess premiums as indicated, was made between the parties in this case. To further protect itself, the plaintiff required covenants, which were duly entered into by the defendants, to render written statements of the amounts of the pay rolls at the end of each year, under oath, if required, and to allow the plaintiff or its agents to inspect their books 'at all reasonable times' to satisfy itself as to the accuracy of the various estimates made.

"The policies issued for the year mentioned were accepted by the defendants, the premiums based upon the estimated pay rolls were duly paid, and the plaintiff indemnified them according to the contract.

"The bill then avers that many of the pay rolls of defendants were much greater than the amount estimated by them at the beginning of the year, and therefore a duty was imposed upon them by the contract to account for the excess, but that they falsely averred that the actual pay rolls were no greater than the estimated amounts, declined to furnish written statements, and refused to allow the plaintiff to examine their books, although, under the contract, it was entitled to do so. It then concludes with a prayer for an accounting, for discovery, and for general relief."

This bill was dismissed because the complainant had an adequate remedy at law, and in obedience to that decision the present action of assumpsit was brought on May 31, 1904. Early in June the plaintiff filed a petition containing the following averments, *inter alia*:

"At the end of the policy period the plaintiff demanded that the defendants submit written statements of the actual amounts of the pay rolls, but the defendants declined to do so, and orally stated that the amounts of the pay rolls were no greater than the estimated amounts as hereinbefore stated.

"The plaintiff avers that the compensation which the defendants paid their employes during the said period far exceeded the sums so estimated by them at the beginning of the term or reported at the end, and that they actually owe the plaintiff, under the contract upon which suit is brought, large sums for premiums in excess of \$2,000, the amount necessary to sustain jurisdiction in this court, but the plaintiff is unable to state the exact amount which the defendants owe, because the records as to the precise amount of wages paid by them to their employes are entirely within their own control. It is necessary that the plaintiff shall be allowed to examine the books of the defendants in order to enable it to state under oath the exact amount of its claim, so as to require the defendants to deny the same under oath, or else to suffer judgment by default for want of an affidavit of defense. The defendants' books show the compensation paid by them to their employes

during the said policy term, and it is only by an examination thereof that the plaintiff can accurately ascertain the amount of such compensation, so as to declare properly as hereinbefore stated. The plaintiff has requested the defendants to allow it to examine their books at some reasonable time, as they have expressly covenanted in their contract to do, but they have refused to allow the plaintiff to make such an examination, notwithstanding their agreement, and still persist in their refusal.

"Said agreement to show the books was a part of the consideration for the insurance of the defendants by the plaintiff during said period, and of which insurance they have had the benefit.

"In view of the fact that the premiums to be paid were based upon the amount of the pay rolls, as recorded in the defendants' books, the said records of the pay rolls in fact constitute a portion of the agreement between the parties; and the plaintiff is advised that, under the decisions in this court, it is entitled to an inspection of the said pay rolls, in order to enable it to file its declaration in this case. The plaintiff prays relief herein asked for, not merely under the Revised Statutes, giving the right to the plaintiff to compel the production of books and papers, but also under the express agreement made by defendants to so show their books, and which they refuse to perform, after having received on their part the entire consideration for the contract. Inasmuch as this agreement calls for the production of the books at any reasonable time upon demand of the plaintiff, the plaintiff conceives that it will be a great hardship for it to be compelled to wait until the case is actually at trial before being allowed to inspect said books.

"The plaintiff further conceives and suggests to the court that it will be impossible to ascertain the amount of money owing by defendants to the plaintiff, except by the aid of an expert accountant, who is employed by the plaintiff for the purpose of examining books of this character, and who will be obliged to make a detailed examination, involving very considerable time, before he can make a report as to the amounts so owing. It is therefore essential to the plaintiff's success in the action that it be allowed to make such inspection before trial; and it is further necessary, as already stated, to make such inspection before a declaration is filed, in order that it may state with accuracy and under oath the actual amount owing to it, so as to demand a direct answer under oath from the defendants.

"Wherefore the plaintiff prays that the defendants may be required to produce in the office of the clerk of the said court, their pay sheets, timebooks, cashbooks, ledgers and all other books or papers which relate to compensation paid to employés of themselves, or of their subcontractors, during the periods of said contracts, and that the plaintiff may be permitted to examine the same."

The defendants answered, denying the plaintiff's right to such an examination; but, after hearing and argument, the court made the following order:

"And now, June 25th, 1904, the court orders the defendants to produce, within twenty days, in the office of the clerk of said court, their pay sheets, timebooks, cashbooks, and all other books of original entry which contain information as to the amount of compensation paid to employés of themselves, or of their subcontractors, or of any other persons contemplated in the contracts upon which suit is brought in this case, during the period of said contracts as set forth in the petition filed."

On July 15th, the defendants produced certain books and papers in the clerk's office, but only two of the books threw any light upon the dispute, and only one of them—a cashbook from December 1, 1902, to July, 1904—was of any material value. No books or papers, except a petty cash book, which showed small and irregular payments to employés during the period from June 1, 1902, to June 17, 1904, were produced to show the wages paid by the defendants during the first six months covered by the policy, viz., from May 28, 1902, to Decem-

ber 1, 1902. The plaintiff thereupon obtained the rule now under consideration to punish the defendants for contempt in failing to obey the order of June 25th, to which rule the defendants replied, excusing their failure to produce the books and papers by averments, which are now made for the first time, that between December 1, 1902, and the middle of March, 1903, while their office was undergoing alteration, many books and papers were moved to a shop not far away, and that some of these books and papers, including these in controversy, were accidentally or mistakenly lost or destroyed. The defendants also averred that a thorough search had been made for the missing documents, but that they could not be found. Witnesses were afterwards heard in open court, under examination and cross-examination, upon the issues thus raised by the petition and answer; and the question now to be decided is whether the defendants have satisfactorily excused their failure to produce the missing books and papers.

It cannot be doubted, I think, that the burden of proof was upon them. The court's order of June 25th necessarily implied that the books and papers were in existence, and within the defendants' reach. If they knew then that the facts were otherwise, it was their duty so to inform the court at once, and to object to the making of an order with which they must have known that they would not be able to comply. Failure thus to act at the proper time is properly followed by imposing upon them the burden of excusing their apparent disobedience to the order; and the same result follows, even if they were ignorant concerning the existence and whereabouts of the books, but did not take the trouble to ascertain in advance whether or not they could comply with such an order, and contented themselves with resisting the application upon other grounds. When a court requires the production of documents, it is presumed that these can be had; and, while the presumption is not conclusive, it has force enough to compel the party upon whom the order is made to undertake the task of showing to the court's satisfaction why the order cannot be fully complied with. If he leaves the matter in doubt or uncertainty, the presumption is not overcome, and the usual consequences of failure must be borne by the party who has failed to sustain the burden of proof. Authority for these propositions may be found in *Fenlon v. Dempsey*, 50 Hun (N. Y.) 131, 2 N. Y. Supp. 763, the later case of *Holly Mfg. Co. v. Venner*, 86 Hun (N. Y.) 42, 33 N. Y. Supp. 287, and in several decisions from Pennsylvania, which, although they are founded upon the Pennsylvania act of 1798, are, I think, in point, because the act requires the party to produce, "or satisfy the said court why the same is not in the party's power so to do," and this alternative is ordinarily implied in any order to produce, although the order may be in form unqualified and absolute. The Pennsylvania decisions referred to are *Wright v. Crane*, 13 Serg. & R. 447; *McNair v. Wilkins*, 3 Whart. 551; *Tuttle v. Loan Co.*, 6 Whart. 216; *Wills v. Kane*, 2 Grant, Cas. 47; and *Gilpin v. Howell*, 5 Pa. 55, 45 Am. Dec. 720.

In their bearing upon the question now to be decided, I have considered again with care all the papers in the case, and the stenographer's notes of the testimony that was taken before me in open court, and I have come to the conclusion that the defendants have not satis-

factorily accounted for their failure to obey fully the order of June 25, 1904, which required them to produce the papers and books therein described. Some of the evidence offered by the defendants was plainly evasive, some was contradicted by disinterested testimony, and some was not credible. There can be no doubt that the ledger of 1902-4, and the pay rolls, or time sheets, from March to May, 1903, were in existence early in March, 1904, for they were audited by a professional accountant at that time; and their subsequent disappearance is rather guessed at than explained. And there is little more doubt in my mind that the cashbook from May 28 to December 1, 1902, was accessible at the same time. What has become of these books and papers since March of the present year, is not accounted for, save in a vague and general way, that has failed to convince; and I am forced to the conclusion, therefore, that the defendants have disregarded the order of June 25, 1904, although it was within their power to obey its commands.

It is accordingly adjudged that the two defendants, and each of them, are guilty of contempt in disobeying the order referred to, and the clerk is directed to enter the following decree:

If the defendants produce in the office of the clerk of the circuit court on or before January 15, 1905, the ledger of 1902-4, the pay rolls or time sheets from March to May 28, 1903, and the cashbook from May 28 to December 1, 1902, or if they produce the cashbook alone, they are ordered to pay no more than the costs accruing upon this motion, including the stenographer's charges, on or before January 20, or, in default of such payment, to suffer imprisonment in the jail of this county for the period of 60 days. If the foregoing books and papers are not produced on or before January 15, the defendants are ordered to pay a fine of \$250, and also the costs accruing upon this motion, including the stenographer's charges, on or before January 20, or, in default of such payment, to suffer imprisonment in the jail of this county for the period of 60 days.

AMERICAN LIGHTING CO. v. PUBLIC SERVICE CORPORATION OF
NEW JERSEY et al.

(Circuit Court, D. New Jersey. December 24, 1904.)

1. INJUNCTION—BREACH—CONTEMPT.

No one can be punished in contempt proceedings for disregarding a restraining order in a case for which the law furnishes a plain, adequate, and complete remedy, where the jurisdiction to make such order is seasonably questioned and ascertained not to exist.

(Syllabus by the Court.)

In Equity.

Albert C. Wall, for complainant.

Frank Bergen and Frederic J. Faulks, for defendant.

BRADFORD, District Judge. The American Lighting Company filed its bill March 4, 1904, against the Public Service Cor-

poration of New Jersey, hereinafter called Public Service Corporation, the Hudson County Gas Company and the Jersey City Gas Light Company, setting forth in substance, among other things, that the complainant had entered into a certain contract with the Mayor and Aldermen of Jersey City, whereby the complainant agreed for and during a certain term to provide, operate and maintain a certain number of gas lamps in the streets of that city, and furnish the gas to be used in those lamps, in accordance with the terms of the contract and its specifications and for the considerations therein mentioned; that aside from the Public Service Corporation, which had theretofore furnished gas for the lighting of the streets of Jersey City, there was no source from which the complainant, which had no gas plant, could procure the gas to be furnished under its contract; and that the Public Service Corporation, notwithstanding its duty to the public, threatened to shut off and prevent the passage and delivery of gas through its mains, pipes and conduits to the posts upon which the complainant was engaged in placing its lamps, the complainant then and there being ready and prepared to receive illuminating gas from the Public Service Corporation and to supply the same to its street lamps in accordance with its contract, and the Public Service Corporation having been notified of the desire of the complainant to purchase the necessary gas and of the readiness and ability of the complainant to comply with all reasonable regulations and requirements for obtaining the same. The bill prayed, among other things, that the defendants be restrained and enjoined from discriminating between the complainant and other consumers of gas in Jersey City and "from diminishing, turning off, interfering with or stopping the present passage and flow of gas to, in and through the said lamp posts and to the said burners affixed thereto" by the complainant. A motion for a preliminary injunction was, after the presentation of affidavits, documentary evidence and arguments of counsel on both sides, denied upon the ground, among others, that there was an adequate remedy at law. 132 Fed. 794. This point was thus treated by the court:

"It does not appear that the complainant is the owner or occupant of any manufacturing plant or other premises in Jersey City, or of any property there requiring a supply of illuminating gas for its beneficial enjoyment. The fact that gas is not supplied to it does not affect its enjoyment of any property rights other than those it may have under or by virtue of its contract with Jersey City. Whatever interest it may have arises under that contract and is restricted to the profits or other benefits it might realize from its due performance. The purpose of this suit is to realize such profits or other benefit. If Jersey City has wrongfully broken its contract with the complainant there is an adequate remedy by way of action for the recovery of damages. Or, if the defendants have wrongfully prevented the complainant from performing its contract with the city, there is a similar adequate remedy."

At the time the motion for the preliminary injunction was made an order was granted restraining the defendants as prayed until the decision upon the motion. Prior to the denial of the preliminary injunction sought proceedings in contempt were instituted by the complainant against the Public Service Corporation and Eugene J.

Donahue and Henry Schmidt, two of its servants and agents, for an alleged violation of the restraining order. The alleged contempt has been fully heard on affidavits and arguments of counsel. In some respects the affidavits are conflicting and lack certainty. But, wholly aside from the character of the evidence, there is the vital question disclosed on the face of the bill, whether this court has authority to punish the respondents in the rule for any violation of the restraining order. The right to punish presupposes the existence of a valid order which has been disobeyed. A court possesses no authority to inflict punishment for disregard of an order which is not merely irregular or voidable, but void as having been made without authority or jurisdiction. In *Ex parte Fisk*, 113 U. S. 713, 718, 5 Sup. Ct. 724, 726, 28 L. Ed. 1117, the court through Mr. Justice Miller said:

"When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void."

Unless this court had equitable jurisdiction of the suit it was without power to grant a valid restraining order. In *Jones v. Mutual Fidelity Co.* (C. C.) 123 Fed. 506, 517-519, I had occasion to consider the distinction in the federal courts between jurisdiction at law and jurisdiction in equity. The court there said:

"There is a fundamental distinction growing out of the federal constitution and legislation between legal and equitable procedure. The seventh amendment of the constitution provides that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,' and section 16 of the Judiciary Act of September 24, 1789, c. 20, § 1 Stat. 82, reproduced in section 723 of the revised statutes [U. S. Comp. St. 1901, p. 583], enacts that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.' These constitutional and statutory provisions control the procedure of the federal courts; and the propriety of resorting in any given case to the law side of the court, on the one hand, or, on the other, to the equity side, must be determined with reference to them. * * * It is an established rule that 'whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' *Hipp v. Babin*, 19 How. 271, 278, 15 L. Ed. 633; *Insurance Co. v. Bailey*, 13 Wall. 616, 620, 20 L. Ed. 501; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. Ed. 174; *Buzard v. Houston*, 119 U. S. 347, 351, 7 Sup. Ct. 249, 30 L. Ed. 451; *Whitehead v. Shattuck*, 138 U. S. 151, 11 Sup. Ct. 276, 34 L. Ed. 873."

It is true that it is difficult, if not impossible, to ascertain preliminarily in all cases whether the proceedings for the enforcement of a right should be in equity or at law. Many cases are in this respect debatable. In *Watson v. Sutherland*, 5 Wall. 74, 79, 18 L. Ed. 580, the court through Mr. Justice Davis said:

"The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the pleadings."

But, whatever may be the propriety of granting a restraining order or inflicting punishment for its violation, where equitable juris-

diction is doubtful or not beyond dispute, it seems clear that when such jurisdiction has seasonably been questioned, as is the case here, and has been ascertained not to exist, the restraining order must be held void and, consequently, no one can be punished for disregarding it. This court, being of opinion that the complainant has a plain, adequate, and complete remedy at law for any wrongs or grievances it has suffered or will suffer by reason of the matters alleged in the bill, holds that the restraining order was granted without jurisdiction and was a nullity, and, therefore, that the rule to show cause in the contempt proceedings must be discharged.

EMPIRE CITY AMUSEMENT CO. v. WILTON.

(Circuit Court, D. Massachusetts. April 4, 1903.)

No. 1,685.

1. COPYRIGHTS—INFRINGEMENT—BILL—MULTIFARIOUSNESS.

Where it was convenient for the court that two causes of action for infringement of copyright, one with reference to certain cartoons and the other with reference to a play based thereon, should be joined in the same bill, it was within the discretion of the court to permit such joinder.

2. SAME—DEMURRER.

Where it was admitted that a bill to enjoin infringement of certain copyrights stated a cause of action arising from the alleged infringement of two dramatic compositions, and a demurrer failed to point out specifically what sentences or paragraphs of the bill were demurred to, it could not be sustained.

3. SAME—COPYRIGHT—CARTOONS.

Where certain cartoons were copyrighted, and later formed the basis of a farce comedy, it will not be held that there was no dramatic right in such cartoons which could be made the subject of copyright, on demurrer to a bill for alleged infringement thereof.

4. SAME—DEMURRER—DEFECT OF PARTIES.

Where a bill is filed to enjoin the infringement of copyright claimed by plaintiff in two dramatic compositions, the right to the use of which plaintiff acquired through assignments from the different owners of such plays, a demurrer to the bill for want of proper parties plaintiff, on the ground that the assignor of one of the plays should have been made a party, cannot be sustained, where defendant has not pointed out specifically the parts of the bill objected to; and the demurrer cannot be sustained for want of parties as to the whole bill.

In Equity.

Edwin J. Prindle, for plaintiff.

Southgate & Southgate, for defendant.

LOWELL, District Judge. The bill in this case alleges that Block and Oppen invented and designed certain cartoons, which were published in the New York Journal and elsewhere under the title of "Alphonse and Gaston"; that the copyright in these pictures was duly taken out by Hearst under an agreement with Block and Oppen; that Hearst duly assigned to Block and Oppen the sole and exclusive right for theatrical purposes, and the dramatic rights arising from the title and cartoons;

that Block and Oppen conveyed these rights to the Lester Company; that thereafter the Lester Company duly secured as proprietor the copyright of a dramatic composition entitled "Alphonse and Gaston, a Comedy in Three Acts, Based upon the New York Journal Cartoons of the Same Name" (the author of the play is not mentioned); that the Lester Company duly assigned to the complainant the entire right, title, and interest east of the Mississippi in and to the dramatic rights in the title "Alphonse and Gaston," and in the cartoons and in the copyrighted dramatic compositions above mentioned. The bill further alleges that the complainant is, by assignment from the original owner of the copyright, the owner of another play, written by one Dumont, entitled "Alphonse and Gaston, a Farce Comedy in Three Acts." The bill then alleges infringement of the complainant's rights by the representation of a play entitled "Looping the Loop," which play is alleged to introduce characters named after those represented in the cartoons above mentioned, and incidents similar to those represented in the cartoons; that these dramatic representations are unfair and misleading to the public; that the complainant has advertised its play by posters and otherwise; and that the defendant has advertised his piratical play in a similar manner.

The defendant has demurred:

(1) Because the bill is multifarious. He contends that the complainant cannot join in one action a suit based upon the Hearst cartoons and upon the Dumont play. Considering the connection of the two, I think it is within the discretion of the court to permit these two matters of complaint to be joined in one action. That it is convenient for the court that they be joined I have no doubt.

(2) That, except as to the two dramatic compositions, there is no equity in the bill. It being admitted that the bill states a cause of action arising from these compositions, I do not perceive how the demurrer can be sustained, as it does not point out specifically what sentences or paragraphs of the bill are thus demurred to. The defendant's remedy is rather by motion to strike out than by demurrer. Even if this formal objection to the sufficiency of the demurrer were removed, I still think that the court cannot here decide upon demurrer that there is no dramatic right, so called, in a series of cartoons. The Supreme Court has lately shown a tendency to widen, rather than to narrow, the scope of the copyright act (Act July 8, 1870, c. 230, 16 Stat. 212 [U. S. Comp. St. 1901, p. 3405]). *Bleistein v. Donaldson Lith. Co.*, 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460.

(3 and 4.) The defendant demurs for want of proper parties, on the ground that Hearst is not made a party to the bill. The licensee under a patent cannot sue alone in his own name, and every partial assignee of patent rights, who does not take an undivided part of the whole patent or a territorial share of the whole patent (or, perhaps, an undivided part of a territorial share), is deemed a mere licensee. Rev. St. § 4898 [U. S. Comp. St. 1901, p. 3387]; *Gayler v. Wilder*, 10 How. 477, 494, 13 L. Ed. 504. Section 4954 [U. S. Comp. St. 1901, p. 3407], which deals with the assignment of copyright, is similar to section 4898, and by analogy it seems that an assignee of "the exclusive right to dramatize" is a mere licensee, and so cannot sue in his own name. See *Black v.*

Allan Co., 42 Fed. 618, 621, 9 L. R. A. 433; Keene v. Wheatley, Fed. Cas. No. 7,644 at p. 186. In Roberts v. Myers, Fed. Cas. No. 11,906, the court held that the assignee of the exclusive right to act and represent a copyrighted dramatic composition for one year could sue in his own name. That case is not precisely analogous to this. Inasmuch as the demurrer for want of parties cannot be sustained as to the whole bill, and as the defendant has not pointed out specifically the parts of the bill objected to, the demurrer must be overruled as to the third and fourth grounds stated.

(5) Because the character of the Block and Oppen cartoons is such that no dramatic right concerning them can exist. This objection has been dealt with under the second head.

(6) The sixth ground of demurrer has been removed by amendment. Demurrer overruled. Defendant to answer on or before May rules.

NOTE. Bill in each case dismissed, without prejudice and without costs, pursuant to agreement of counsel, December 22, 1904.

MARTIN v. ST. LOUIS S. W. RY. CO. OF TEXAS et al.

(Circuit Court, W. D. Texas, Waco Division. December 13, 1904.)

No. 808.

1. REMOVAL OF CAUSES—FEDERAL QUESTION—SUIT TO ESTABLISH JOINT LIABILITY OF FEDERAL CORPORATION.

A suit against two railroad companies, one of which is organized under the laws of the state of which plaintiff is a citizen and the other created by a federal statute, to establish a joint liability of the defendants for negligence, is one arising under the laws of the United States, and is removable on that ground on a petition therefor by both defendants.

On Motion to Remand to State Court.

This suit was brought by the plaintiff, as a passenger, to recover damages for personal injuries sustained while attempting to cross an open culvert, which the petition alleges was negligently constructed and maintained by the two defendants. The question to be considered arises upon a motion to remand the cause to the state court. It appears from the record that the plaintiff is a citizen of Texas; that the defendant St. Louis Southwestern Railway Company of Texas is a corporation organized under the laws of this state; and that the defendant the Texas & Pacific Railway Company owes its corporate existence to federal statutes. The suit was removed to this court, pursuant to an order of the state court, upon the joint petition of the two defendants, as one arising under the laws of the United States. The plaintiff seeks to remand the cause for the following reasons: "(1) The plaintiff's cause of action, as set forth in his petition, is against both defendants jointly, and neither presents nor discloses any separate or separable controversy as between the plaintiff and either of said defendants; (2) the cause of action, as set forth in the petition, does not contain nor include any separate or separable controversy whatever which would, in any event, authorize or sustain a removal of the cause by, or upon the petition of, the defendant St. Louis Southwestern Railway Company of Texas alone, a corporation deriving its powers from the laws of the state of Texas; (3) that the cause does not involve nor present any controversy whatever arising under the Constitution and laws of the United States, at least so far as the St. Louis Southwestern Railway Company of Texas is concerned, the same

being a Texas corporation, and there being in the suit no separable controversy as to it."

I. W. Culp & W. E. Hawkins, for plaintiff.

Spoontz & Thompson, for Texas & Pacific Ry. Co.

Clark & Bolinger, for St. Louis Southwestern Ry. Co. of Texas.

MAXEY, District Judge. It is conceded by counsel representing the respective parties, and the motion to remand is based upon the theory, that the purpose of the suit is to establish a joint liability against the two defendants, the one being a Texas corporation, and the other a corporation deriving its charter, and hence its corporate powers, from acts of Congress. It is therefore apparent that the cause is not removable under either clause 2 of section 2, or clause 3 of section 2, of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]. It then becomes necessary to determine the question of removability under clause 1 of the section mentioned. That clause provides as follows:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district."

Touching the right of removal under clause 1, in cases involving the proper jurisdictional amount, the following propositions may be regarded as settled law, since the Supreme Court has definitely determined them: (1) Where a corporation, deriving its powers from an act of Congress, is sued alone in a state court, it is entitled to have the cause removed to the Circuit Court on the ground that the suit is one arising under the laws of the United States. *Texas & Pacific Railway Co. v. Cody*, 166 U. S. 603, 17 Sup. Ct. 703, 41 L. Ed. 1132; *Same v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319. (2) Where there is no separable controversy, as between the plaintiff and the removing defendant, but the ground of removal is that the cause of action arises under the Constitution or laws of the United States, the suit can be removed only on the petition of all the defendants. *Chicago, Rock Island, etc., Ry. Co. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055.

Prior to the case last cited the ruling of several of the Circuit Courts seemed to authorize the removal of a cause under clause 1, § 2, although there was not a joinder of all the defendants in the petition. See *Southern Pacific R. R. Co. v. Townsend* (C. C.) 62 Fed. 161; *Seattle & M. Ry. Co. v. State* (C. C.) 52 Fed. 594; *Hunter v. Conrad* (C. C.) 85 Fed. 803; *Lund v. Chicago, R. I., etc., Ry. Co.* (C. C.) 78 Fed. 385; *Landers v. Felton* (C. C.) 73 Fed. 311. The ruling thus made found justification in *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; but *Martin's Case*,

178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055, explains and modifies *Mitchell v. Smale*, and the rule now is that all defendants must join in the application.

In the present case both defendants have joined in the petition to remove. But it is objected by counsel for the plaintiff that the federal question affects only the Texas & Pacific Railway Company, and hence, notwithstanding the two defendants have united in the petition, the cause is not removable. The answer to the objection will be found in the fact that the cause of action as declared on by the plaintiff is joint, the purpose of the suit being, as before stated, to establish a joint liability against both defendants. Any suit, whatever its nature, brought against the Texas & Pacific Railway Company alone, would be one arising under the laws of the United States, and the same result would follow where the object of the suit was to establish a joint liability against that company and other parties defendant. In such case the federal question necessarily affects both parties and permeates the entire suit, entitling it to be removed where all the parties unite in the petition. Upon this point it was said by Judge Taft in *Landers v. Felton* (C. C.) 73 Fed. 314:

"The question here arises whether an action brought against the receiver of a United States court and others who are citizens of the same state as that of the plaintiff, to establish a joint liability of all the defendants, is a suit arising under the laws and Constitution of the United States. I do not see how it can be otherwise. No separate liability could be asserted against the receiver, as receiver, except under the laws of the United States. If no separate liability could be asserted against him except by virtue of those laws, certainly no joint liability with another can be asserted against him except by virtue of the same laws. Therefore the joint liability of the defendants with the receiver arises under the laws and Constitution of the United States. If the plaintiff wished to sue the other defendants without joining the receiver, he had his election to do so, because the liability of joint tortfeasors is also several. He might, therefore, have maintained his action against the resident defendants in a state court, without any possibility of removal to a federal court. He elected, however, to join the resident defendants with a person against whom he could establish no liability, in the capacity in which he sues him, except by virtue of the laws of the United States. Therefore the joint cause of action which he asserts against all the defendants must find its sanction in the federal statutes. Hence the cause of action is removable."

See, also, *Lund v. Chicago, R. I., etc., Ry. Co.*, supra.

This question has been otherwise decided by the Court of Civil Appeals of Texas for the Fifth District in *Texas & Pacific Railway Co. v. Huber* (Tex. Civ. App.) 75 S. W. 547. With due deference to the learned judges composing that court, the writer is compelled to dissent from the views expressed in the *Huber Case* upon the subject of removal of causes.

For the reasons stated the motion to remand should be overruled, and it is so ordered.

In re GREENE.

(District Court, D. Connecticut. December 30, 1904.)

No. 1,342.

1. BANKRUPTCY—CHATTEL MORTGAGES—VALIDITY—FILING—WHAT LAW GOVERNS.

Where a chattel mortgage, executed by a bankrupt, was duly recorded in Connecticut in the town clerk's office of the town where the property mortgaged was located, it was valid as against the bankrupt's creditors, though it was not filed or recorded in New York, where both the mortgagor and mortgagee resided, according to the laws of that state.

In Bankruptcy. In this matter one Thomas J. Conroy, as creditor, in his own behalf and that of Sarah R. Greene, deceased, objected to the payment of any moneys realized from the sale of furniture of said bankrupt which was held under a chattel mortgage owned by Bertram L. Young, and thereupon the referee, John W. Banks, made a finding that the chattel mortgage was good as against the trustee in bankruptcy, which finding is as follows:

On November 13, 1901, the bankrupt herein made and executed a chattel mortgage to Bertram L. Young upon certain chattels consisting principally of hotel furniture, which was then and at the time of his adjudication as a bankrupt, contained in the hotel in Greenwich, in the state of Connecticut. The mortgage was made and executed in the city of New York, where both the mortgagor and mortgagee then resided. It was recorded on November 19, 1901, in the office of the town clerk of the town of Greenwich, Conn. The mortgage was not recorded in the state of New York. The trustee has sold the property in question free and clear of the lien of the mortgage, under an order of the court heretofore made providing that the lien of the mortgage should attach to the fund arising from such sale. The question arising upon this petition is whether or not the mortgage is valid as against the trustee in bankruptcy. It is conceded that New York law requires such mortgages to be recorded where the mortgagor resides, and, if that law is to control, then the mortgage is invalid as against the creditors, the mortgagor, and as against the trustee in bankruptcy, who succeeds to their right. If, however, the validity of the mortgage is to be determined by the Connecticut law, the mortgage is valid as against the trustee in bankruptcy, since it was recorded in compliance with the Connecticut statute. The sole question, then, is whether the question as to the validity of the mortgage as against creditors of the mortgage shall be determined according to the law of the state where the mortgage was made and executed and where the parties thereto resided, or according to the law of the state where the property was situated at the time that the mortgage was made and where the question arose.

The general rule that personal property is governed by the law of the domicile of the owner is subject to many exceptions, and a well-established one is that the transfer of such property by way of a mortgage is governed by the *lex situs*, and not by the *lex domicilii*. Jones on Chattel Mortgages, § 305; 6 Ency. of Law and Procedure, 1061; 4 Ency. of Pleading & Practice, 508. The reason for this rule is well stated in case of *Chillingworth v. Eastern Tin Ware Company*, 66 Conn. 317, 33 Atl. 1011: "The general rule that the *lex loci contractus* shall govern is, theoretically at least, founded upon the presumed intention that the parties contracted with reference to that law; and when the contract is to be performed elsewhere, or is to have its entire beneficial operation and effect elsewhere, then the law of the latter place is to govern, because, in the absence of anything to the contrary, it is presumed that the parties so intended." This was a case almost identical with the case at bar. A chattel mortgage was made and executed in New York upon personal property located in the town of Portland, Conn. The mortgagor was a New York corporation, and the mortgagee a resident of that state.

The mortgage was recorded in Portland, where the property was located. 'It was conceded, however, that the mortgage was made in contemplation of insolvency, within the meaning of the New York statute, and under that statute was void. The plaintiff claimed that, since the mortgage was void under the law of the state where it was made, it was void everywhere, and that neither recording it in Portland nor any other act could give it validity. The court held that since the mortgage affected no property in New York, and was not intended to have beneficial operation or effect upon property there situated, but did affect and was intended to affect Connecticut property only, and to have its entire beneficial operation and effect as a security there, the law of Connecticut, and not the law of New York governed. This rule was reaffirmed in case of *Beggs v. Bartels*, 73 Conn. 132, 46 Atl. 874, 84 Am. St. Rep. 152. The same rule prevails in other jurisdictions and has been announced in the Supreme Court of the United States. *Green v. Van Buskirk*, 7 Wall. 139, 19 L. Ed. 109; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003.

I have been unable to find any decision to the contrary, and none of the cases cited upon the brief for objecting creditors seem to me to be in point upon this question. In most of the cases where this question has arisen the mortgage was properly recorded and valid in the state where executed and where the parties resided, but was not executed or recorded in compliance with the laws of the state where the property was located and where the action arose. In the present case the situation is the reverse, the mortgage being invalid in the state where the parties resided and where it was made, but valid in the state where the property is located; hence the claim is made that the contract, being void where made, is void everywhere. This claim was made and overruled in *Chillingworth v. Eastern Tinware Company*, supra, and its fallacy is clearly shown in the opinion of the court in case of *Altman & Taylor Machinery Co. v. Kennedy*, 114 Iowa, 447, 87 N. W. 435, 89 Am. St. Rep. 373, a case where the facts were very similar to those in the present case. The court said: "The rule that the validity, interpretation and effect of a contract are to be governed by the *lex loci contractus* applies only to the rights and obligations of the parties to the contract. The question in this case is not the validity of the contract between the parties. That must be conceded to be good, no matter what the locus of the property at the time the mortgage was executed. The recordation required by the statute was to preserve the lien as against third parties, and the real question is one of priority between lienholders, which must be determined by the law of the place where the property lies and where the court sits which decides the case."

The objecting creditor concedes in his brief that the laws of the state in which property, either real or personal, is situated, must control in respect to the liability of such property to be attached and sold under legal processes issuing from the courts of that state. It seems to me that this concedes the whole case. Even under the laws of New York the mortgage is not absolutely void, but is good as between the parties thereto. It is conceded that it is also good as against an attaching creditor in this state. The trustee in bankruptcy has no greater rights than those of the bankrupt plus those of an attaching creditor. It follows, then, that the mortgage is good as against the trustee in bankruptcy. An order may be drawn granting the petition of the mortgagee, the terms of the order to be fixed at the hearing on the trustee's final account. A petition for review may be filed within ten days from this date.

Dated November 28, 1904.

John W. Banks, Referee.

Wm. P. Keiley, for opposing creditors.

Alfred Yankauer, for mortgagee.

And thereupon certain opposing creditors brought a petition into the District Court for review of said finding, whereupon the court on the 30th day of December, 1904, filed its finding and opinion as follows, viz.:

PLATT, District Judge. The memorandum of the referee, prefixed hereto, states the facts and the question of law arising therefrom and at issue. It is certainly a rather startling proposition that a mortgage on local chattels, which is faultless in form, properly executed, and recorded in full obedience to our statutes, must lose its efficacy, because the parties thereto, being residents of another state, overlooked or neglected her statutes. The Supreme Court, speaking by Mr. Justice Davis, in *Hervey v. R. I. Locomotive Works*, 93 U. S. 664-667, 23 L. Ed. 1003, says: "Every state has the right to regulate the transfer of property within its limits." That being so, it was decided that, if New York and Rhode Island parties saw fit to take their property to Illinois, they by implication consented to be bound by the regulations as to transfer there in force. If the property happens to be in the other state when the parties make their contract, the conclusion reached by the Supreme Court becomes all the more irresistible. To sustain the contention of the objecting creditors in the case before me would be unfortunate from any point of view. It might be subversive of a bed-rock principle of commercial life, and, at best, it would lead to the necessity for adopting complicated and useless details, in order that validity might attach to a very simple transaction.

The order of the referee is affirmed.

DAVIES v. WELLS.

(Circuit Court, M. D. Pennsylvania. December 22, 1904.)

No. 11.

1. REMOVAL OF CAUSES—EJECTMENT—ISSUE TAKEN AS TO VALUE OF LAND—BURDEN OF PROOF.

Where, on a petition for the removal of an action of ejectment, the value of the land is traversed, it must be established by the removing party by proof. This, as the matter in controversy, is a jurisdictional fact, which cannot be left in doubt, as it must be where petition and answer contradict each other.

2. SAME—REMOVAL BY ONE DEFENDANT—PARTIES JOINED IN EJECTMENT—DISCLAIMER.

Where a person found in possession of part of the property on the service of a summons in ejectment was thereupon brought in as a defendant, and served as provided by the Pennsylvania statute, he becomes a party for all purposes, and, if a citizen of the same state as plaintiff, the cause is not removable by the original defendant unless a separable controversy is shown; nor is the filing of a disclaimer by such person in the federal court sufficient to sustain the removal, the question of his possession and consequent liability for costs and mesne profits remaining, which the federal court is not competent to try.

On Motion to Remand to State Court.

W. D. B. Ainey, for motion.

Charles H. Welles, opposed.

ARCHBALD, District Judge. This is an action of ejectment for three lots of land in the village of Dundaff, brought in the common pleas of Susquehanna county by T. J. Davies against

Helen E. Wells, and removed by the latter into this court on the ground of diverse citizenship. A motion is made by the plaintiff to remand the case: (1) Because the amount in controversy is not sufficient to give the court jurisdiction; and (2) because, as the case stood when the removal was made, there were two defendants of record, one of whom was a citizen of Pennsylvania, and it was not alleged or shown that there was a separable controversy as to the removing party.

○ The value of the land is declared in the petition for removal to exceed \$2,000, and, if there were nothing to call this in question, it would sufficiently establish the jurisdictional amount. It is argued that the controversy is not necessarily fixed by the value of the land, it being possible that only a fractional interest is involved, or that the action proceeds for the enforcement of purchase money or some other equity. But the plaintiff avers that he is the owner of the land, the title being in him, and not in the defendant; by which is to be understood the whole title, and not a part of it, which effectually disposes of any such contention. But the value put upon the property by the defendant is not conclusive, and, having been traversed by the plaintiff, who swears that it does not exceed \$1,500, it should have been established by the defendant by proof. 18 Encycl. Plead. & Pract. 374; *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682. This is a jurisdictional fact, which cannot be left in doubt, as it must be where, as here, we have nothing more than the petition and answer, the one contradicting the other. I should not remand the case, however, on this ground without giving the defendant opportunity to supply the required proof, if there were not also another reason for doing so, which it does not seem possible to overcome. Upon proceeding to serve the writ of ejectment, the plaintiff found one Mary J. Edwards in possession of one of the three lots, and thereupon added her name as a defendant, and served her, in compliance with the provisions of the Pennsylvania statute. Act July 9, 1901, § 1, subd. 10, cl. "a" (P. L. 617). This brought her upon the record as a party as effectually as if originally made so, and the case could not thereafter be proceeded with in any particular without reckoning with her. As, then, she is a citizen of Pennsylvania, unless the controversy with her is distinct and separable from that with Mrs. Wells the case is not removable. The return of the sheriff is to be taken as prima facie evidence that Mrs. Edwards is in possession as he states, although she denies it; and, if that be so, aside from the requirements of the statute, she cannot be regarded as a mere formal party, with no direct interest; a judgment in favor of the plaintiff, if she were not brought in, not entitling him to possession of that part of the property if she saw fit to resist.

Reliance is placed, however, on the fact that Mrs. Edwards has filed a disclaimer. But this does not necessarily eliminate her as a party, nor establish a separable or removable controversy as to Mrs. Wells (18 Encycl. Plead. & Pract. 217), whatever might be the case if Mrs. Edwards were shown to be a mere tenant (*Mitchell*

v. Smale, 140 U. S. 406, 11 Sup. Ct. 819, 35 L. Ed. 442). To produce any such result, it should at least have been filed in the common pleas while the case was there (although I am not prepared to say that even then, of itself, it would have done so), the right to a removal being determined by the state of the record at the time the removal is asked for. 18 Encycl. Plead. & Pract. 229. The only effect of it here and now is to narrow the issue, as to the disclaimant, to the question of possession and consequent liability for costs and mesne profits (*Bratton v. Mitchell*, 5 Watts, 70; *Ziegler v. Fisher*, 3 Pa. 365), which, having regard to the citizenship of the parties, this court is not competent to try.

The motion is allowed, and the case remanded.

In re HINTZE.

(District Court, D. Massachusetts. January 7, 1905.)

No. 9,257.

1. BANKRUPTCY—ADJUDICATION—RES JUDICATA—APPLICATION TO VACATE.

An adjudication in bankruptcy is *res judicata* of the question of the bankrupt's residence as against a creditor who has acquiesced in the adjudication and has proved his claim prior to filing a petition to vacate such adjudication because of the bankrupt's alleged nonresidence.

In Bankruptcy.

Coakley & Coakley, for bankrupt.
J. B. Warner, for creditor.

LOWELL, District Judge. Adjudication upon a voluntary petition in due form. Thereafter a creditor who had proved his debt moved to have the adjudication set aside upon the ground that the bankrupt had neither residence, domicile, nor usual place of business within the district, and so that the court had no jurisdiction in the case.

That a creditor, after adjudication upon a voluntary petition, may in some cases move to have the adjudication vacated because of the bankrupt's nonresidence, was decided by this court in *In re Scott*, 111 Fed. 144. But in that case the court expressly noted that the creditor had moved to vacate the adjudication as speedily as possible, and so had waived none of his rights. Here the creditor, by proving his claim, has assented to the adjudication, and has taken advantage thereof. The motion which he now urges is repugnant to his own action in the case. He contends that the bankrupt's residence so affects the jurisdiction of the court that nonresidence may be set up at any time by any person. But this is not so. Let us suppose that the court now tries the question of residence *de novo*, decides that the bankrupt resided within the district, and accordingly refuses to vacate the adjudication. The creditor cannot thereafter attack the adjudication on the ground of nonresidence, however jurisdictional a matter residence may be. As to him, the bankrupt's residence has become *res judicata*. So the adjudication in bankruptcy, here rendered upon a petition alleging resi-

dence, has made that residence *res judicata* for the purpose of this proceeding, and, as the proceeding was in rem, has determined the bankrupt's residence as against all the world. The injustice of binding a creditor, who has had no notice of the proceeding, requires the court to reopen the question at the instance of such a creditor, who has not, expressly or by implication, assented to the adjudication. In *re Scott*, *ubi supra*. Where, however, the creditor, by proving his claim, has acquiesced in the adjudication, it is unjust to permit him to dispute that which the court has adjudged with his implied approval. As soon might the Circuit Court permit a defendant to deny the plaintiff's citizenship in a suit depending thereon, after judgment rendered upon a declaration containing all suitable allegations.

The creditor's motion to vacate is dismissed, with costs.

In re ADAMS.

(District Court, D. Connecticut. January 12, 1905.)

No. 1,389.

1. **BANKRUPTCY OF TENANT—LEASES—RIGHTS OF TRUSTEE.**

Where, prior to the bankruptcy of a tenant, the landlord took no steps to regain possession of the premises for rent in arrear, on the appointment of the tenant's trustee, the latter was entitled to possession under the tenant's lease, as against lessees of the landlord subsequent to the adjudication.

2. **SAME—TERMINATION OF LEASE—ELECTION.**

The opening of a hole through the brick partition of certain leased premises, prior to the tenant's adjudication as a bankrupt, for no other purpose than to reach the only heat supply for water pipes connected with apartments occupied by other tenants, was insufficient to establish the landlord's election to terminate the bankrupt's lease for nonpayment of rent.

3. **SAME—INJUNCTION—REFEREE—POWERS.**

Where a trustee was entitled to possession of premises leased by the bankrupt as against lessees of the landlord subsequent to the bankruptcy adjudication, the referee had power to enjoin such subsequent lessees from interfering with the possession of the trustee or his assigns.

In Bankruptcy. On review of referee's order.

Slade, Slade & Slade, for petitioners.

C. S. Hamilton, for trustee.

PLATT, District Judge. In this case the rent for the month of November, 1904, amounting to \$85, was due on the 1st, and should have been paid on or before the 5th. Several demands were made by Mr. Hiller, the lessor, during those days, but the rent was not paid. Mr. Hiller, after the 5th, could have resorted to an action of summary process, and, so far as appears, would have succeeded in regaining possession of the premises. He did not take that course. On the contrary, he continued to demand the rent, and in this condition of affairs the lessee, finding himself financially embarrassed, filed a voluntary petition in bankruptcy, upon which an adjudication was had on November

22d. In due course a trustee was appointed, and the application, upon which it is claimed that the referee acted erroneously, demands that the trustee shall turn over the leased premises to Goldbaum and Rappaport, who, under a tentative agreement, were given leases subsequent to adjudication. The referee has denied the application, and has enjoined Goldbaum and Rappaport from interfering with the trustee, or his assigns, in the possession.

After due deliberation, I shall state my conclusions with reasonable brevity. The trustee takes the premises by operation of law, and the bankrupt has in no sense violated the provisions of the leases by his proceedings. Finding himself unable to pay his debts, he came to the court, as the Congress had given him the right to do. He offered up all his property which was not by law exempt, and asked for a discharge from his obligations. He assigned nothing, transferred nothing, conveyed nothing. Upon his showing, the court took the usual action. That action was a judgment, which, by its own force, instantly passed the title to the bankrupt's property to the trustee to be appointed. The interest of the bankrupt in the leasehold premises was intact, and to the trustee the right of possession passed. Their future disposition will be governed by the best judgment of the trustee, who will act, as all trustees should act, under the advice and guidance of the referee. Up to the time of the adjudication, the facts do not disclose that the lessor showed the lessee, by any decisive and unequivocal act, that he had elected to terminate the lease. Knocking a hole through the brick partition for no other purpose than to reach the only heat supply for the water pipes connected with the other tenants is not such an act. The tentative dealings with Goldbaum and Rappaport occurred after adjudication, and for that reason alone are shorn of all efficacy. In this view of the case, it seems unnecessary to apply any equitable powers to avoid forfeitures. Such powers will be put in operation, however, if in future cases a situation shall arise which invokes their use.

The petitioners are aggrieved by various actions of the referee. I cannot find that anything was done in the matter which warrants the complaint. The petitioners had their day in court, and were afforded every opportunity to present their facts and to apply their view of the law to the facts. The case turns upon facts which are conceded to be indisputable. In his injunctive order, I do not think that the referee exceeded the power which the act confers upon him. It would be a sad state of things, if in such emergencies the referee should be compelled to discover the judge in time to save the situation. The matter in hand was peculiarly within the knowledge of the referee, and the court will, in advance, thank all like officers who shall relieve it from an unnecessary burden.

In all respects the action of the referee is affirmed.

SINK et al. v. THE SIKES CO.

(Circuit Court, E. D. Pennsylvania. January 14, 1905.)

No. 30.

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINERY—ASSUMED RISK.

Where an immature servant was not aware of the unusual danger resulting to him from the defective condition of a saw at which he was directed to work, he did not assume the risk thereof.

2. SAME—QUESTION FOR JURY.

In an action for injuries to an immature servant caused by defective machinery, evidence held to require submission of the question of defendant's negligence to the jury.

Granting a New Trial.

Thomas James Meagher, for plaintiffs.

John O. Bowman, for defendant.

HOLLAND, District Judge. In this case there was evidence tending to show that the circular saw upon which the plaintiff was assigned to work was out of repair, as a result of which it was rendered considerably more dangerous to operate than machinery of this class usually is when kept in proper working condition. There is nothing to show that this boy was aware of the unusual danger resulting from this construction of the saw, and of course was not required to take other risks than those incident to the operation of machinery of that kind when in good repair. Other employes, of mature age and experience, had shortly prior worked upon this saw, and discovered this defective condition and reported it to the foreman.

It appears that the frame upon which it was mounted had been jarred loose from the floor, and instead of bolting it down it was tied with a rope. As a result of this and other reasons unexplained the saw wobbled laterally at times, and it was as a result of one of these jerks or lateral wabbles that the plaintiff received the injury. When this defective condition was reported to the foreman he simply said the saw was "all right," and directed the employé to proceed with his work. This could not be a structural defect with which the employer was not acquainted and for which he was not responsible. As a matter of fact it was a defect resulting from the lack of repair, and it was reported to him, and instead of repairing it the evidence shows he simply asserted that there was nothing wrong with the machine; and subsequent to the fact of this having been called to his attention the plaintiff, inexperienced in that sort of work, was placed at work on this machine in the defective condition, and as a result the injury occurred.

We are of the opinion that the court was clearly wrong in entering a nonsuit, in view of the evidence as it stood at the time the motion

¶ 1. Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.

See *Master and Servant*, vol. 34, Cent. Dig. § 603.

was made. The rule that an employer is only required to furnish the best-known machinery of the class in question was inapplicable to the facts upon which the nonsuit was entered.

Motion for a new trial sustained.

In re FLYNN.

(District Court, D. Massachusetts. January 7, 1905.)

No. 1,542.

1. BANKRUPTCY—COMPOSITIONS—TAXES.

Though Bankr. Act July 1, 1898, § 12b, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3427], requiring the bankrupt, on making a composition, to deposit the money necessary to pay all debts which have priority and the costs of the proceedings, makes no mention of taxes, the deposit must nevertheless provide for the payment of taxes, which by section 64 are made a preferred claim against the bankrupt's assets.

2. SAME.

Where a city tax was assessed against a bankrupt's property on May 1, 1899, prior to his being adjudged a bankrupt on August 8th, such taxes became "legally due and owing" on the day they were assessed, within Bankr. Act July 1, 1898, § 64, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], making such taxes a preferred claim against the bankrupt's estate, though the taxes were not payable until after the adjudication.

In Bankruptcy.

Parsons & Bowen, for city of Lynn.

Hurlburt, Jones & Cabot, for assignee of bankrupt.

LOWELL, J. Adjudication August 8, 1899. Trustee appointed September 9, 1899. Composition confirmed June 12, 1900. The deposit made provision for the payment of the tax on personalty assessed by the city of Lynn May 1, 1899. The bankrupt now asks for the return of that part of the deposit, contending that the tax is not due from his estate.

Section 64 of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], provides that the court shall order the trustee to pay all taxes legally due and owing. Section 12b, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3427], makes no mention of taxes, but, by analogy, the deposit must provide for their payment. The bankrupt cannot be permitted, by a composition, to distribute his property among his other creditors, leaving himself without means to pay taxes. Under the statutes of Massachusetts, I think that the tax here in question became "legally due and owing" May 1, 1899, though not payable until after the adjudication. Moreover, for aught that appears, the property here taxed came into the hands of the trustee, and, after being held by him for some nine months, made part of the deposit which the bankrupt now seeks to recover. In effect, the bankrupt is asking the court to protect property from taxation, leaving to the municipality only the personal liability of a man who, ex hypothesi, has been deprived of all means of present payment. This result is opposed

to the plain intent of the act. It follows that the bankrupt's petition for the return of his deposit must be denied, and the tax assessed by the city of Lynn must be paid therefrom.

Order accordingly.

REES et al. v. UNITED STATES (WIESE, Intervener).

(District Court, N. D. California. March 30, 1904.)

No. 1,620.

1. SHIPPING—SALVAGE—PROPERTY OF UNITED STATES—VESSELS—OWNERSHIP.

That two vessels were owned by the United States is not sufficient to deprive the master and crew of one of them of their right to salvage compensation for services rendered in saving personal property belonging to the United States from the wreck of the other.

F. R. Wall, for libelants and intervener.

Edward J. Banning, for the United States.

DE HAVEN, District Judge. Personal property of the United States on board of a vessel for transportation from one port to another is liable to a lien for salvage services rendered in saving it. *The Davis*, 10 Wall. 15, 19 L. Ed. 875. It also seems to be the rule that the master and crew of one vessel may recover salvage for services rendered the master of another vessel belonging to the same owner. *Lewis v. A Lot of Whalebone* (D. C.) 51 Fed. 916; *The Colima*, 5 Sawy. 181, Fed. Cas. No. 2,996. It would seem to follow, therefore, that the fact that the *Justin* and the *Yosemite* were both owned by the United States is not sufficient to deprive the libelants, who were members of the crew of the *Justin*, of their right to salvage compensation for services rendered by them in saving from the wreck of the *Yosemite* the personal property of the United States mentioned in the libel. I do not think the service in fact rendered by the libelants was of a very high order of merit. Indeed, there was very little, if any, personal danger connected with its performance; and an award of \$500, to be divided among the libelants and intervener pro rata, according to the monthly wages received by each, will be ample compensation for the service rendered.

Let such decree be entered.

THE ELLERICO.

(District Court, E. D. New York. December 30, 1904.)

1. SHIPPING—INJURY TO STEVEDORES—ABSENCE OF HATCH SUPPORT—RESPONSIBILITY OF SHIP.

Where the ship had been turned over to the stevedores, who had for some days been engaged in receiving and storing cargo, and had the hatches and their covers at their disposal, the ship could not be held responsible for an injury to a stevedore, caused by the want of a fore-and-after to support the hatch covers, in the absence of evidence that the ship, which had fulfilled its primary duty of originally supplying the fore-and afters, instead of the stevedores, had misplaced the fore-and-after.

2. SAME—NEGLIGENCE OF STEVEDORES.

Fault in the action of the stevedores or contracting stevedore in employing but one fore-and-after to support the hatch, in consequence of which a stevedore was injured, is no ground for action against the ship.

3. SAME—DIRECTIONS OF MATE.

Where it was obvious from the number, dimensions, and notches of a hatch cover that it did not belong on the part of the hatch over which the stevedores placed it, and, had they tried, they could have discovered that it belonged to another part of the hatch, one of their number could not hold the ship responsible for injuries caused by the failure of the cover to fit the hatch, although the ship's mate told the stevedore's foreman that the covers would fit.

4. SAME—NEGLIGENCE OF STEVEDORES.

Where some hatch covers had been repaired by fresh wood, so that the number indicating their proper places was obliterated, it was the duty of stevedores engaged in covering the hatches to ascertain, by trying the different covers, where they belonged.

5. SAME—LIABILITY OF SHIP.

The laying by stevedores of a hatch cover marked "XII" or "X" as the second cover, with a margin of but one-fourth of an inch support at one end, and no fore-and-after to support it, whereas there were covers at hand which would have added nearly a half inch to the support, was a reckless use of appliances, the consequences of which, resulting in injury to a stevedore, were not chargeable to the ship.

Convers & Kirlin (John M. Woolsey, of counsel), for claimant.
Walter L. Pate (William S. Maddox, of counsel), for libelant.

THOMAS, District Judge. The libelant was a stevedore employed by persons who had engaged to load the ship. The cargo was lowered through the upper hatch, and allowed to rest on the fore section of the between-decks hatch, and thence shifted into its proper position. The fore part of the hatch was covered by five hatch covers, placed athwartships. There was under them but one fore-and-after, placed at about one-third of the distance from the port side of the hatch. Another fore-and-after towards the starboard side of the hatch was required, but it was not in place. The athwartship iron beam was in place near the middle of the hatch, but there were no fore-and-afters in the after-part of the hatch, although several hatch covers were laid longitudinally across the after-part of the hatch, one end resting on the aft coaming and the other on the athwartship beam. It appears that several of the longshoremen were engaged in trying to find the remaining fore-and-afters, but after diligent search could not do so, and reported the fact to Downey, their foreman, who was on the upper deck. He, as claimed, called the attention of the third mate to it, who said that the fore-and-afters were down there. Thereupon the foreman told the men to look again, but upon their reporting that they could not find them Downey again spoke to the mate, who, as Downey affirms, stated that, "The hatches will fit anyway." Thereupon the men were ordered to put on the hatch covers, and they did in the manner stated. It appears that some nine hatch covers were put on—five athwartships in the manner stated and four lengthwise over the aftersection of the hatch—but that only a few of them had any numbers, and these were not consecutive numbers. Several of the hatch covers showed that they had been repaired recently, and bore no numbers whatever. The

morning after the accident all four of the fore-and-afters were found in the between-decks, and one of them was new. On July 24th the proctor for the libelant visited the ship and made some measurements. He found seven hatch covers out of the ten required to cover the hatches. Of these three had numbers. The distance across the fore section of the hatch was 13 feet 11½ inches, and across the after-part of the after-section of the hatch 13 feet 10½ inches. Of this distance 1½ inches on each side constituted the supports for the hatch covers. The second hatch cover from the forward part of the hatch bore the marks "LXII," meaning "Larboard XII." It was 13 feet 10¼ inches. The claimant contends that it read "LX." None of the other hatch covers was as much as half an inch longer than this one. If this cover were set back snugly in place on the port side of the hatch, it would be supported on the starboard side to the extent of only ¼ of an inch. If it had been placed in the after-section of the hatch, it would have fitted and filled the entire space lacking ¼ of an inch. After the work had been in progress for about an hour, during which time boxed sewing machines had been laden, a sling was lowered into the forward part of the hatch, and all of it was stowed away except one box, which the stevedores were handling, when another sling came down on the hatch, whereupon the starboard side of the second hatch cover slipped off, allowing the libelant to fall on the starboard side of the fore-and-after that was in place. At the time of the accident he was standing on the port side of the fore-and-after. The question is, what breach of duty was there on the part of the vessel? It is first to be observed that the hatch covers were not consecutively numbered, that some of them were without numbers, that there was no specific place for hatch cover "LXII," although the evidence of the ship is to the effect that this hatch was numbered "X." But, assuming that it was a promiscuous lot, was it the duty of the persons undertaking to use them to see that they were put on in places where they would fit? For instance, it was not proper to put the hatch cover numbered "XII" or "X," and in length 13 feet 10¼ inches, across a space 13 feet 11½ inches, so that it would receive a support of but ¼ of an inch on one side, and to receive on such hatch cover the slings of cargo in addition to the weight of the men working there. The ship had been turned over to the contracting stevedores, and for several days they had been engaged upon her. Before beginning the work on the between-decks, the stevedores had been receiving and stowing cargo in the hold. Hence the hatch and its covers had been at their disposition, as had been the other cargo portions of the vessel. When the stevedores wished to stow cargo in the between-decks, it was necessary to replace the hatch covers over the hold. Three fore-and-afters were missing. Search did not discover them. They were present the next day. One of them was new. There is no evidence that the ship was responsible for the undiscovered fore-and-afters. They and the hatches had been in the presumptive possession of the stevedores for the purpose of loading, and the inference that the stevedores misplaced them is stronger than that the ship's fault caused their disappearance. Therefore no recovery by the libelant can be based upon the absence of the fore-and-afters. That they were on the ship is certain. So the

primary duty of supplying them had been fulfilled. Some one had misplaced them. There is no presumption that the ship did it. The men laid five hatch covers across the open hatch. They used but one fore-and-after. The plank worked out and fell, as, of course, it must fall. If there was fault in employing but one fore-and-after, it was the fault of the contracting stevedore or the stevedores, or both. The foreman told the men to do it. They did it. If there was danger and negligence in view thereof, the ship should not respond for the fault of the stevedore. But to this the libelant answers that the hatch cover would not have fallen if it had fitted, and the third mate told the foreman that the covers would fit. Assuming that the mate did so state, he did not state that any cover would fit in any place throughout the entire hatch where it might happen to be laid down. He did not authorize covers to be laid by chance. No stevedore could justly infer that. Each stevedore knew that there is an order in which the covers of a hatch must be laid. When the men laid the hatch cover marked "LXII" or "LX" as the second cover from the fore part of the hatch, they knew it did not belong there, (1) because it was marked for some other place, (2) because it was notched to fit into stanchions aft, (3) because they could see that it lapped but one-fourth of an inch on its support. Had they tried it in the after-part of the hatch, according to the evidence, they would have found that it fitted the space, less one-fourth of an inch, and was adjustable to the stanchions. It is true but ten hatch covers were required, and that a cover marked "LXII" could not be placed as the twelfth cover. But it was just as certain that it was not the second cover, while a trial of it aft would have resulted in suitably placing it, and a trial of some of the other hatches at the second place would have given a full support on the port side, and a three-fourths of an inch support on the starboard side. But it is urged that the ship did not number the hatches consecutively, and some not at all; hence their order could not be determined by the number. The evidence shows that the absence of numbers in some cases came from repairing the hatches, so that the numbers were cut out. But the men knew this. It was their duty to look for the numbers. Had they done so, they would have found that in some cases they were absent, and the fresh wood in the places of repair gave the reason. There was all the more reason for ascertaining where each cover belonged. As there were no numbers to direct, trial of the pieces alone could determine. But the laying of a cover marked "XII" or "X" as the second cover, with a margin of one-fourth of an inch support at one end, and no fore-and-after at all on that side, while there were covers that would have added nearly a half inch to the support, was a reckless use of appliances that is not chargeable to the ship. If the stevedore ordered it, he is the person to be accused.

The libel should be dismissed.

GEBBIE & CO. v. REVIEW OF REVIEWS CO.

(Circuit Court, E. D. Pennsylvania. January 12, 1905.)

No. 23.

1. FEDERAL COURTS—REMOVED CAUSES—JURISDICTION—MOTION TO DISMISS.

The filing of a petition by a defendant in a state court to remove the cause to the proper Circuit Court of the United States does not prevent defendant, after the case is removed, from moving in the federal court to dismiss it for want of jurisdiction of defendant's person, he having appeared specially in the federal court for that purpose.

2. SAME—RESIDENCE.

Where both plaintiff and defendant, in a suit in a state court, were foreign corporations, but were doing business within the state, and were amenable to its laws, but neither were residents of the judicial district of the federal court to which defendant sought to remove the cause, for the purpose of avoiding its liability to plaintiff in the state court, the federal court would not assume jurisdiction without the consent of both parties.

Overruling a Motion to Dismiss and Remanding Suit to the State Court.

John Creth Marsh and V. G. Robinson, for complainant.

Frederic R. Kellog and Julius C. Levi, for respondent.

HOLLAND, District Judge. This is a bill in equity, filed by the plaintiff on September 24, 1904, in the court of common pleas of Philadelphia, No. 4, a state court of Pennsylvania, against the defendant company. Service was had upon one Bedford for the defendant at Philadelphia on October 7, 1904. A bond and petition for removal were filed in the said court, and an order thereupon made removing this cause, and the record was filed in this court on November 4, 1904. The petition for removal to the Circuit Court of the Eastern District of Pennsylvania sets forth that the controversy is one involving more than \$2,000, exclusive of interest and costs; and that Gebbie & Co., plaintiff, is a corporation organized under the laws of the state of New Jersey, and a citizen of said state; and that the defendant, the Review of Reviews Company, was at the time of the commencement of this suit, and still is, a corporation organized under the laws of the state of West Virginia, and a citizen of the said state, and no other state; and, further, that the time to answer or appear herein has not expired, and no answer or appearance has been filed; and generally prays that "this suit may be removed into the Circuit Court of the United States to be held in the Eastern District of Pennsylvania, pursuant to the statutes of the United States in such case made and provided, and that no further proceedings may be had herein in this court." Counsel for the defendant appeared specially for the petitioner for the purpose of the removal of the cause, and not otherwise, and subsequently, upon the cause being removed to this court, appeared specially for the purpose of moving to dismiss the cause, first, for want of jurisdiction of the person of the defendant, and, second, for the reason that no legal service was had upon the defendant in the state court. This motion was filed November 4, 1904, and following this the plaintiff, on November

16, 1904, filed a petition, and a rule was granted to show cause why the case should not be remanded to the state court. Both motions were argued together.

The bill filed in the state court sets forth that Gebbie & Co., the plaintiff, is a corporation of the state of New Jersey, and was duly registered under the laws of the state of Pennsylvania on the 6th day of August, 1904, and has been carrying on its said business of manufacturing and publishing books in the city of Philadelphia, since it has been so registered, in its place of business at 714 Spruce street, in the said city; and that the Review of Reviews Company, defendant, is a corporation organized and existing under the laws of the state of West Virginia, doing business in Philadelphia and vicinity and throughout the United States, having an agent and an officer for the transaction of business in Philadelphia and vicinity at 701 Lippincott Building, Philadelphia, and is engaged in selling books, and in the publication of a certain monthly magazine known as *The Review of Reviews*. The question of legal service upon the defendant is raised by an affidavit filed in this court, in which it is stated that Bedford, upon whom service was made, was not an officer or director of the defendant company, but was employed at a salary, having no general agency whatever, although he was called "manager." It is further stated the corporation was not registered as required by the Pennsylvania statute, and that the only business conducted in Pennsylvania was that under the management of Bedford, who hired canvassers and salesmen to canvass the citizens of Philadelphia and vicinity to find purchasers for books which were sold by the defendant company, and to instruct these canvassers with regard to their duties. The company kept a small stock of goods in Philadelphia in the possession of Bedford, and he delivered from this stock to fill the orders of canvassers, and then would order from the New York house to replace the goods sold. The company kept only such accounts in Philadelphia as might be due from book purchasers. The record filed in this court does not show upon whom service was had in the state court (this only appears from the affidavit filed), nor the form of the return made thereto. As neither the plaintiff nor defendant has furnished this record, it is presumed that it is in accordance with the practice in the state courts.

For the purposes of this case, and upon the admissions of the defendant itself in its affidavit, it is evident it was doing business in this state, in the city of Philadelphia, to an extent to subject it to a suit in the state courts under the ruling in *Hagerman v. Empire Slate Company*, 97 Pa. 534. Both of the parties to this suit are corporations. One is a citizen of New Jersey, the other a citizen of West Virginia, and neither a citizen and resident of this judicial district. While the diverse citizenship of the plaintiff and defendant exists, which gives the federal courts jurisdiction of the case, yet the court in this district cannot take jurisdiction without the consent of both plaintiff and defendant, and neither has waived its right to object to the jurisdiction of the Circuit Court of this district. While it is true the defendant presented its petition for the purpose of removing the case here, it only entered its appearance specially for that purpose; and it has been decided in *Wabash Western Railway v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126,

41 L. Ed. 431, that the filing by the defendant in an action in a state court of a petition for its removal to the proper Circuit Court of the United States does not prevent the defendant, after the case is removed, from moving in the federal court to dismiss it for want of jurisdiction of the person of the defendant in the state court or in the federal court; and in *Foulk v. Gray* (C. C.) 120 Fed. 156, it is held that a suit brought in a court of a state of which neither party is a resident is not removable into a federal court on the ground of diversity of citizenship under the judiciary act of March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, pp. 508, 509], unless both plaintiff and defendant waive objection to the jurisdiction of such court. Notwithstanding the fact that both the plaintiff and defendant are foreign corporations, they are in this state doing business, and amenable to the laws thereof in the transaction of their business.

It is very evident that the object of the defendant in presenting its petition for removal to this court, and then moving to dismiss for want of jurisdiction, was to avoid its liability to the plaintiff in the state court, and by this means an effort is made to use the right of a removal for the purpose of avoiding its liability within the jurisdiction of the state courts. The right of removal from the state to the federal courts under the acts of 1887 and 1888 was not intended to enable foreign corporations doing business in a state, and amenable to the laws thereof, to use the latter in this way to defeat the state jurisdiction.

The motion to dismiss is overruled, and the case is remanded to the court of common pleas No. 4, Philadelphia county, state of Pennsylvania.

ANGLO-AMERICAN LAND MORTGAGE & AGENCY CO., Limited, v.
CHESHIRE PROVIDENT INSTITUTION.

(Circuit Court, D. New Hampshire. December 29, 1904.)

1. JUDGMENT AGAINST BANK—EFFECT OF LIQUIDATION PROCEEDINGS UNDER
STATE STATUTE AS TO STAYING EXECUTION.

Where, pending an action in a federal court against a New Hampshire bank, an assignee was appointed by the state court under Pub. St. N. H. 1891, c. 162, in whom the assets of the defendant bank were vested, and thereafter judgment was rendered against it by the federal court, in view of the uncertainty as to the rights of the parties under such statute, and especially of the fact that defendant has a clear remedy at common law against any wrongful enforcement of the judgment, the federal court will not interpose summarily by denying an execution to plaintiff which might be prejudicial to his rights.

On Motion to Revoke Order Staying Execution.

Omar Powell and H. G. Sargent, for plaintiff.

J. M. Mitchell, O. E. Cain, and J. S. H. Frink, for defendant.

PUTNAM, Circuit Judge. This is the sequel of a suit at common law, the more important points of which are stated in the opinion of this court in the same suit of July 27, 1903 (124 Fed. 464).

and in that of the Circuit Court of Appeals passed down on August 11, 1904 (132 Fed. 968), affirming the judgment for the plaintiff rendered in accordance with the opinion first named. The defendant is what is ordinarily known as a savings bank. The plaintiff sued as a creditor, and not as a depositor. The only defense at the trial was that, after this suit was brought, an assignee had been appointed in accordance with section 15, c. 162, Pub. St. N. H. 1891, found at page 461. In connection with section 1, which clearly extends its provisions to savings banks, chapter 162 provides that, whenever the bank commissioners judge it "to be necessary for the public safety," they may apply to the Supreme Court, or a justice thereof, to appoint an assignee of the property and effects of a bank; and thereupon the assignee shall be appointed, and the orders and rules by which he shall be governed shall be prescribed. The statute further provides that the assignee shall take possession of all the estate of the institution, and recover the same wherever found; also that the court may restrain all proceedings at law brought by any creditor against the institution, and may order notice requiring all creditors to prove their claims; and it further provides how the property of the institution shall be distributed—First, to the expenses; second, to payment of bills (that is, circulating bills); third, to payment in equal proportion of all debts; and, fourth, to a division of the balance among the stockholders. Many of these expressions are inapt for savings banks, especially so except as depositors stand qua stockholders, as undoubtedly they do for the purposes of the statute.

Whether the assignee provided for by the statute is an officer of the court, or holds an official position, and whether his possession of the assets is to be regarded as possession by the court, has not been precisely determined, and need not be considered for the present purposes, because, whichever way the questions may be answered, it is certain that no judgment which we might render, and no execution which we might authorize, can be enforced against the assets in the possession of the assignee, at least until either he, or the court or justice appointing him, shall have actually refused to permit a plaintiff who has obtained a judgment from us to share equitably with other creditors, if the plaintiff has no attachment, or to receive the benefit of the lien given him by attachment if he has one, and the same is still in force. In either such contingency the present plaintiff in this court would probably find some remedy within our power to give him, or else by writ of error from the Supreme Court of the United States to the state court or by appeal; but until such a practical condition of affairs arises there is no occasion to consider the precise nature of the assignee's office or of his title or possession.

When we entered judgment for the plaintiff, we expressly reserved all questions as to an execution in the following phraseology:

"It" (meaning this court) "also finds that such proceedings of the Supreme Court are immaterial, unless on the question of the plaintiff's right to an execution, which question is reserved."

The order for judgment also provided "that no execution issue therefor until further order." Thus we held in our own hands, for the time being, the matter of the issue of an execution, expressing no views whatever in reference thereto. Properly speaking, the question now before us arises out of this reservation, although it comes in the shape of a motion by the plaintiff that we shall order judgment in accordance with the mandate of the Circuit Court of Appeals, that the stay of execution, of which we have already spoken, be revoked, and that "plaintiff have execution in accordance with the law and practice." To this motion we have no formal answer, no statement of the precise condition of facts in this particular case, no proofs, and no proposition on either one side or the other except general citations having some bearing with reference to the construction to be given to the very crude and indefinite provisions of Pub. St. 1891, c. 162. It appears by the officer's return on the writ of attachment that certain assets of the defendant corporation were attached, and there is also an indirect suggestion that that attachment was dissolved by a bond given to pay any judgment recovered by the plaintiff. Yet, whether there are assets on which the plaintiff now claims a lien by virtue of its attachment; whether, if an execution issue, it should be qualified so as to reach only those assets in accordance with the practice which the federal courts have found themselves capable of, but as to which some of the state courts have not been able to mold their processes as to the federal courts; whether the attachment has been dissolved, and a bond given, so that the plaintiff needs no execution; whether the defendant would be damnified, or even embarrassed, by the issue of an execution—are questions which the record does not assist us in answering. Further, chapter 162 of the Public Statutes makes no express provision avoiding attachment liens, and there are no judicial decisions holding that dissolution of such liens are the inevitable consequence of the scheme provided by statute. Moreover, the proceedings which resulted in the appointment of an assignee contained nothing specifically pointing out their nature and purpose; and, inasmuch as such proceedings may be inaugurated whenever the bank commissioners and the court deem it "necessary for the public safety" that they should be, it is impossible to say whether any question of insolvency exists, or what the governing fact is by which the relations of all concerned should be determined.

We have had no assistance on the solution of any of these particular difficulties. No reported decision cited to us solves any of them; and on all sides we may well say that we encounter grave doubts, in addition to those spoken of by the Circuit Court of Appeals in the opinion to which we have referred. If we merely revoke so much of the proceedings as reserved execution, we leave matters to take their ordinary course. In that event we will have failed to interpose in a summary manner. Inasmuch as the questions involved in this motion necessarily arise after judgment, and are not issuable before it, the parties have a clear remedy, if we do not interpose summarily, either by *audita querela* (Bacon's

Abridgment [Am. Ed. 1868] vol. 1, 510), or by mandamus or by prohibition (*McCargo v. Chapman*, 20 How. 555, 557, 15 L. Ed. 1021; *Barber Co. v. Morris*, 132 Fed. 945, 952). If we interpose summarily it is, on the present record, impossible for us to understand the extent of the detriment we might do the plaintiff; and in view of *McCargo v. Chapman* we cannot even say that it would be entitled to a writ of error. *United States v. Abatoir Place*, 106 U. S. 160, 162, 1 Sup. Ct. 169, 27 L. Ed. 128; *Loeber v. Schroeder*, 149 U. S. 580, 585, 13 Sup. Ct. 934, 37 L. Ed. 856. On the whole, if we proceed summarily it is impossible for us to forecast to what extent we will prejudice or damnify the rights of the plaintiff, but if we leave events to the normal course of the common law no serious detriment can arise to either party. Therefore we ought to regard the ordinary rule with reference to discretionary action in a summary way, which has been especially applied to proceedings where parties can obtain relief by *audita querela* (*Bacon's Abridgment* [Am Ed. 1868] vol. 1, 514), and let the law take its course.

There will be an order that all orders and directions heretofore entered staying or delaying execution be revoked.

PORTER V. DELAWARE, L. & W. R. CO.

(Circuit Court, D. New Jersey. January 6, 1905.)

1. INFANTS—INJURIES—EARNING POWER—EXPENSES.

Where, in an action for injuries by an unemancipated infant, it appeared that she would fully recover long before she became of age, she was not entitled to damages for loss of earning power, or for physicians' or nurses' charges.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 234, 240.]

2. SAME—DAMAGES—EXCESSIVENESS—NEW TRIAL.

Where, in an action for injuries to a girl 16 years of age, she had nearly recovered at the time of the trial, nearly a year after the accident, and she was neither entitled to recover exemplary damages, nor for loss of time or physicians' or nurses' services, a verdict in her favor for \$3,500 was excessive, and should be reduced to \$1,750, as a condition to refusing a new trial.

In Tort. On rule to show cause why verdict should not be set aside, and a new trial granted.

Eugene Emley, for plaintiff.

Robert H. McCarter, for defendant.

LANNING, District Judge. On November 12, 1903, the plaintiff sustained personal injuries as she was passing along Ogden street, in Newark, under a railroad bridge of the defendant company. The bridge broke, with a locomotive upon it, and the plaintiff was injured by the portions of the bridge which fell upon her. She was then not quite 16 years of age. Although she was then engaged in employment in Newark, her father resided in Paterson, where her home was, and she was unemancipated. The trial was

had before a jury on November 9, 1904. The proofs in the case showed that at the time of trial, just about a year after the accident, she had nearly recovered from the injuries received, and that there was no doubt that she would fully recover therefrom long before arriving at the age of 21 years. In such circumstances, she was not entitled to recover anything for loss of earning power, or for physicians' or nurses' bills. The right of action for these items is in her father. All she can recover for is her pain and suffering. On this theory the case was submitted to the jury. The jury rendered a verdict in favor of the plaintiff against the defendant for \$3,500, and the defendant, on a rule to show cause, now moves to have the verdict set aside and a new trial granted.

After a careful consideration of the case, I have concluded that the verdict is excessive. It is true that no rule of law can be stated whereby the measure of pecuniary compensation for pain and suffering can be definitely fixed. They have no market value, and the allowance therefor must be left to the jury, subject only to the provision that the jury must not allow themselves to be controlled by sympathy, passion, or prejudice. In this case I am constrained to believe that the jury have unwittingly been influenced by considerations that ought not to have moved them. The case is not one for exemplary damages. A fair award for the plaintiff's pain and suffering is all they could have legally made.

In *Morgan v. Illinois & St. Louis Bridge Company*, Fed. Cas. No. 9,802, an action was brought by a child four years old against the bridge company for personal injuries received from a fall into an unguarded tunnel. The child's thigh bone was broken, but, the fracture having been well healed, and the leg neither shortened nor deformed, the master in chancery, to whom the case had been referred, concluded that the child could recover for nothing except his pain and suffering. In the course of his report, the master said:

"Will damages be given on account of physical suffering, where there has been no direct pecuniary loss? Upon this point I have some difficulty; but the tendency of the courts seems to be to sustain verdicts where the plaintiffs receive no substantial injury except physical pain and mental suffering, unless the verdicts are so excessive as to create a presumption that the jury acted from passion or prejudice."

He recommended a decree that the plaintiff recover \$500 and costs. Exceptions were filed to this report, but Circuit Judge Dillon overruled the exceptions and sustained the report.

Taking as my guide this case, which I think is a fair one, I am forced to conclude that the verdict in the case at bar cannot be sustained. A reasonable allowance for the plaintiff's pain and suffering cannot, in my judgment, exceed the sum of \$1,750. If the plaintiff is willing to accept that sum, the verdict may stand for \$1,750 instead of \$3,500. Otherwise it will be set aside, and a new trial granted.

In re BURTON BROS. MFG. CO.

(District Court, N. D. Iowa, Cedar Rapids Division. January 16, 1905.)

No. 472.

1. BANKRUPTCY—LABOR CLAIMS—PREFERENCE—STATE LAWS.

Code Iowa 1897, § 4019, provides for a preference of claims for labor earned within 90 days next preceding the seizure or transfer of property belonging to the master, etc., to the extent of \$100, and section 4020 provides that any employé desiring to enforce such claim at any time after seizure of the property, and before sale is ordered, shall present to the officer levying on the property, or to the receiver, trustee, assignee, or court having custody thereof, or from which the process issued, a statement under oath, showing the amount due after allowing all just credits, etc. *Held*, that where labor claimants procured executions to be levied on the bankrupt's property on judgment recovered on their claims, which executions were dissolved by the bankruptcy adjudication, as provided by Bankr. Act July 1, 1898, c. 541, § 67c (1), 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], but claimants failed to present any statement of their claims, as required by Code Iowa 1897, § 4020, they were not entitled to preferred payment from the bankrupt's estate as against unsecured creditors.

2. SAME—PERFORMANCE OF LABOR—TIME.

Where only a part of a claim against a bankrupt for labor was for services performed within three months prior to the commencement of the bankruptcy proceedings, the claimant was only entitled to priority for such part as was earned within such time, under Bankr. Act July 1, 1898, c. 541, § 64, subd. b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], providing for the priority of wages due to workmen earned within three months before the commencement of bankruptcy proceedings, etc.

In Bankruptcy.

On petition of Stanley Zbanek and Frank Robins for review of orders of referee denying to each of them priority of payment of their respective claims from the bankrupt estate.

The Burton Bros. Manufacturing Company was adjudged bankrupt by this court upon a petition filed August 20, 1904. Each of the petitioners filed a claim against that estate upon a judgment not exceeding \$100 in his favor against the bankrupt dated June 18, 1904, when it was insolvent. The proof of each claim shows that the judgment was upon a debt due the petitioners, respectively, from the bankrupt, for labor performed within 90 days next preceding the date of the judgment; that an execution was issued on each judgment June 18, 1904, and placed in the hands of an officer, who on the same day levied the executions separately upon certain property of the bankrupt; that \$20 of the claim of Zbanek was earned within three months next preceding the filing of the petition in bankruptcy; that the remainder of such claim, and all of the Robins claim, was earned more than three months before the filing of such petition. The referee allowed the petitioner Zbanek priority of payment as to \$20 of his claim, and refused to so allow the remainder thereof, or any of the Robins claim. Each of the petitioners ask that the orders of the referee be reversed, and that he be allowed priority of payment of his entire claim.

Crosby & Fordyce, for petitioners.

REED, District Judge. The petitioners base their right to priority of payment of their respective claims from the bankrupt estate upon sections 4019, 4020, 4021, and 4022 of the Code of Iowa of 1897, which are as follows:

"Sec. 4019. When the property of any company, corporation, firm or person shall be seized upon by any process of any court, or placed in the hands of a receiver, trustee or assignee for the purpose of paying or securing the payment of the debts of such company, corporation, firm or person, the debts owing to employes for labor performed within the ninety days next preceding the seizure or transfer of such property, to an amount not exceeding one hundred dollars to each person, shall be a preferred debt and paid in full.

* * *

"Sec. 4020. Any employé desiring to enforce his claim for wages at any time after seizure of the property under execution or writ of attachment and before sale thereof is ordered, shall present to the officer levying on such property or to such receiver, trustee or assignee, or to the court having custody of such property, or from which such process issued, a statement under oath, showing the amount due after allowing all just credits and set-offs, and the kind of work for which such wages are due, and when performed.

* * *

"Sec. 4021. [Provides for a contest of the labor claims.]

"Sec. 4022. Claims of employes for labor, if not contested, or if allowed after contest, shall have priority over all claims against or liens upon such property, except prior mechanics' liens for labor in opening or developing coal mines as allowed by law."

These sections give the right and prescribe the terms upon which a wage-earning employé may have priority of payment of a debt owing to him by his employer for labor to the amount of \$100 from the property of such employer. The right so given is statutory, and while the statute should be liberally construed so as to effect its purpose it must be substantially complied with or the right is not secured. In order that the employé may have such priority of payment of his debt, the property of his employer must have been (1) seized upon process issued by a court; or (2) placed in the hands of a receiver, trustee, or assignee for the purpose of paying or securing the payment of the debts of such employer; (3) the employé must then present either to the officer making the levy, the court from which the execution issues, or which has custody of the property, or the receiver, within the time stated, the sworn statement required by section 4020. These sections, as construed by the Supreme Court of Iowa, when complied with, give priority of payment to the wage-earning employé, to the amount stated, from the property of the employer which has been so seized upon execution, or placed in the hands of a receiver, trustee, or assignee, over all other liens upon such property (except certain mechanics' liens) and other creditors of the employer. *Reynolds v. Black*, 91 Iowa, 1, 58 N. W. 922; *St. Paul Title & Trust Co. v. Diagonal Coal Co.*, 95 Iowa, 551, 64 N. W. 606; *Haw v. Burch*, 110 Iowa, 234, 81 N. W. 460.

Neither of the petitioners ever presented to the officer making such seizure, or to the court from which the execution issued, the sworn statement required by section 4020 of the Code, nor in any other manner complied with the provisions of the above-named sections. They apparently relied solely upon the levy of their executions upon the property to secure payment of their judgments, and nothing further seems to have been done after such levy and prior to August 20, 1904, when the petition in bankruptcy was filed against the judgment debtors. The adjudication of bankruptcy upon that petition dissolved the liens of the petitioners acquired by the levy of their executions upon the property of

the bankrupt. Section 67c (1), Bankr. Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

To have secured and preserved the right or liens given them by the state statute the petitioners should have complied with the provisions of that statute, and had they done so such right or lien might have been recognized and enforced by the court of bankruptcy. Section 64 b (5), Bankr. Act, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]. Not having done so, the only lien they had was that acquired by the seizure of the property under their executions. When such liens were dissolved by the adjudication of bankruptcy, they were left upon a level with the other unsecured creditors of the bankrupt.

The debt of each of the petitioners (except as to \$20 of that due Zbanek) is for labor performed more than three months before the commencement of the bankruptcy proceedings. It therefore cannot be allowed priority of payment under the bankruptcy act, except as to such \$20 (section 64b [4], 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), and this was so allowed by the referee. It follows that the order of the referee in each case must be and is approved.

THE NAPOLITAN PRINCE.

(District Court, E. D. New York. December 1, 1904.)

1. SHIPPING—LIABILITY OF VESSEL—INJURY TO PASSENGER—NEGLIGENCE OF PHYSICIAN.

The errors, mistakes, or negligence of a ship's doctor in caring for a passenger are not imputable to the ship, where it was not guilty of negligence in selecting him.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 543.]

Charles C. Smith, for libellant.

Convers & Kirlin (John M. Woolsey, of counsel), for claimant.

THOMAS, District Judge. The libellant, a woman of 50, was a passenger on the English steamship *Napolitan Prince*. One evening the forefinger of her right hand was caught in a door. The next morning a doctor on the ship properly dressed it, but, as she says, refused to give it any further attention, although she twice called upon him thereafter, he telling her that it would be attended to when she arrived in New York, where the ship did arrive five days later. The accident happened on the 18th, and the port was made on the 23d of December. Upon arrival the libellant went to Ellis Island, and was placed under the care of a surgeon, her hand dressed, and an operation was performed the next day. The wound had become infected, with the result that after the operation the finger was bent and stiffened. The libellant claims that this interferes with her occupation as a seamstress. The law requires the Italian government to furnish a doctor for each ship. The ship, as required by the British law, also had its own physician, who testified that he did not attend the woman, and that he limited his attention to any of the passengers to carrying out the directions of the official doctor. The libellant describes the physician as a stout man,

which does correspond to the description of the ship's own doctor, as claimed, while the official doctor is said to have been a lean man; and the libellant's daughter, nine years of age, and a fellow steerage passenger give evidence tending to show that the physician selected by the ship was the attendant. It is not necessary to decide this question, nor whether the physician was guilty of negligence. Even so, his errors, mistakes, or negligence are not imputable to the ship. It is not shown that the ship was negligent in selecting him. The authorities are collated in *Thomas' Negligence* (2d Ed.) p. 606.

THE STEAM DREDGE NO. 1.

MORRIS & CUMMINGS DREDGING CO. v. NELSON.

(District Court, D. Maine. October 20, 1903.)

1. ADMIRALTY—DIVISION OF DAMAGES—CONTRIBUTORY FAULT.

The admiralty rule of dividing damages when they arose from the concurrent fault of both parties does not apply in an action for personal injuries, where, although libellant had placed himself in a position of some danger on board a dredge, where he was performing his duty as a government inspector, his injury resulted from the subsequent negligence of those operating the dredge, of which libellant had no knowledge, and which he had no reason to anticipate. In such case the injury was not due to libellant's fault, but to that of the dredge, which was its proximate cause.

In Admiralty. On petition for rehearing.
For former opinion, see 122 Fed. 679.

HALE, District Judge. The court has fully considered the claimant's petition for a rehearing of this cause, and the very able and exhaustive arguments of counsel. It has carefully studied the cases cited and all the authorities that can be found on the subject to which the petition relates. The learned counsel for claimant earnestly insists that on the facts found the damages should have been divided; but the court, after a further and very careful examination of the whole case, is still of the opinion that the injury was due to the fault of the dredge and those in charge of it, and was not due to any fault of the libellant concurring with that of the crew of the dredge. The reasons for this decision have been already fully stated. The court is of the opinion that the admiralty rule of dividing damages when those damages are the concurrent fault of both parties does not apply to this cause, as the court has already found that the libellant's injury was not the result of his fault.

The petition for rehearing is denied. A final decree in accordance with this view may be filed and entered forthwith.

THE STEAM DREDGE NO. 1.

MORRIS & CUMMINGS DREDGING CO. v. NELSON.

(Circuit Court of Appeals, First Circuit. December 22, 1904.)

No. 510.

1. CONTRIBUTORY NEGLIGENCE—RULE IN ADMIRALTY—DIVISION OF DAMAGES.

Libelant, who was rightfully on a dredge as a government inspector of the work, was injured by the breaking of a bitt around which one of the lines used for changing the position of the dredge passed before reaching the winch head, such breaking being the result of the negligence of the man in charge of the winch in failing to throw it out of gear after the dredge had been previously moved, or to see that it was out of gear when the signal was given to turn on the steam again for the purpose of raising the spuds which held the dredge in position while at work; the consequence being that the winch head was revolved before the dredge had been released from her fastenings, and the bitt gave way under the strain put upon the line. Libelant was seated on the bitt and within the bight of the line which struck him and caused the injury. While the man operating the winch knew the position of libelant, it did not appear that he had in mind at the time the steam was turned on the fact that the winch was in gear, so as to be chargeable with recklessness or perverseness, or with having acted with a full apprehension of all the conditions. *Held*, that the negligence of libelant in unnecessarily placing himself within the bight of the hawser, and which continued until the accident occurred, was a concurrent cause of the injury, and that under the rule in admiralty the damages should be divided.

2. SAME.

Held, also, that *Davies v. Mann*, 10 M. & W. 546, has no application to this case.

Appeal from the District Court of the United States for the District of Maine.

George E. Bird (William M. Bradley, on the brief), for appellant.

Benjamin Thompson (William H. Looney, on the brief), for the appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This was a libel brought in the District Court for the District of Maine against Steam Dredge No. 1, a vessel engaged in dredging, under a contract with the United States, in Cape Porpoise Harbor, in the district of Maine, for injuries to William Nelson on the 4th day of September, 1900. The substance of the allegations of the libel is that at the time of the injury Nelson was employed by the United States, aboard the dredge, as an assistant inspector in regard to improvements then being made at Cape Porpoise Harbor; that as a part of his duties it was necessary for him to observe whether the work was being executed in accordance with the plans and specifications, and, as incidental thereto, to note the shifting of the position of the dredge from time to time; that about 4 o'clock on the afternoon of the day in question he was sitting on a double bitt for the purpose of observing a change then being made; that the quarter line

used in moving the dredge came in over the port quarter, was carried around the forward part of the double bitt on which he was sitting, and then inboard to a steam gypsy; that while the location of the dredge was thus being changed, either by reason of the heavy strain put on the quarter line by the use of the steam gypsy or by reason of the insecure condition or the insufficiency of the bitt, the bitt suddenly broke off at the deck, thereby causing the line to sweep over the front side of the deck, striking Nelson, and throwing him into a scow alongside; that the injury was caused wholly by the negligence of the crew of the barge in subjecting the quarter line to an improper strain, and by reason of the weak and insecure condition of the bitt; and that it was without negligence on the part of Nelson. We will refer again to such of these allegations as are disputed and also are material.

The barge, while at work, was held in position by spuds in the usual way; the outboard end of the quarter line which was used in moving her run out to an anchor, or some other permanent object, and it was kept taut to assist in holding the barge in position. The barge was moved by the use of this and other lines. The inboard end of the quarter line was run over a gypsy head, operated by a steam engine of considerable power. Before putting the gypsy head in gear, it was customary to raise the spuds, so that the dredge could be moved with the assistance of the engine. On this occasion the engine was started before the spuds were raised, with the gypsy head in gear, and the result was that the bitt broke off, as stated in the libel.

The answer alleges that the claimant of the dredge is ignorant for what purpose Nelson was sitting on the bitt. It denies it was necessary for him to sit there in the discharge of his duties. It denies that the injury was caused by the negligence of the crew in subjecting the quarter line to an improper strain, or by the weak and insecure condition of the bitt. It alleges that Nelson was, at the crucial time, in a sitting position on the bitt, facing forward, with his feet and legs on the forward side of the bitt and within the bight of the quarter line. Also, that the breaking of the bitt and the consequent injury of the libelant were not caused by the negligence of any officer or any of the crew of the dredge, or of the owners thereof, but wholly by the negligence of the libelant in assuming an unnecessary position on the dredge, and that he, as a man of long experience as a sailor and inspector, knew the dangers.

It is not questioned that the bitt gave away, and that the cause of its giving away was the starting of the engine while the gypsy was in gear, and before the spuds were raised. Much of the evidence and many of the contentions of the parties relate to one Christiansen, one of the crew of the dredge, whose duty it was to take charge of the raising the spuds and to superintend the lines. The dredge claims that he was ignorant that the gypsy was in gear when the signal for moving was given, and also ignorant of the position of Nelson on the bitt. But the work was in open daylight, under circumstances where there was no difficulty in perceiving and understanding all the conditions in question; so that the issue cannot be cut down to a mere contention as to the personal negligence of any single member of the crew. The case in this particular comes within the well-known presumptions which

were applied by us in *Burr v. Knickerbocker Steam Towage Company* (C. C. A.) 132 Fed. 248. Likewise we pass by, as not of substantial importance, all criticisms arising from any suggestion that Nelson, at or about the time of the injury, was not actually engaged in his duties as inspector. Such duties required him to be quite constantly aboard the barge, and to pass from time to time, in his discretion, from one part of her deck to another. Of course, there would be intervals when there would be no occasion for him to be actually engaged in any immediate active duty; but his presence aboard and about such parts of the deck as he might reasonably select, even at those times, was proper, and entitled him to protection. The law does not apply to this so fine a rule as to be impracticable.

Neither can it be said that the mere act of leaning against the bitt, or wholly sitting on it, was one of negligence. There is no evidence in the record that there was any reason, arising either from the condition of this particular vessel, or from the customary course of events with reference to happenings in connection with bitts and lines, which would reasonably create any apprehension that in case of an unusual strain this bitt would give way instead of the line. It is common knowledge that it is customary to lean against or sit on the windlass or the bitt, or the rail of a vessel; and yet each, especially the rail under some circumstances, is subject to its own peculiar contingencies. In fact, it is difficult to say what part of a vessel is not at times so subjected; and yet it remains to be shown that a passenger, or other person rightfully aboard a vessel performing duties thereon, is not entitled to be protected in any of these particular positions. For one, however, to take a position in the bight of a line, subject to a strain, is another matter; and to do this may well subject him to criticism as guilty of negligence if injury results to him.

The facts, as understood by the learned judge of the District Court, are so fully detailed in his opinion that we need not touch on them further, except to a very limited extent. We have stated those parts of the case where there are questions of mixed law and fact, or where the topics are so far within the common knowledge that we could apprehend them clearly. As to the substantial questions of mere fact—that is, as to negligence on the part of the libelant so far as that is affected by the claim that he was within the bight of the quarter line—and as to the negligence of those whose duty it was to attend to the movements of the barge with reference to the strain put on the bitt and its giving way, the proofs are contradictory, and, moreover, not entirely clear. The learned judge of the District Court found that those who were at the time managing the barge were guilty of negligence as a matter of fact, and the effect of his other finding is that the libelant had so placed himself within the bight of the line that he, also, was guilty of negligence. He also held that the negligence of those who were maneuvering the barge supervened, so that, consequently, damages could not be divided. We have carefully examined the record, and, while there are unquestionably serious doubts on all the mere questions of fact—whether the libelant, and also whether those in charge of the barge, were each guilty of negligence—yet, under the circumstances stated, we cannot determine that any conclusion we might reach,

different from those reached by the District Court, would be more satisfactory to ourselves, or better supported by the record.

The allegations of the libel, in that it says that the sudden breaking of the bitt caused the quarter line "to sweep over the port side of said deck with tremendous force, striking the libelant, and throwing him" into the scow, gives strong support to the proposition that the libelant was within the bight of the line, although it does not necessarily lead to that conclusion. On the other hand, the proofs in the record that the construction of the parts of the barge involved were of an improved character, and the common knowledge that the bitt would reasonably have been expected to bear even the strain which was improperly put on it, leaves an impression that the injury to the libelant was not a consequence for which the barge, within the contemplation of the law, could be held responsible merely because the gypsy was put or left in gear unseasonably. Yet in this case the bitt consisted of a bedplate of nearly five feet in length, and of good width and thickness. The length of the bedplate was in line with the keel of the barge. From this bedplate came up two uprights, also in line with the keel of the vessel, and braced by a heavy cross-bar extending from one upright to the other. The line was run around the upright which was nearer the gypsy, so it failed to receive the support of both uprights, braced as they were by the cross-bar which we have described. The upright around which the line was run gave way at its base. To the common comprehension this would not have occurred, and in lieu thereof the line would have given way, if it had been run in such a way as to receive the support of both uprights of the double bitt, braced as they were by the cross-bar which we have described. Also other elements suggest themselves which might well have been considered by the District Court, but which are not clearly solved by the record; as, for example, the reasonable probability that the power of the engine of the barge was so great, and its action was so sudden, and the quarter line itself so unyielding, that, whatever might be the reasonable apprehension ordinarily, the reasonable apprehension in this particular case must have been that, where only a single upright was availed of, as was the fact, the bitt would probably give way if anything gave way. However all these things may have been, we cannot, as we have already said, satisfy ourselves that, if we should reverse the conclusions of the District Court on these mere questions of fact, we should reach any new conclusions which could be better supported than those of that court.

It may be said that the District Court did not positively find that the libelant was guilty of negligence in placing himself in the bight of the quarter line. It said that in leaning upon an object within the bight of a rope he assumed a position of some danger; that "as a reasonable man he must have known that in placing himself in such a position he took some chances"; and that he must be charged with the knowledge of the ordinary risk incident thereto. The court also observed that it must be remembered that the libelant was not aware that the gypsy was in gear, and that the hawser would be subjected to the strain to which it was exposed as a consequence thereof; and that, therefore, this was a risk of which he had no knowledge, and which he

cannot be held in law to have assumed. The court also adds later, "It is true that the libellant was guilty of some negligence in sitting within the bight of the hawser." Notwithstanding the libellant was entitled to exercise a liberal discretion as to what parts of the barge he would visit, as we have already explained, yet certainly he could have had no occasion to put himself within the bight of the quarter line; so that, taking all in all, the observations of the District Court must be held to amount to a finding that Nelson was guilty of negligence in this respect. That this negligence was specially contributory follows from the allegation of the libel that Nelson was struck and thrown by the quarter line. That it was of a lesser degree than the negligence of the barge, if it was such, it is settled cannot be taken account of in admiralty, unless the ratio was so overwhelming as to render his negligence trivial. The District Court does not find such to be the fact, nor are we impressed that it was.

The refusal to apportion the damages, and the assessment of the whole on the dredge, are sought to be justified on the strength of the line of cases represented by *Davies v. Mann*, 10 M. & W. 546, decided in 1842. As we have said, we must adopt the findings of the District Court on questions of mere fact. They show that it was the duty of the dredge, in providing for the safety of all concerned, to take care that when the steam was to be given the engine the spuds should be raised before the gypsy was put in gear, and that the managers of the dredge committed this duty to Christiansen. The findings also show that, if he had properly attended to that duty, he would have thrown the gypsy out of gear, and would have seen to it that it was kept out of gear until the spuds were raised. While the findings were that Christiansen knew that Nelson was in a negligent position, it does not appear that he knew that the gypsy was in gear, or how it happened to be in gear. The presumption is that it was through Christiansen's fault that it was in gear, but there is no presumption that he had in mind at the time the whistle sounded that such was the fact. In other words, whatever negligence Christiansen was charged with, he was not charged with having allowed the engine to be started with a present appreciation of both facts that Nelson was sitting on the bitt and that the gypsy was in gear. If he had had both facts present in his mind, his conduct in allowing the whistle to be blown while the gypsy was in gear might have been so reckless or perverse that it might well be said to have been the sole proximate cause of the injury which resulted. But, for various reasons, *Davies v. Mann* cannot be held to apply.

Davies v. Mann must be taken in connection with *Butterfield v. Forrester*, 10 East, 60, decided in 1809, and *Tuff v. Warman*, 5 C. B. [N. S.] 573, decided in 1858. Of the three, the last-named case must be regarded as the leading one according to *Pollock on Torts* (6th Ed. 1901) 448, where it is said that those earlier than *Tuff v. Warman* are now material only as illustrations. In *Butterfield v. Forrester* Lord Ellenborough said that the fact that a person was on the wrong side of the street would not authorize another purposely to ride up against him. This relates to mere perverseness. He also said some other things, more in line with *Davies v. Mann*. In *Davies v. Mann* a donkey left unlawfully in the highway was run down by the defendant driving

a pair of horses. Lord Abinger said, in effect, that the plaintiff could recover, as the defendant might, by proper care, have avoided injuring the animal. The case, however, to which we call especial attention is the one we have already referred to, *Tuff v. Warman*, decided in 1858, where a barge was run down by a steamer. It was shown that the barge was negligent in not having a lookout. Nevertheless, the steamer saw the barge, but failed to port her helm, as she should have done. It being a common-law suit, the steamer was charged with all damages on the ground that she continued in a course which would inflict an injury, and was therefore liable, although the plaintiff had no lookout. We will have occasion to refer to this case again in a pointed manner. *Davies v. Mann*, as interpreted and applied in England, is undoubtedly the law of England, as was declared in the House of Lords. *Radley v. The London and Northwestern Railway Company*, 1 App. Cas. 754, 759. The difficulty, however, of applying *Davies v. Mann*, even in England, at that late day (1876), is apparent from the fact that there, under the directions of the trial judge, a verdict was allowed to be taken for the defendant, which, on appeal to the Divisional Court, was set aside. The decision of the Divisional Court was reversed in the Exchequer Chamber by such eminent justices as Blackburn, Mellor, Lush, Brett, afterwards Lord Esher, and Archibald. An appeal was then taken to the House of Lords, which reversed the Exchequer Chamber, and restored the judgment of the Divisional Court. Lord Blackburn, who, pending the appeal, had taken a seat in the House of Lords, overruled himself, concurring with the other lords. In that case Lord Penzance, who delivered the opinion in which the other lords briefly concurred, put *Davies v. Mann* in two different forms. One was (page 759) to the effect that if the defendant, by the exercise of ordinary care, might have avoided the mischief, the plaintiff's negligence would not excuse him; and the other (page 760) described the plaintiff's negligence as "a previous negligence." Therefore it was not a concurring, nor necessarily a contributing, negligence in any sense of either of those expressions.

In view of these varying applications, the observation of Pollock on Torts, at page 449, to the effect that *Davies v. Mann* has been much discussed in America, though not always wisely so, seems hardly suitable. This is very patent in the light of Sir Frederick Pollock's further observations as to *Davies v. Mann*. In connection with the discussion of this case, at page 451, he quotes with approval one whom he styles a "learned writer," although anonymous, who undertook to restate the rule of *Davies v. Mann* as follows: "He who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible." The same "learned writer" also said that, "If the plaintiff could, by the exercise of ordinary care, have avoided the accident, he cannot recover." He sums up the result of both rules to be that the law looks to the proximate cause, and "holds that person liable who was, in the main, the cause of the injury." As practically applied in England, it may, after all, be well doubted whether this whole line of cases means anything more than to illustrate and emphasize the distinction between *causa causans*, which the fundamental rules of the law regard, and *causa sine qua non*, which they do not regard.

As indicated by Pollock, *Davies v. Mann* is still the subject of discussion in America, except so far as it recognizes the rule of a subsequent, disconnected negligence, or the rule of *causa causans*, or that of perverseness or persistency, spoken of by Lord Ellenborough. It is in this light that *The Inland and Seaboard Coasting Company v. Tolson*, 139 U. S. 551, 558, 559, 11 Sup. Ct. 653, 35 L. Ed. 270, is to the implied effect that the negligence of the plaintiff is a defense unless the defendant had knowledge of the position. However, as the appeal at bar is in admiralty, it is not necessary for us to follow the intricacies of *Davies v. Mann* and its history. We do not know that *Davies v. Mann*, or any decisions of its kin, was ever cited in a maritime court. Attempts have been made in England to apply this class of cases in admiralty, with contradictory and unsatisfactory results. *Marsden's Collisions at Sea* (5th Ed.) pp. 16-22. Certain it is that there are decisions of the highest authority in admiralty directly impugning *Tuff v. Warman*, and dividing the damages under the same substantial circumstances as those of that case, and disregarding any application of *Davies v. Mann*.

In the Circuit Court of Appeals in the Second Circuit we find *The James D. Leary*, appearing in the District Court in 110 Fed. 685, and affirmed in 113 Fed. 1019, 51 C. C. A. 620, on the opinion of the District Court. Both vessels involved were steamers—the *Leary* and the *Evelyn*. The *Evelyn* was found at fault for coming to anchor east of the proper anchorage ground, as marked by buoys, but her anchor light was visible to the *Leary* from one to two miles. The damages were divided. There is no mistaking that this decision absolutely disregarded any rule found in *Tuff v. Warman* or in *Davies v. Mann*, although all the substantial circumstances were alike. The same must be said about *The Providence*, decided by this court, and reported in 98 Fed. 133, 38 C. C. A. 670, where a large Sound steamer, coming into Fall River, was in collision with a schooner at anchor. The schooner was at fault. Nevertheless the opinion observes at page 134, 98 Fed., page 671, 38 C. C. A., that, if the *Providence* had used proper precautions, the collision might have been avoided, or at least the consequences would not have been serious. Again the damages were divided.

In *The America*, 92 U. S. 432, 436, 23 L. Ed. 724, one vessel was a tug and the other a ferryboat. The ferryboat struck the tug on the port bow. The court states that the proofs were clear that each vessel was seen by the other in ample season to have prevented the collision, and yet, not only the ferryboat which struck the tug, but the tug, also, was held to half the damages. *The New York*, 175 U. S. 187, 209, 20 Sup. Ct. 67, 44 L. Ed. 126, is another very marked case. One steamer was in fault for not stopping when the other steamer failed to answer her signals. Both steamers saw each other, and both were held guilty, and damages divided. One of the most striking of all is *Atlee v. Packet Company*, 21 Wall. 389, 392, 395, 397, 398, 22 L. Ed. 619, in which the circumstances were even more extreme than any which could be deduced from *Davies v. Mann*, because in *Davies v. Mann* the object unlawfully left in the public highway was a donkey, only temporarily there, the presence of which might or might not be presumed to be known to travelers. In *Atlee v. Packet Company*, the object un-

lawfully in the public highway—that is, in the river—was a pier of a permanent character, existing for so long a time that the court found that a skillful pilot was bound to know of it; and yet Atlee, who constructed and maintained the pier, as well as the steamer colliding with it, were both held liable, and the damages were apportioned equally between them. A more positive case is *The James Gray v. The John Fraser*, 21 How. 184, 191, 16 L. Ed. 106, where the collision was with a vessel anchored in an improper place, without any light; but the other vessel was held in fault for not sighting her, and damages were equally divided. In every one of these cases the circumstances were known to the party who was guilty of the final negligent act. A multitude of other admiralty decisions to the same effect can be cited. Indeed, some of them go so far as to make it clear that the law of these tribunals is not strict with reference even to subsequent, and somewhat independent, disconnected negligences, as is the common law. In view of these propositions and decisions, we are not justified in applying in an admiralty case any peculiar rule which can be deduced, or ever has been deduced, from *Davies v. Mann*. Moreover, on this appeal it is not clear that one negligence did supervene on the other. It is not even known which party's negligence first originated. Certain it is that both were existing and concurring at the time of the accident. Moreover, as we have shown, it is not proved that Christiansen had an existing appreciation of all the conditions, or was guilty of perverseness. In any view, applying the practical rules of the decisions of the Supreme Court and of the Courts of Appeals which we have cited, neither party to this proceeding can escape the consequence of his own fault.

It may be, in view of the fact that the admiralty is, under no circumstances, as stringent as the common law in refusing to impose liability on one party on account of the contributory negligence of the other, that it need not apply the incidental rules of *Davies v. Mann*, and the cases akin to it, in any event. Its principal rule being amelioratory, it has no occasion to hold incidental rules too strictly for the purpose of avoiding results which otherwise might shock the common sense as to justice. However this may be, the decree of the District Court must be modified to the extent of requiring a division of damages.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to apportion to each party one-half of the damages and of the interest thereon and one-half of the costs in the District Court, and the appellant recovers its costs of appeal.

LILLARD v. KENTUCKY DISTILLERIES & WAREHOUSE CO.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1904.)

No. 1,332.

1. PLEADING—DEMURRERS—ADMISSIONS OF FACT.

Averments of fact in an answer and counterclaim must be taken to be true on demurrer.

2. CONTRACTS—CONSTRUCTION—CONTEMPORANEOUS AGREEMENTS.

Agreements negotiated between the same parties or their representatives at the same time, and with reference to each other, may be looked

to in order to determine how far each is affected or interpreted by the terms of the other.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 746.]

3. LANDLORD AND TENANT—LEASES—COVENANT—TRADE FIXTURES.

The lease of a lot "to be used as a cattle feeding lot" does not require the lessee to put in cross-fences, or piping or troughs, or sheds, but merely gives him the permission so to do, with the right to remove the improvements at the end of the lease.

4. CONTRACTS—CONSTRUCTION—USAGE.

A distilleries company contracted to sell slop, to be delivered at a certain feeding lot. A contemporaneous contract between the parties provided for the lease of land by the purchaser of the slops to the distilleries company to be used as a cattle feeding lot. The lease also gave the lessors the refusal of the slop during any year, and provided that, if they should exercise the option, no rent should be paid for the lot. *Held*, that any obligation on the part of the distilleries company, arising out of custom and usage in the sale and delivery of slop, to deliver the same in a feeding lot adapted to feeding purposes, arose out of the contract for the sale of the slop, and not out of any express or implied obligation of the lease.

5. SAME—CONTEMPORANEOUS AGREEMENTS—INDEPENDENT CONSTRUCTION.

A distilleries company contracted to sell the slop made from part of its daily consumption of grain, and to deliver the same at a feeding lot. The price of the slop was settled by the contract. A contemporaneous agreement providing for the lease of land by the purchaser of the slop to the distilleries company, to be used as a cattle feeding lot, was executed. This agreement provided that the lessor should have the refusal of all the slop during any year at the market price, and that, in case the option was exercised, no rent should be paid for the lot. *Held*, that the two contracts were separate, and each was complete in itself, and required no reference to the other to be understood.

6. SAME—CUSTOM AND USAGE.

Written or oral contracts, especially such as relate to trade or mercantile agreements, are presumably made with reference to the known and established custom and usages which prevail in respect to such agreements. Evidence of such custom and usage is therefore admissible to explain the meaning of words or phrases which would otherwise not explain the intention of the parties, and also to annex to the contracts incidents which it is supposed the parties intended to tacitly annex, unless the words used necessarily exclude the operation of the custom or usage. But evidence of custom can neither contradict, destroy, nor modify language which is otherwise plain.

[Ed. Note.—Presumptions as to customs and usages, see note to *Great Western Elevator Co. v. White*, 56 C. C. A. 394.]

7. LANDLORD AND TENANT—RELATION OF TENANT TO PROPERTY—EXEMPTION FROM LIABILITY FOR RENT.

A distilleries company contracted to sell slop and deliver the same at a feeding lot. Contemporaneously with this agreement the purchaser agreed to lease a lot to the company, to be used as a feeding lot. The lease provided that the lessor should have the refusal of the slop for any year, and, in case he took it, no rent should be paid for the lot. *Held*, that the exercise of the option by the lessor did not terminate the lease or change the relation of the distilleries company to the property, and the feeding lot at which the company was obligated by its contract to deliver the slop was to be regarded as supplied by it, although the lot was owned by the purchaser of the slop, and the company was exempt from liability for rent while furnishing the slop.

8. CONTRACTS—CONSTRUCTION—CUSTOM AND USAGE.

Evidence of custom and usage explaining a written contract is not to be excluded unless the language employed by the parties is plainly irreconcilable with the rule imposed by custom.

9. SAME.

Evidence of custom or usage is admissible to show that a contract to deliver distillery slop at a cattle feeding lot supplied by the distiller contemplated, in accordance with the prevailing custom and usage in the making of like agreements, that the feeding lot should be supplied by the distillery with suitable cattle pens equipped with pipes, troughs, tubs, and tanks adapted to distribute the slop in a manner convenient for the feeding of cattle.

10. SAME—REPUGNANT PROVISIONS OF CONTRACT.

Nor was a further provision of the contract, giving the buyers of the slop the privilege of using troughs and tubs which the seller was to place in the feeding lot, repugnant to the alleged custom or usage, so as to exclude evidence thereof.

11. SAME—PLEADING.

An allegation in an answer that contracts were made in recognition of a custom and usage among distillers and feeders of slop, that the slop should be delivered to a feeding lot adapted and fitted for the feeding of slop to cattle by partition in suitable pens supplied with feeding troughs, tanks, and tubs, constituted a good averment that the contracts were made in recognition of the alleged custom, and did not aver a separate parol contract by which the feeding lot was to be appropriately supplied.

12. DAMAGES—GENERAL AND SPECIAL—DISTINCTION.

The distinction between general and special damages is that the former are such damages as the law implies and presumes from the breach complained of, while the latter are such as have proximately resulted, but do not always immediately result, from the breach, and will not, therefore, be implied by law.

13. SAME—RECOVERY OF SPECIAL DAMAGES.

Special circumstances will justify a recovery of special damages when specifically sued for, if they proximately flow from the breach, and are such as might reasonably be within the contemplation of the parties.

14. SAME—LOSS OF PROFITS.

Where the inherent and obvious purpose of an agreement for the sale of distillery slop was the procurement of slop to be delivered at a feeding lot in such a way that it might be economically fed to fatten cattle, the failure of the seller to furnish the slop which it contracted to supply, or its failure to deliver it in the manner contemplated under the contract, in such a way that it could be advantageously fed, would entitle the buyer to recover damages resulting from additional outlays for food or labor or any other expense, or injury to the cattle, including loss of anticipated profits from the sale of the cattle, provided such profits could be shown with reasonable certainty, and were not purely speculative.

15. SAME—DUTY TO PREVENT DAMAGE.

Where a contract has been breached the injured party must use reasonable exertions to save himself from the accruing loss, and can charge the defaulting party only with such damages as he cannot, with reasonable expense and exertion, prevent.

16. SAME—BREACH OF CONTRACT OF SALE—BUYER'S DAMAGES.

The measure of damages for a breach by the seller of a contract of sale is the difference between the contract and market price, for the buyer can indemnify himself by going into the market and supplying himself, if there is a market for the commodity.

17. SAME—PREVENTION OF DAMAGES—BURDEN OF PROOF.

The burden of proving that damages which have been sustained by a breach of contract could have been prevented by the injured party rests upon the party guilty of the breach.

18. SAME—PROMISES TO REPAIR BREACH.

A buyer of distillery slop for feeding purposes is not precluded from recovering damages for a breach of the provisions of the contract by

which the seller agreed to deliver the slop in suitable troughs and tubs for feeding purposes, by reason of the fact that he did not himself erect the proper appliances, where he relied on repeated promises of the seller to perform his obligations in the premises.

19. SAME.

The fact that the party injured by a breach of contract has suffered a greater loss than he reasonably should have suffered by reliance on the defaulting party's promises to make good the breach does not preclude him from recovering such damages as were sustained before he himself should have taken the requisite step to save himself from loss.

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

This is an action of assumpsit for the recovery of the price of distillery slops contracted to the defendant to be delivered at a certain feeding lot, being all of the slop made from a daily consumption of 1,200 bushels of grain during the operation of the Cedar Brook Distillery between December 25, 1902, and May 25, 1903.

The plaintiff sets out a copy of a contract in writing between the parties, and avers that this slop was sold, delivered, and received according to the terms of this contract, but that the defendants have failed and refused to pay for same. The defendants filed an answer and counterclaim. In substance they deny that the writing produced by the plaintiff and sued upon constitutes the whole of the contract, and say that contemporaneously with the contract sued upon there was another written agreement in respect of the same subject-matter, and that, though the latter is dated November 18, 1902, and the former November 19, 1902, each was made with reference to the other, and that they should be read together as constituting one agreement. This contract of November 18th is set out and made part of defendant's answer. This agreement so set up as a part of the contract between the parties is primarily a contract for the lease of 30 acres of ground adjoining Cedar Brook Distillery, to be used as a feeding lot for cattle fed upon slop from the distillery; and the right to put thereon, and remove at the end of the lease, all proper troughs, pipes, sheds, etc., proper for such use. The parties to this lease were the Julius Kessler & Co., a corporation engaged in the operation of Cedar Brook Distillery, and one W. F. Lillard, one of the defendants herein. The term of the lease was 10 years, with right of renewal, at an annual rental of \$250. It was also provided that the lessor, W. F. Lillard, or his brother, R. H. Lillard, the other defendant herein, or the firm of Lillard Bros., here sued as partners, who are the parties of the second part to the contract for the sale of slops mentioned above, should have the refusal of the distillery slops during any year, at the market price, and that during any year that this option was exercised no rent should be paid for said lot. It is averred that said corporation styled Julius Kessler & Co. was either a trustee or agent acting for the plaintiff, the Kentucky Distilleries & Warehouse Company, a corporation of the state of New Jersey, and as such was operating said Cedar Brook Distillery for the use and benefit of the plaintiff, and made said contract of leasing with said W. F. Lillard for the use and benefit of said plaintiff and with reference to the contract for sale of slops to defendants, both of which agreements were negotiated together. It is then averred that both of said contracts were made in recognition of a custom and usage among distilleries and feeders of slop that the slop should be delivered in a feeding lot adapted and fitted for the feeding of slop to cattle by partition into suitable pens to prevent crowding, supplied with feeding troughs, tanks, and tubs, so constructed through the pens as to distribute the slop in the most economical way and to the best advantage in feeding cattle. The defendants deny the delivery of slop according to the terms of the contract, or that the plaintiff has complied with the terms of the agreement as alleged. By way of counterclaim defendants say that, in reliance upon the plaintiff's agreement to deliver its slop in such a suitable feeding lot adapted to economically feed same as delivered, and upon notice that plaintiff had provided suitable troughs, tanks, etc., as it was bound to do, they bought 1,421 head of cattle, paying for

same \$45,922.80, and caused same to be delivered in the feeding lot adjacent to said distillery; but that plaintiff broke its contract, and did not supply a fit and suitable feeding lot properly divided into pens and supplied with suitable troughs, tubs, or tanks, etc., and that this failure to properly adapt said lot for the purpose intended continued for 12 weeks after delivery of slop commenced, at which time plaintiff did fit said place for delivery of slop, as it had bound itself to do. It is averred that plaintiff was notified of its failure to divide said lot into pens and to provide suitable troughs, tubs, etc., "and repeatedly promised to remedy said defects, and defendants, relying upon said promises, kept their cattle in said insufficient feeding lot, and tried to fatten their cattle as they had contemplated doing when their contract was made, but found themselves unable to do so." It is then averred that defendants' cattle were greatly damaged for the want of proper means for feeding and distributing said slop, some dying from crowding and some from starvation, while all suffered and lost weight; that no other slop was procurable; and that, to prevent greater loss, defendants bought grain and hay and fed same at great expense, but that, notwithstanding their efforts, they sustained great loss, and sue by way of counterclaim for the loss and injury resulting, which aggregates some \$19,000. The plaintiff filed a general demurrer because no defense to plaintiff's petition or ground for counterclaim was stated. This demurrer was sustained. The defendants declining to plead further, there was judgment for the entire sum sued for.

L. W. McKee, L. C. Willis, and T. L. Edelen, for plaintiffs in error.
C. H. Stoll, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Two questions arise upon the demurrer to the answer and counterclaim filed by the defendant in error. The first concerns the terms of the agreement between the parties, and the second the measure of damages for the breach of same by the plaintiff. The first question may fairly be split into two parts: First. To what extent, if any, is the agreement for the sale of slops modified, enlarged, or affected by the agreement for the lease of the ground adjacent to the distillery, made contemporaneously with the other? Second. Was it competent to show the custom and usage in respect to the manner in which distillery slops were delivered for feeding purposes?

The first question is not difficult of solution. The averments of fact in the answer and counterclaim must be taken to be true. If, as averred, Julius Kessler & Co. were acting for the Kentucky Distilleries Company both in leasing the Lillard lot for feeding purposes and in the operation of Cedar Brook Distillery, and if, as averred, the two agreements were negotiated at the same time, and with reference to each other, we may look to both to see how far each is affected or interpreted by the terms of the other. When we do this, when we place the two contracts side by side, and read them together, we can only see that the distilleries company was looking forward to a sale of its slop, possibly to W. F. Lillard, possibly to his brother, or to both as a copartnership, and was by the lease preparing a place to be used by whoever should buy its slops as a feeding lot when slop should be delivered and fed to cattle.

The leasing contract does not in express terms obligate the lessee to divide the lot into pens, or put in pipes, or feeding troughs, tanks, or tubs, or to do any specific thing except to erect and maintain an outside fence. That the lot was leased "to be used as a cattle feeding lot" can hardly be regarded as a covenant to put in cross-fences, or piping or troughs, or sheds, but as a privilege, with the right to remove all such improvements at the end of the lease. If W. F. Lillard or Lillard Bros. should exercise the right to receive and feed the slops made at Cedar Brook Distillery—a right extended by the contract of leasing—a different question would arise; for, in the absence of some other agreement between the parties, there would be the question as to the operation of the custom and usage in the sale and delivery of such slop to deliver same in a feeding lot adapted to feeding purposes. But this would be an obligation or term of the agreement which would attach itself as a term of a contract for the sale of slop, and would not grow out of any express or implied obligation found in this contract of leasing. If we assume that Lillard Bros. had the right to take all the slop made by the Cedar Brook Distillery at the market price by virtue of the option contained in the lease agreement, they did not do so. Upon the contrary, they entered into a separate writing, by which they contracted for the slop from a daily consumption of only 1,200 bushels of grain, though it appears that the distillery had a daily mashing capacity of 1,800 bushels. The price for this slop is also settled, and not left to be determined by the market price. Each contract is apparently complete in itself, and needs no reference to the other to be understood.

The pivotal question raised by the demurrer is as to the effect to be given to the averment in the answer that both contracts were made with reference to and in recognition of a custom or usage that parties contracting to sell distillery slops for feeding cattle do so with the mutual understanding that the slop shall be supplied or delivered to a feeding lot supplied with suitable cattle pens equipped with pipes, troughs, tubs, and tanks adapted to distribute the slop in a manner for convenient feeding to cattle. The court below was of opinion that upon the facts of this case evidence of such a custom or usage would be inadmissible upon the ground that it would vary or contradict the terms of a written contract, or add a new term to a complete agreement. Nothing can be plainer than that it is not admissible to contradict a contract, written or oral, by evidence of a custom or usage. *Barnard v. Kellogg*, 10 Wall. 383, 390, 19 L. Ed. 987; *Grace v. Cent. Am. Ins. Co.*, 109 U. S. 278, 279, 3 Sup. Ct. 207, 27 L. Ed. 932; *The Gazelle*, 128 U. S. 474, 486, 9 Sup. Ct. 139, 32 L. Ed. 496; *Seitz v. Brewers' M. Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520; 12 *Cyclopedia*, and cases cited, 1091. Touching the inadmissibility of custom or usage if repugnant to a term of contract, Justice Harlan has most happily stated the rule and its reason in *Grace v. Am. Cent. Ins. Co.*, cited above. "In *Barnard v. Kellogg*," says the learned justice (10 Wall. 383, 19 L. Ed. 987), "this court quotes with approval the language of Lord Lyndhurst in

Blockett v. Royal Exchange Assurance Co., 2 Crompton & Jervis, 244, that 'usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject-matter of their negotiations, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom." Every written or oral contract, and especially such as relate to trade or mercantile agreements, is presumably made with reference to the known and established custom and usages which prevail in respect to such agreements. Evidence of such prevailing custom or usage is therefore admissible for the purpose of explaining the meaning of words or phrases which would otherwise not explain the intention of the parties, and also to annex to such contracts certain incidents which it is supposed the parties intended to tacitly annex, when the words they have used do not necessarily exclude the ordinary operation of such custom or usage. But the evidence of custom can neither contradict, destroy, nor modify what is otherwise plain. *Renner v. Bank of Columbia*, 9 Wheat. 581, 587, 6 L. Ed. 166; *Bliven v. New England Screw Co.*, 23 How. 420, 431, 16 L. Ed. 510, 514; *Robinson v. U. S.*, 13 Wall. 363, 20 L. Ed. 653; 1 *Addison on Contracts*, § 56; *Capitol Gas & Electric Co. v. Gaines*, 49 S. W. 462, 20 Ky. Law Rep. 1468; *Johnson v. Roylton*, 7 Queen's Bench, 438; *Florence Machine Co. v. Daggett*, 135 Mass. 582; *Bryan v. Spurgin*, 5 Sneed, 681; *The Delaware*, 14 Wall. 579, 603, 20 L. Ed. 779; *National Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *Cyclopedia of Law and Procedure*, vol. 12, p. 1082 et seq., and cases cited.

In *Renner v. Bank of Columbia*, cited above, evidence of a local custom that payment of a note should not be demanded until the fourth day after due, contrary to the law merchant, which gave only three days of grace, was held admissible in order to understand the intent of the parties to a note made in reference to it. Among other things, the court said:

"It is said, however, that the effect of this testimony is to alter and vary by parol evidence the written contract of the parties. If this is the light in which it is to be considered, there can be no doubt that it ought to be laid entirely out of view, for there is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character; but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom; for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract, and it rests upon the same principle as the doctrine of the *lex loci*. All contracts are to be governed by the law of the place where they are to be performed; and this law may be, and usually is, proved as matter of fact. The rule is adopted for the purpose of carrying into effect the intention and understanding of the parties. That the note in question was to be paid at the Bank of Columbia, and to be governed by the regulations and custom of the institution, and so understood by all parties, cannot admit of a doubt."

In *Bliven v. New England Screw Co.*, cited above, evidence was admitted of a custom of the factory to fill orders only in the order

in which they were received, in defense to a suit for not supplying a sufficient quantity of an article ordered. The court said:

"Customary rights and incidents universally attaching to the subject-matter of the contract in the place where it was made are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded."

In *Robinson v. U. S.*, cited above, evidence was received to show a usage of trade to deliver barley in sacks, the contract being silent as to how delivery should be made. So, too, evidence of custom or usage is admissible to interpret words or phrases in a contract, written or oral, which are of doubtful signification. *Barnard v. Kellogg*, 10 Wall. 389, 390, 19 L. Ed. 987.

The contract in suit is not only peculiar in respect to its subject, but as to the conditions and place of delivery. The daily product of slop is to be "delivered" by the distiller at a "feeding lot" supplied by the distiller. How is this delivery to be made? Is it to be piped, or delivered in barrels, tubs, or tanks? Obviously this is a question which must be answered by reference to the usual and customary mode prevailing among those who furnish and those who feed such slop. But it is to be delivered at a particular place supplied by the seller—a "feeding lot." That this place is to be supplied by the seller is plain, although it has been suggested that when Lillard Bros. became themselves the purchasers and feeders of the slop made at Cedar Brook Distillery they themselves supplied the feeding lot. This contention is founded upon a clause in the leasing contract which provided that, if the defendants should themselves exercise the option of feeding the distillery slop, the lessor, W. F. Lillard, should receive no rent for that season. This is a specious argument. The subject of the lease was an unimproved and unfenced parcel of 30 acres of ground. It was leased for a term of 10 years at an annual rental of \$250, "to be used for a feeding lot for cattle." The expectation was that this naked lot would be adapted for use as a feeding lot, for the right to put in sheds, pipes, and troughs is granted, with the right to remove them at end of lease. One term of the contract of leasing was that either or both of the Lillards might have an option to take the distillery slops during any season at market price, but that during the period of their exercise of this privilege they should receive no rent. But the exercise of this option would not terminate the lease or change the relation of the distillery company to the property. It was nothing more, in substance, than an agreement that if the Lillards should choose to take the produce of slop during any season, they should pay the market price, and also remit rent otherwise demandable. Now, what did the parties intend by the agreement that this daily product of distillery slop should be delivered at a "feeding lot" supplied by the distillery company, the plaintiff in this case? How was delivery to be made? What did they mean by a "feeding lot"? Did they mean a bare lot, or one divided into suitable subdivisions, and supplied with feeding troughs, tubs, tanks, etc., adapted to receive and distribute distillery slop? The question is not whether, under the leasing contract, there is an

implied agreement that the lessee shall subdivide the leased lot, or equip it with facilities for either feeding or caring for cattle, but whether, under the contract for the sale and "delivery" of slop at a "feeding lot," there is such an obligation.

The fourth clause of the contract for the sale of this slop provides that the buyers "shall have the privilege of using the necessary troughs and tubs which the first party [the Kentucky Distillery & Warehouse Company] is to place in feeding lot leased from W. F. Lillard." Of this claim the circuit judge said, in substance, that it implied no duty or obligation to place troughs, tubs, etc., in the feeding lot, but expresses a mere benevolent purpose, and confers the privilege of using same so far as necessary in case this purpose is carried out. Thus construed, the court was of opinion that evidence of a custom or usage which would impose a positive obligation would be repugnant. But we cannot agree to this interpretation. In reference to contracts where custom is ordinarily comprehended as part of the agreement the rule, as we understand it to be, is that evidence of such custom and usage is not to be excluded, unless the language employed by the parties is found to be plainly irreconcilable with the rule imposed by custom. The character of the contract here in issue is such as to raise a strong presumption that the agreement to deliver at a cattle feeding lot raises a strong presumption that the delivery is to be according to the prevailing custom under such agreements, and the obligations imposed by rule should be recognized as a part of this agreement unless the fourth clause of the contract plainly and explicitly manifests an intention to substitute for the obligation imposed by custom and usage the mere option of the seller to furnish the usual and necessary facilities for distributing and feeding such slop.

But there is another and more reasonable construction of this provision, when read in connection with its context and in the light of the prevailing custom under such contracts, and that is that its purpose was to limit the right of the Lillard Bros. to the use of only such feeding troughs, tubs, etc., as shall be necessary for the feeding of the slop contracted to them. This is a reasonable limitation of the rule imposed by custom or usage in such cases, in view of the fact that the mashing capacity of the distillery was 1,800 bushels of grain per day, while Lillard Bros. agree only to take the slop produced from a daily mash of 1,200 bushels. If, therefore, the feeding lot afforded feeding facilities for a greater number of cattle than could be expected to consume the slop contracted to Lillard Bros., this provision would limit their use to such facilities as were necessary, and enable the surplus of slop to be fed under some other arrangement. We therefore regard this clause as one which is not repugnant to the operation of the rule imposed by custom and usage, but a recognition of that usage. Without the aid of this evidence of custom this clause would be ambiguous, for it would not be clear whether an obligation to supply the necessary feeding troughs, tubs, etc., was imposed or a mere purpose to do so expressed. Neither do we think the answer and cross-claim should be interpreted as averring that there was

another and separate contract in parol, by which the feeding lot was to be subdivided, and supplied with suitable troughs, pipes, tubs, etc. The language used by the pleader means that such an agreement was made because the contract was made in recognition of the obligation imposed by operation of the prevailing custom. That the parties should in their negotiations recognize the rule of custom is not to add a new term by parol, but a recognition that it is a term of the written contract by operation of the custom.

The court also sustained the general demurrer because it was of opinion that none of the items of damage set out in the counterclaim were recoverable, assuming the contract to have been breached as averred. The cross-claim is for special items of damage, and includes no count for general damages. The items are: (1) The death of 67 head of cattle from crowding and starvation. (2) Loss of gain in weight and condition of cattle because insufficiently supplied with slop. (3) Cost of meal, hay, etc., and extra labor, necessitated by the failure to comply with the agreement. The ground upon which this conclusion is defended is that while the defendants might recover what it cost them to supply suitable troughs, pens, tubs, etc., and damages for any loss necessarily incurred while supplying the means for properly distributing slop for feeding, or loss of gain sustained by a prompt sale of the cattle when the distributing and feeding appliances were found insufficient, they did neither of these things, but continued to receive slop and feed it to their cattle, although the facilities were not such as they had a right to demand. The distinction between general and special damages is not always obvious. The one is supposed to be such damages as the law implies and presumes from the breach complained of, while special damages are such as have proximately resulted, but do not always immediately result, from such a breach, and will not, therefore, be implied by law. 13 *Cyclopedia of Law*, p. 13; *Lawrence v. Porter*, 63 Fed. 62, 64, 11 C. C. A. 27, 26 L. R. A. 167; *Parsons v. Sutton*, 66 N. Y. 92, 98. But special circumstances will justify recovery of special damages when specifically sued for, if they proximately follow from the breach, and are such as might reasonably be within the contemplation of the parties. *Lawrence v. Porter*, 63 Fed. 62, 64, 11 C. C. A. 27, 26 L. R. A. 167. The counterclaim avers, in substance, that prior to December 25, 1902, and before plaintiff had subdivided said feeding lot into suitable cattle pens or constructed suitable lead troughs, tubs, or tanks, and feeding troughs, plaintiff notified defendants "that the feeding pens, tubs, tanks, troughs, and slop would be ready on said date, and that plaintiff would be ready to deliver to the defendants the slop as it had contracted to do, and thereupon the defendants, relying upon said notice, and upon its said contract with the plaintiff," bought and placed in said feeding lot for the purpose of consuming the slop so to be delivered 1,421 head of cattle, but that plaintiff failed and refused to furnish suitable tubs, lead troughs, tanks, feeding troughs, etc., as it had agreed to do, and for a period of 12 weeks failed to comply with its contract until 12 weeks had elapsed. They also aver that plaintiff's attention was called to its failure in these respects, "and that plaintiff repeatedly promised to remedy said defects, and these defendants, relying on said promises, kept their cattle in the insufficient pens,

and tried to fatten their cattle as they had contemplated doing when the contract was made, but found themselves unable to do so." Now, the very object of this contract was to procure slop delivered in such way as that it might be economically fed for the purpose of fattening cattle. This purpose was one which inhered in the very nature of the agreement, and was therefore a purpose of which the distillery company had notice. Under such circumstances it is very obvious that if the plaintiff had furnished no slop, or had furnished only a part of that it contracted to supply, the loss resulting from any outlay for other food or for labor necessitated, or any other expense, as well as any injury to the cattle consequent upon insufficient supply of slop, would be recoverable as the natural and proximate result of the breach. Neither would defendants be necessarily excluded from recovering the damages resulting from loss of gain or profit anticipated, provided they are capable of being shown with reasonable certainty, and are not purely speculative. *Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80; *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; *Howard v. Stillwell Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; *New Market Co. v. Embry*, 48 S. W. 980, 20 Ky. Law Rep. 1130.

But counsel for defendant in error say that Lillard Bros. do not aver that slop was not furnished, and only claim damages because the feeding lot was not divided into pens and supplied with sufficient and suitable troughs, tubs, tanks, etc. But if the slop was not delivered in the manner contemplated under the contract, but in such way as that it could not be advantageously fed, the damages consequent are of the same kind as if there had been a breach as to the quantity or quality. A delivery in the way contemplated by the prevailing custom was as much a part of the contract as the furnishing of the slop itself.

But it is said that these special damages might have been prevented if the defendants had themselves divided the lot into pens and put in proper lead and feeding troughs, tubs, tanks, etc., and that it was their duty to save themselves from the large losses they now sue for when they might have done these things at comparatively small cost. When a contract has been breached the party entitled to its benefit must use reasonable exertions to save himself from the loss arising, and can charge the other party only with such damages as he could not, with reasonable expense and exertion, prevent. *Lawrence v. Porter*, 63 Fed. 63, 65, 11 C. C. A. 27, 26 L. R. A. 167; *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117; *Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L. Ed. 752. In case the contract breached is one of bargain and sale, the rule of damages for a breach by the seller is the difference between the contract and market price, for the buyer can indemnify himself by going into the market and supplying himself, if there is a market for the commodity. *Lawrence v. Porter*, cited above. But where the contract is of a different description the duty of the party entitled to the benefit of the contract in respect to a course calculated to mitigate his loss must depend upon circumstances. The burden of proving that the damages which have been sustained in such cases could have been prevented rests upon the party guilty of the breach of contract. *Costigan v. The M. & H. R. Co.*, 2 Denio, 609, 43 Am. Dec. 758; *Hamilton v. McPherson*, 28 N. Y. 72, 77, 84 Am. Dec. 330. In the case at bar it is

insisted that the defendants should have adapted the feeding lot for the proper feeding of cattle with slop by proper subdivisions, lead and feed troughs, etc., and charged same to plaintiff, or sold the cattle and sued for the loss. But these suggestions entirely overlook the averment of the counterclaim that, when notified of the condition of matters, the plaintiff repeatedly promised to perform their contract, and remedy the matter complained of, and that in reliance upon these promises they continued to feed their cattle as best they could, but that it was 12 weeks before these promises were kept. Thus it appears that the repeated promises made by the plaintiff, and the reliance of defendants upon those promises, have resulted in enlarging the injury they have suffered beyond their probable loss if they had disregarded such promises and taken a different course to save themselves. That the defendants should now have their complaint dismissed because the damages suffered are greater than they would have been if defendants had not credulously accepted the assurances of the plaintiff itself would be a crying injustice. It may be that defendants relied upon plaintiff's promises unreasonably long, and that they should not, therefore, be permitted to recover such part of their loss as should have been prevented. That will be a question upon the evidence. Upon the averments of the counterclaim there is no rational ground for saying that the entire special damage sustained should have been prevented. But assuming that defendants have suffered a greater loss than they reasonably should by reliance upon plaintiff's promises, they certainly are not by that course precluded from recovering such damages as were sustained before they were bound to make the requisite changes themselves. Plaintiff can only escape such part of the damages as should have been prevented, and the burden is upon it to show what the damages are which it was the duty of plaintiff, under the facts, to have prevented.

As the demurrer went to all the damages, it was too broad, and should have been overruled.

Reverse, with direction to overrule the demurrer, with leave to plead.

Following will be found the opinion of the court below (COCHRAN, District Judge):

This is an action to recover \$10,140, the purchase price of slop made from 1,200 bushels of grain at the Cedar Brook Distillery in Anderson county, Ky., each day it ran between December 25, 1902, and May 25, 1903, delivered under a written contract of sale between the plaintiff and the defendants dated November 19, 1902, and set forth in full in the petition. The delivery was on a lot adjacent to, if not adjoining, said distillery, where it was fed by defendants to cattle owned by them. An answer and counterclaim has been filed by defendants. It consists of two paragraphs, the second of which contains the counterclaim. It is, in substance, that said contract of sale does not contain the entire contract between the plaintiff and defendants entered into at the time said writing was executed; that a lease of said lot made by the defendant W. F. Lillard to Julius Kessler & Co., a corporation, dated November 18, 1902, and referred to in the contract of sale, a certain usage in the case of similar contracts between distillers and cattle men as to the action of the distillers, and a verbal agreement between plaintiff and defendants formed a part of said contract and with said contract of sale constituted the entire contract between them; that by said contract as thus made up plaintiff agreed to divide said lot by suitable fencing into not less than five pens for the separation of the cattle into groups, and to provide a lead trough with suitable

falls and connections running through the pens longitudinally, and other suitable troughs and tanks or tubs for the distribution and storing of the slop: that the plaintiff failed to comply with its contract in this particular, and that by reason of such failure 67 head of cattle died from starvation, crowding, and other casualties, to defendants' damage in the sum of \$2,166.78; 1,340 head did not fatten as they would have to the extent of 115 pounds per head, and did not sell for as much otherwise as they would have to the extent of 75 cents per 100 pounds, to their damage on the one account in the sum of \$6,540.25 and on the other in the sum of \$9,115.20; and they were compelled to furnish extra hands to care for and look after the cattle and additional feed, to wit, oil seed meal and hay, to their damage on account of the hands in the sum of \$100 and on account of the feed in the sum of \$1,820—making a total damage of \$19,751.23. The plaintiff has filed demurrers to said pleadings and motions to elect and strike out. The demurrers are to certain portions of each paragraph and to each paragraph as a whole. I do not think that a demurrer to a portion of a paragraph of a pleading is correct practice. If any portion thereof is improper, it should be reached by a motion to strike out. But, whether so or not, it is in order first to inquire whether the demurrer to each paragraph as a whole is well taken as to both or either paragraph. If so, it will be unnecessary to inquire further in regard to the propriety of any particular portions of said paragraphs. The disposition of the motions to elect and strike out should abide the disposition of such demurrers also.

And first, as to the second paragraph, setting forth the counterclaim. The contract of sale dated November 19, 1902, certainly contains no such agreement on plaintiff's part as defendants rely on. There is no reference in it whatever to the matter of fencing. It provides that the plaintiff will deliver and the defendants receive and accept the slop at said lot, referred to as "the feeding lot recently leased from W. F. Lillard near Cedar Brook Distillery," and that defendants should have the privilege of using the "necessary troughs and tubs" which the plaintiff "is to place" in said lot. In the Imperial Dictionary it is said that the word "is" forms with the infinitive a particular future tense, which often expresses duty, necessity, or purpose." Here it does not express necessity. Nor can it be said to express duty, as the clause confers on defendants a privilege, and not a right, which is the correlative of duty. It must, then, express purpose. It is the privilege of using the necessary troughs and tubs which it is the purpose of plaintiff to place in said lot that is conferred on defendants. There is no other provision in said contract of sale making any reference to said lot, or to troughs, tubs, or tanks.

Then as to the lease dated November 18, 1902. Two questions arise in this connection. One is as to whether, under the allegations of defendants' pleading, said lease can be read in connection with said contract of sale as forming a part of the contract between plaintiff and defendants. The conditions under which two or more writings can be read together as constituting one contract are thus stated by Mr. Justice Clifford in the case of *Bailey v. H. & St. J. R. R. Co.*, 17 Wall. 96, 21 L. Ed. 611: "It is well-settled law that several writings executed between the same parties substantially at the same time, and relating to the same subject-matter, can be read together as forming parts of one transaction." According to this, three things are essential: (1) The writings must be "between the same parties"; (2) they must have been executed "substantially at the same time"; (3) they must relate "to the same subject-matter." Further on in the opinion he says that it must appear also "that the several writings are parts of a single transaction, either from the writings themselves or by extrinsic evidence; as it may be that the same parties have had more than one transaction in one day of the same general nature." It is alleged by the defendants in their pleading that the two writings in question were executed as parts of one and the same transaction. This allegation must be accepted as true on the demurrer. It may be assumed also that they were executed substantially at the same time, and that in part at least they relate to the same subject-matter. But on their face they are not between the same parties. The contract of sale is between plaintiff and defendants; the lease between W. F. Lillard, one of the defendants, and Julius Kessler & Co., a corporation. The plaintiff and the defendant R. H. Lillard

are not parties to the lease. In order to connect plaintiff therewith, defendants allege that for all intents and purposes concerning the management and operation of said distillery and said lease plaintiff and said Kessler & Co. were one and the same person. Whatever this may mean, it cannot be true. Plaintiff and Julius Kessler & Co. are two distinct corporations or legal persons. There is no such thing as a mystical union of distinct persons in law, however it may be in theology. Defendants, however, allege further the said Kessler & Co. held and operated said distillery and carried on the business connected with it in trust for plaintiff, and without any beneficial interest therein, and that said lease to it from the defendant W. F. Lillard was for its use and benefit. This is the sole fact alleged to make these two writings between the same parties and thus comply with this condition of reading them together as one contract. The only ground, therefore, on which it can be said that they are between the same parties, is that plaintiff, the cestui que trust, is bound by the agreements contained in the lease made by Kessler & Co., the trustee, and that the defendant R. H. Lillard, equally with the defendant W. F. Lillard, is entitled to the benefit of said agreements by virtue of some provision in the lease. Assuming that this is good ground for so saying, we proceed to a consideration of the other question referred to above. That question is whether the lease contains an agreement on the part of Kessler & Co. to do that which it is alleged in the counterclaim plaintiff agreed to do. By that writing the defendant W. F. Lillard leased to Kessler & Co. said lot to be used as a cattle feeding lot for the term of 10 years, with the privilege of an additional 10 years at an annual rental of \$250 per year, payable July 1st in each year, with the right to lay pipes upon it and build such sheds and houses for storage of forage as it might deem necessary in the conduct of said business. It provided that said lot should be inclosed by a lawful fence, at the expense of said defendant, who was to keep same in repair during the continuance of the lease, but all inside or partition fences should be built at the expense of and maintained solely by Kessler & Co.; that said defendant, or the defendant Roger H. Lillard, or the firm of Lillard Bros., composed of both defendants, should have the refusal of the sloop made at said distillery at the market price for the season in which this privilege was exercised—that is, at the price paid for other sloop to be fed under similar conditions; that in case of the transfer of said lot by the death of said W. F. Lillard or other unavoidable cause said R. H. Lillard should not be entitled to the refusal of the sloop; that whenever Kessler & Co. furnished sloop to be fed upon said lot by either of said Lillards, or both, or any firm or corporation in which they or either of them were interested, no rent should be paid for said lot by Kessler & Co. for the year in which cattle were fed thereon, unless it was furnished to said R. H. Lillard after the transfer of said lot, in which event rent was to be paid; that whenever the distillery was not operated during the distilling season no rent was to be paid, and the lessor was to have the right to cultivate the land; that, should the sloop be fed by other parties than the defendants, all stock was to be removed from the lot within five days from suspension of the distillery for the season; and that said Kessler & Co. should have the right to remove from said lot all pipes, fixtures, buildings, and material which it might place therein during the continuance of the lease, provided it should be removed within sixty days after the expiration of the lease. Such, substantially, are the provisions of the lease. There is no agreement in it on the part of Kessler & Co. to do anything to the lot, or to place anything upon it. There is no provision whatever in relation to any troughs, tanks, or tubs. There is the provision as to placing pipes and sheds and houses for storage of forage on the lot, but this confers simply a privilege upon Kessler & Co. to place them there. It imposes no duty upon them so to do. There is the provision also in regard to building inside or partition fences. This provision, however, is not that Kessler & Co. shall build any inside or partition fences, but that all such fencing shall be built and maintained at their expense. Its purpose was to relieve the lessor of any possible duty as to building and maintaining any such fencing, or from being at any expense on account of it, and not to impose any duty on Kessler & Co.; and it was no doubt suggested by the express provision that the lessor was to be at the expense of erecting and maintaining

the outside fencing. It follows from this consideration of the terms of the lease that it contains no agreement whatever on the part of Kessler & Co. to divide the lot into cattle pens by suitable fencing or to furnish any troughs, tanks, or tubs.

How, then, as to the usage and verbal agreement? Defendants allege that in the business of furnishing distillery slop to cattlemen with which to feed their cattle it is the usage, under the conditions similar to those existing in this case, for the distillers to divide the feeding lots into suitable cattle pens by suitable fencing, and to provide suitable troughs and tanks or tubs for distributing and storing the slop, and that in this case at the time of the execution of the contract of sale and lease plaintiff agreed verbally to divide the feeding lot in question into five cattle pens by suitable fencing, and to provide a lead trough with suitable falls and connections running through the pens longitudinally. I understand that the defendants are relying on the verbal agreement as to the number of cattle pens and the lead trough and the usage as to the other troughs and tanks or tubs, the usage being made definite in the former particulars by the verbal agreement. In order for the defendants to avail themselves of this alleged usage and verbal agreement as the basis of their counterclaims, it is essential that this should be a case where parol evidence of usage and verbal agreement is admissible. The rule as to the admissibility of such evidence is alike in both cases. The general rule on the subject is that parol evidence of usage or verbal agreement is not admissible to add to, vary, or contradict the terms of a written contract. In the following decisions by the Supreme Court of the United States this rule was applied as to parol evidence of a verbal agreement: *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; *Seitz v. Brewers' M. Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Culver v. Wilkinson*, 145 U. S. 205, 12 Sup. Ct. 832, 36 L. Ed. 676; *Van Winkle & Co. v. Crowell*, 146 U. S. 42, 13 Sup. Ct. 18, 36 L. Ed. 880. In the following decisions of said court it was applied as to parol evidence of an alleged usage: *Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534; *Orient Ins. Co. v. Wright*, 1 Wall. 470, 17 L. Ed. 505; *Thompson v. Riggs*, 5 Wall. 663, 18 L. Ed. 704; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Stagg v. Conn. Mut. Ins. Co.*, 10 Wall. 589, 19 L. Ed. 1038; *The Delaware*, 14 Wall. 579, 20 L. Ed. 779; *Partridge v. Ins. Co.*, 15 Wall. 573, 21 L. Ed. 229; *Hearne v. Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395; *Nat. Sav. Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Tilley v. City of Chicago*, 103 U. S. 155, 26 L. Ed. 374; *Grace v. Am. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Meissner v. Brun*, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. Ed. 496. In the case of *Partridge v. Ins. Co.*, Mr. Justice Miller, in referring to the parol evidence offered therein, said: "It appears to us that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff. The language of the latter was neither ambiguous nor technical. It required and needed no expert, no usage, to discover its meaning. To have admitted the usage offered in evidence in the case would have been to make a contract for the parties differing materially from the written one under which they had both acted for some time." And in referring generally to the cases where parol evidence of usage is admissible he said: "But when it is sought to extend the doctrine beyond this, and incorporate the custom on to an express contract whose terms are reduced to writing and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to or vary or contradict the well-expressed intention of the parties made in the writing. No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts." And in the case of *The Delaware*, Mr. Justice Clifford said: "Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed in the particular trade to which the contract refers are used in a particular sense, and different from the sense which they ordinarily import; and it is also admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties. Such

evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are at common law." It will be noted that Mr. Justice Clifford in the above quotation refers to an exception to the rule against parol evidence when he says that such evidence of usage is admissible in certain cases "for the purpose of annexing incidents to the contract in matters upon which the contract is silent." It may be well, perhaps, for the purposes of this case to ascertain the exact meaning of this exception. An application of it will be found in the previous case of *Robinson v. U. S.*, 13 Wall. 363, 20 L. Ed. 653. That case was an action to recover damages for nondelivery of barley under a written contract. The contract was silent as to whether the barley was to be delivered in bulk or in sacks. It was tendered in bulk and refused. In justification of the refusal it was proven by parol that it was, and always had been, the usage at the place where the contract was made and to be performed to deliver grain in sacks. Such evidence was held to be admissible. Mr. Justice Davis said: "The contract, by its terms, is silent as to the mode of delivery, and, although there are two modes in which this can be done, yet they are essentially different, and one or the other, and not both, must have been in the mind of the parties at the time the agreement was entered into. In the absence of an express direction on the subject, extrinsic evidence must of necessity be resorted to in order to find out which mode was adopted by the parties; and what extrinsic evidence is better to ascertain this than that of usage? If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it and specifying no means of doing it different from the ordinary one, mean that the ordinary one, and no other, should be followed. Parties who contract on a subject-matter concerning which known usages prevail by implication incorporate them into their agreement if nothing is said to the contrary. The evidence in the present case did not tend to contradict the contract, but to define its meaning on an important point, where, by its written terms, it was left undefined. This, it is settled, may be done." The parol evidence of the usage in that case was for the purpose of annexing an incident to the contract in a matter upon which it is silent, and it was on this ground that it was held to be admissible. But this is not the only instance where parol evidence of usage or verbal agreement is admissible on the ground of silence in the contract. Another instance is referred to in the following statement of Judge Wallace in the case of *Sun Printing & Publishing Ass'n v. Edwards*, 113 Fed. 445, 51 C. C. A. 279, to-wit: "When the writing is of a nature to import that it was not intended to embody the entire contract between parties, oral evidence to prove the whole terms is admissible. An example of such a writing is a memorandum of purchase or sale." Possibly, also, Judge Lurton has this instance in mind when he says in the case of *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520: "There may be instances in which a contract is partly in writing and partly oral, and the two together constitute the contract, so there may be a question of facts as to whether the written agreement is or is not the entire agreement. Illustrations of such cases are afforded by the cases of *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, and *Bank v. Cooper*, 137 U. S. 473, 11 Sup. Ct. 160, 34 L. Ed. 759, where the question was whether a bill of lading constituted the entire contract." Judge Wallace's statement of this instance, however, is not broad enough to cover all cases coming within it. He limits it to cases where it is the nature of the writing to import that it was not intended to embody the entire contract. It covers all cases where the writing so imports, whether such is the nature of the particular writing or not. But the essential condition of this instance of said exception is that the writing so imports. If it does not so import, parol evidence is not admissible to add a term to the contract by usage or verbal agreement merely because the writing is silent as to such term. The necessity of its existence was emphasized in the case of *Seitz v. Brewers' Ref. M. Co.*,

supra. That was an action on a written contract to recover the purchase price of a refrigerating machine. The defendant set up by way of defense and counterclaim a contemporaneous verbal guaranty that the machine had a certain capacity, and would accomplish a certain result. It was decided that parol evidence of such agreement was inadmissible. Mr. Chief Justice Fuller said: "Undoubtedly, the existence of a separate oral agreement as to any matter on which the written contract is silent, and which is not inconsistent with its terms, may be proved by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies: that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing." And again he says: "Whether the written contract fully expressed the terms of the agreement was a question for the court, and, since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject-matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

We are now in position to apply this general rule as to the inadmissibility of parol evidence of verbal agreement or usage to add to or vary or contradict a written contract and this exception thereto to the case in hand. We have here two writings, a lease and a contract of sale. They purport on their face to be separate transactions, and not parts of one transaction. They bear different dates, the one of later date referring to the one of earlier date as a completed transaction, and they are between different parties. But, as stated, it is alleged that they are parts of one transaction, and for the purposes of the demurrers we have assumed that this allegation must be accepted as true. This aside for the present, however, and treating in connection with the matter now in hand the two writings as separate transactions, as they on their faces purport to be, what result have we? And, first, as to the lease. Possibly the defendant W. F. Lillard, the lessor, and perhaps, also, the defendant R. H. Lillard jointly with the former, would have been entitled to the slop for the season in question at the market price as against Julius Kessler & Co., the trustee, and possibly, also, as against the plaintiff, the *cestui que trust*, under the lease alone, without any further contract on the subject. It may be said that it did not contemplate any subsequent contract in relation to the slop between those parties, or any of them, but only a notification that the slop would be taken at the market price. But if it be conceded that it did contemplate such a contract, the lease was certainly a complete contract in and of itself otherwise. There is no reason for inferring therefrom that the parties thereto did not intend the lease to be a complete and final statement of the whole of that transaction between them with this possible exception, otherwise the lease does not import that it was not intended to embody the entire contract between said parties. This being so, parol evidence of usage or verbal agreement is not admissible to add to it the agreement relied on as a basis of the counterclaim on the ground that the lease is silent in regard thereto. But the lease is not entirely silent as to the matters covered by said alleged agreement. It is silent as to troughs and tanks or tubs. It is not silent as to inside or partition fences. To admit the parol evidence in question would be to vary the provision in regard thereto from a stipulation that the lessee, Kessler & Co., was to bear the expense of building and maintaining such fencing to a stipulation that said lessee was to divide the feeding lot by suitable inside or partition fencing into five cattle pens. Then as to the contract of sale, though it may not have been contemplated by the lease, it served a purpose in addition to any that was served by the lease. It limited the quantity of slop to be furnished to that obtained from 1,200 bushels of grain,

fixed the price, and added plaintiff, the cestui que trust, as an express party to the contract. On its face it purports to be a complete contract. It cannot be inferred from its terms that the parties thereto did not intend it to be a complete and final statement of the whole of that transaction. It does not import that it was not intended to embody the entire contract. But it may be said that the contract is silent as to the mode of delivery of the slop, and therefore, under the authority of the case of *Robinson v. U. S.*, supra, the parol evidence in question was admissible. But an agreement in regard to the fencing has nothing to do with the delivery of the slop. It is not a mode of its delivery. All that plaintiff was to do by the contract was to deliver the slop at the lot, and the defendants were to accept it there. There was no agreement on plaintiff's part to feed the slop to the defendants' cattle. Then as to providing troughs, tanks, or tubs. Though there is more reason, perhaps, for saying that furnishing such articles has something to do with the delivery of the slop than the division of the lot into cattle pens, the contract is not silent in regard thereto. To admit the parol evidence in question would be to vary the stipulation that the defendants were to have the privilege of using the necessary troughs and tubs which it was the purpose of plaintiff to place in the lot to a stipulation that plaintiff was to furnish all the troughs and tubs which defendants should need in feeding their cattle.

The result, then, of our consideration of the two writings as separate transactions, is that it must be held that the parol evidence in question is inadmissible. Considering them as parts of one transaction cannot result differently. The only effect of doing so is to render the lease complete in the only particular in which it is possible to say that it was incomplete. In other words, the lease contemplated that, if the defendants exercised the privilege conferred by it of taking the slop, then a contract would be made in relation thereto, and in pursuance to this forward look of the lease the contract of sale was executed. Reading them together, fits them together, and makes a complete transaction.

Counsel for defendants cite a number of authorities bearing on the question of the admissibility of parol evidence of usage, and quote general expressions therefrom. The decisions of the Supreme Court of the United States, which are binding upon me, cover the ground so completely that I have not found it necessary to consider these authorities carefully, in order that I might point out wherein they do or do not support the position taken herein. It will be noticed that in some of the decisions of the Supreme Court reference is made to the fact that in some jurisdictions the rule as to admissibility of such evidence is broader than it will allow, and that the tendency of the decisions in that court is to narrow the rule, and restrict its application. For this reason, if none other, it is not helpful to consider the decisions in other jurisdictions when those of the federal jurisdiction are so numerous and explicit.

In reflecting upon the ground thus far covered, it occurs to me to add that the only possible basis for claiming that there was any agreement to do the things set up by defendants is this: The stipulation in the lease in regard to inside and partition fences should be construed to be an agreement not only to bear the expense of building and maintaining such fences, but also an agreement to build and maintain them. If the provision in regard to the defendants' taking the slop made at the distillery had been an absolute agreement on their part to take all the slop so made during the term of the lease at the market price, it could be said that the lease was a complete contract, and no additional contract in regard thereto was in contemplation, and, as defendants had agreed to take all the slop absolutely, the stipulation as to inside or partition fences should be construed as above indicated. But the defendants did not so agree. They stipulated only for the refusal of the slop. The lease contemplated that others than defendants might take the slop. In that contingency defendants would not have any interest whatever in the matter of inside or partition fences. In view of this, the stipulation as to the fences should be construed to mean just what it says, and no more, to wit, that plaintiff is to bear the expense of building and maintaining such fences, leaving it open, in case defendants exercised their privilege, and another contract was made covering the matter, to insert in such contract such stipulation as might be agreed on in regard thereto. But, even if such a construction should be

given to said provision, it relates only to the fencing, and is for necessary fencing, and not for dividing the lot into five cattle pens. And, besides, it must be maintained that plaintiff, who was no party to the lease, was bound by the stipulation—a proposition which we have simply assumed without taking position as to its correctness one way or the other.

But there is another ground of general demurrer to the counterclaim. The damages alleged to have been sustained by the breach of the alleged agreement are specialized into five distinct items, to wit, the death of 67 head of cattle, the failure of the 1,340 head to take on 115 pounds per head, the failure of those head to sell for as much as they would have sold by 75 cents per 100 pounds, the increased expense of labor, and the increased expense of feed. Are defendants, if entitled to recover at all, entitled to recover an account of either element of damage thus alleged? What must now be accepted as the leading case on the subject of measure of damages in breach of contract cases is the recent case of *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. In that case Mr. Justice Holmes says that: "The parties themselves, expressly or by implication, fix the rule by which the damages are to be measured." The principle for determining what rule the parties have fixed by implication where they have said nothing on the subject he says is "what the parties probably would have said if they had spoken about the matter," or, more definitely, such damages as "it may be fairly presumed he [i. e., the obligor] would have assented to if they had been presented to his mind." And here it is not the damages that he would have assented to for a willful breach, but for a breach that he could not have prevented. That case was an action to recover damages for the non-delivery of oil. And in expressing this last idea Mr. Justice Holmes said: "In the present case the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed when the contract was made." The measure of damages, therefore, for plaintiff's breach of its alleged agreement to divide the lot into five cattle pens and to provide troughs and tanks or tubs is such damages as the plaintiff fairly may be supposed to have assumed consciously or to have warranted the defendants reasonably to suppose that it assumed when the contract was made.

What, then, are the damages which the plaintiff fairly may be supposed to have so assumed or to have warranted the defendants reasonably to suppose it so assumed? Are they the reasonable expenses of so dividing the lot and providing the troughs and tanks or tubs and any loss sustained in the meantime caused by delay in having them, or the difference between the contract price of the cattle purchased in reliance upon the contract and what they could have been sold at as soon as the breach was known, or the reasonable profits which defendants would have made under the contract assuming them to have sold them as soon as the breach became known, or those claimed by defendants? I do not deem it necessary to go farther than to say that, in my opinion, those damages are not the damages claimed by defendants. The defendants having limited their claim to certain specified damages, none of which they are entitled to recover, their counterclaim is demurrable, even though damages might have been claimed to which they are entitled. This, then, is an additional ground for sustaining the demurrers to the second paragraph.

The defendants cite the case of *New Market Co. v. Embry & Co.*, 48 S. W. 980, 20 Ky. Law Rep. 1130. That, however, was an action to recover damages for the nondelivery of slop under a contract similar to some extent, no doubt, to the one involved in this case after the performance of the contract had been entered upon. I don't think it applicable to this case, which is not an action to recover damages for nondelivery of the slop, but for breach of a side agreement to divide the lots into cattle pens and furnish troughs, tanks, or tubs.

This consideration of the matter of damages suggests the question whether the defendants did not waive the breach of the alleged agreement to divide the lot into cattle pens and furnish troughs and tanks or tubs by going ahead under the contract with the knowledge that it had not been complied with. It is alleged that no other slop could be procured, and plaintiff repeatedly promised to comply with the contract. This may be the reason why defendants went ahead under the contract. But, having done so, can they now complain of the breach? I do not find it necessary to decide this question, but simply refer to it as one of the questions raised by the demurrers.

It remains to consider the demurrer to the first paragraph as a whole. It is certain that it does not allege any affirmative defense to the action. Does it traverse any of the essential facts alleged in the petition? There is a certain denial of the delivery of the slop, but it is not a good denial. It is simply a denial of the delivery of all the slop alleged to have been delivered, and a denial that it was delivered under the terms of the contract as defendants claim it to have been, or in accordance therewith. This is clearly insufficient to make an issue.

For the reasons stated, the demurrers are sustained so far as they apply to each paragraph, and the defendants are given leave to amend. In view of this ruling it is not necessary that I should act on the motion to elect and to strike out.

MCGREGOR v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 542.

1. CRIMINAL LAW—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error in a criminal case, based on the admission of evidence, which fail to set out the evidence so admitted, as required by rule 11 of the Circuit Court of Appeals (90 Fed. cxlvi, 31 C. C. A. cxlvi), will not be considered by such court.

2. INDICTMENT—MOTION TO QUASH—REVIEW OF RULING.

A motion to quash an indictment is addressed to the discretion of the court, and in the federal courts the refusal to quash will not be reviewed in an appellate court.

3. SAME—EVIDENCE BEFORE GRAND JURY—INVESTIGATION BY TRIAL COURT.

It is not the duty of a trial court, on a motion to quash an indictment, to investigate the character of the evidence taken by the grand jury, in order to ascertain if a portion of it was incompetent or illegal, or if it was insufficient to justify the finding of the indictment, and such matters should not be gone into unless in exceptional cases, where the ends of justice imperatively require it.

4. SAME—JOINDER OF OFFENSES.

Charges against the same defendants for conspiracy to defraud the United States, based on Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], and for receiving money from their alleged co-conspirator for aiding to procure a contract from the government, and for services rendered in relation to the same, based on sections 1781, 1782 [U. S. Comp. St. 1901, pp. 1212, 1213], defendants being clerks in a department, and such charges all relating to the same transaction, may properly be joined in different counts in the same indictment under Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720].

5. SAME—REQUIRING ELECTION BETWEEN COUNTS.

Where the different counts of an indictment, while charging different offenses, all relate to the same transaction, so that the evidence offered to sustain one is also admissible under the others, the court may properly refuse to require the government to elect between them.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 444, 451, 452.

8. CRIMINAL LAW—RULING ON MOTION FOR ELECTION BETWEEN COUNTS—REVIEW ON ERROR.

A motion to require the government to elect between the counts in an indictment is addressed to the discretion of the court, and the ruling thereon is not reviewable on a writ of error in the federal courts.

7. CONSPIRACY TO DEFRAUD THE UNITED STATES—REQUISITES OF OFFENSE.

It is not necessary, to sustain an indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], which makes it an offense to conspire "to defraud the United States in any manner or for any purpose," that the consummation of the conspiracy would have caused pecuniary loss to the government, where the defendants are its officers or employes.

8. UNITED STATES—OFFENSES BY OFFICERS—CLERKS IN DEPARTMENTS.

A clerk in one of the departments is subject to indictment under Rev. St. § 1781, or section 1782 [U. S. Comp. St. 1901, pp. 1212, 1213], as an "officer and agent" or an "officer and clerk" of the United States.

9. CONSPIRACY—INSTRUCTIONS—INTENT.

Instructions with respect to the intent necessary to be found to warrant a conviction of defendants on a charge of conspiracy to defraud the United States, which charged, in effect, that, if defendants intended the consequences which naturally and in fact resulted from their acts, and such result was to defraud the government, they could not be acquitted because they may not have thought the government would be defrauded, considered and approved.

In Error to the District Court of the United States for the District of Maryland.

A. E. L. Leckie and William S. Bryan, Jr. (Charles A. Douglas, on the brief), for plaintiff in error.

Charles J. Bonaparte and John C. Rose (Morris A. Soper, on the brief), for defendant in error.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

GOFF, Circuit Judge. The grand jury of the United States for the district of Maryland on the 25th day of June, 1903, found an indictment containing 14 counts against the plaintiff in error and one Columbus Ellsworth Upton. The first and second counts of the indictment were drawn under section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676]. The first count charged the defendants with conspiring with one Charles E. Smith to defraud the United States. It was alleged in that count that said defendants were clerks in the Post-Office Department of the United States, in the office of the general superintendent of the free delivery system; that said Smith, with whom they so conspired, was a dealer in leather goods in Baltimore, and that he was, in furtherance of said conspiracy, to submit to the superintendent of the free delivery system a sample pouch, convenient for the use of letter carriers, and offer to furnish pouches like said sample in lots of 1,000 each, at 90 cents per pouch, the said defendants and Smith then and there knowing that such price was greatly in excess of the real value of said pouches, and greatly in excess of the price at which the government could procure the same elsewhere. And it was further set forth that the defendants were to use their influence and official positions to have such offer of Smith accepted, they to conceal from the First Assistant Postmaster General, who by law was

the person authorized to accept such offer, the fact that such price was excessive, and then that said Smith, on the consummation of the sale and the receipt of the sum of 90 cents per pouch, was to pay said defendants 40 cents for each pouch so bought and paid for. In this count the three conspirators were charged, one or the other of them, with doing 28 overt acts in pursuance of the object of such conspiracy.

The second count, after stating the official positions of said defendants in character like as they were set forth in the first count, went on to charge that said Smith had theretofore furnished pouches to the government at the price of 90 cents each, which was greatly in excess of the real value of the pouches, and the price at which such pouches could have been purchased by the department, as defendants well knew, and the count then set forth the conspiracy to be that the defendants should use their official positions to secure additional orders for Smith, and that they should be paid by him 40 cents on each pouch for which additional orders should be given. This count designates 14 overt acts done by some of the three conspirators in furtherance of the object of the conspiracy, these acts being the same as 14 of the 28 set forth in the first count.

The counts of the indictment from 3 to 10, inclusive, were based upon section 1781 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1212]. The third count charged that the defendants, at Baltimore, on the 3d day of October, 1902, being officers and agents of the United States, took and received \$2,000 from Charles E. Smith for procuring and aiding to procure for said Smith a contract from the Post-Office Department to furnish that department with 5,000 leather pouches at the price of 90 cents each. The fourth, fifth, and sixth counts, with the exception of the dates, were identical with the third. The seventh count charged that said Smith had offered the general superintendent of the free delivery system of the Post-Office Department of the United States government to furnish that department leather pouches for the use of letter carriers in lots of 1,000 at 90 cents each; that the defendants were officers and agents of the government, and that prior to the commission of the offense charged they had procured and aided to procure the First Assistant Postmaster General to accept said offer and contract with Smith for 5,000 of said pouches at the rate mentioned, and that on the 2d day of October, 1902, at Baltimore, the said defendants being then and there officers and agents of the government, did take and receive \$2,000 from Smith for procuring and aiding to procure for him said contract. Except as to the dates, the eighth, ninth, and tenth counts are identical with the seventh.

From 11 to 14, inclusive, the counts are drawn under section 1782 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1213]. Count 11 charges that before the commission of the alleged offense the said Smith had offered to furnish the general superintendent of the free delivery system of the Post-Office Department of the United States leather pouches for the use of letter carriers in lots of 1,000 at 90 cents each; that the defendants were officers and clerks in the employ of said government, and that they had rendered certain services to Smith, in that they had procured and aided to procure the said department, through the First Assistant Postmaster General, to accept the

offer of said Smith for 5,000 of such pouches, and that afterwards, on the 22d day of October, 1902, at Baltimore, the defendants, officers and clerks as aforesaid, unlawfully did receive certain compensation, to wit, the sum of \$2,000, then and there paid by Smith for their services so rendered. Except as to the dates mentioned, the twelfth, thirteenth, and fourteenth counts are identical with the eleventh.

When called upon to plead to the indictment, each of the defendants moved to quash it on the ground that inadmissible testimony had been considered by the grand jury. The motion to quash was overruled by the court, after which the defendants demurred to the indictment, and to each and every count thereof, which demurrer was overruled. The defendants then pleaded not guilty to each count, and also filed a special plea to each count. To the first and second counts the special pleas set up that the Post-Office Department had purchased from one Maurice Runkel pouches similar to those mentioned in said counts for 90 cents each, and that, if the pouches mentioned in the indictment had not been purchased from Smith at 90 cents, pouches no better would have been purchased from Runkel at 90 cents, and that the United States suffered no pecuniary loss by the pouches having been purchased from Smith instead of from Runkel. The special pleas to the other counts each set forth that the defendant McGregor was a third-class clerk in the Post-Office Department of the United States, and that he was not an official of the United States in the sense in which that term is used in the statute of the United States under which such counts of the indictment had been drawn. The United States demurred to said special pleas, and to each of them, and the court sustained such demurrer. The defendants then moved to quash the indictment, alleging as a reason therefor its duplicity, and this motion the court also overruled. They then moved that the government be required to elect on which count of the indictment it would proceed to trial, and this motion was overruled. The sections of the Revised Statutes before mentioned, under which the indictment was drawn, read as follows:

"Sec. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment, in the discretion of the court."

"Sec. 1781. Every member of Congress or any officer or agent of the government who, directly or indirectly, takes, receives, or agrees to receive, any money, property, or other valuable consideration whatever, from any person for procuring, or aiding to procure, any contract, office, or place, from the government or any department thereof, or from any officer of the United States, for any person whatever, or for giving any such contract, office, or place to any person whomsoever, and every person who, directly or indirectly, offers or agrees to give, or gives, or bestows any money, property, or other valuable consideration whatever, for the procuring or aiding to procure any such contract, office or place, and every member of Congress who, directly or indirectly, takes, receives, or agrees to receive any money, property, or other valuable consideration whatever after his election as such member, for his attention to, services, action, vote, or decision on any question, matter, cause, or proceeding which may then be pending, or may by law or under the Constitution be brought before him in his official capacity, or in his place as such member of Congress, shall be deemed guilty of misdemeanor, and shall

be imprisoned not more than two years and fined not more than ten thousand dollars. And any such contract or agreement may, at the option of the president, be declared absolutely null and void; and any member of Congress or officer convicted of a violation of this section, shall, moreover, be disqualified from holding any office of honor, profit, or trust under the government of the United States.

"Sec. 1782. No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a department, or other officer or clerk in the employ of the government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the government of the United States."

A jury was then sworn to try the issues thus joined, and the testimony of a number of witnesses offered by the United States was heard, together with some documentary evidence. The defendants offered no evidence, but submitted to the court a large number of instructions, with the request that the same be given to the jury. A few were granted, but the greater portion of them were refused. Both of the defendants were found guilty, and each of them was sentenced by the court to pay a fine of \$1,000 and to be imprisoned in the Maryland penitentiary for and during the term of two years.

The defendant McGregor has prosecuted this writ of error on 30 assignments of error. Of these assignments 1 and 2 have reference to the court's action on the motion to quash the indictment because of the alleged hearing of inadmissible testimony by the grand jury, and No. 6 concerns the court's refusal to quash because of the alleged duplicity of the indictment. Assignments 3, 4, 11, 12, 15, 16, and 17 concern the court's action in overruling the demurrer to the indictment, and No. 5 is because the court refused to require the government to elect on what counts it would proceed; assignments 9, 10, and 13 relate to the action of the court in sustaining the demurrer to defendants' special pleas, and assignment 23 is because of the instruction given to the jury during the argument before it made by defendants' counsel; assignments 7, 27, 28, 29, and 30 relate to the action of the court in admitting certain testimony over the objection of defendants, but as these assignments fail to quote the full substance of the evidence admitted, and in fact cite none of the testimony so admitted, they utterly ignore the provisions of Rule 11 of this court (90 Fed. cxlvi, 31 C. C. A. cxlvi), and therefore will not be further considered by us. 3 Desty, Fed. Pro. 1558; Prichard v. Budd et al., 76 Fed. 710, 22 C. C. A. 504; Newman v. Virginia T. & C. Steel & Iron Co., 80 Fed. 228, 25 C. C. A. 382.

Assignment 8 claims that the court erred in refusing to give the rejected prayers submitted by the plaintiff in error. To this action of the court we see no objection, as will appear from the conclusion we reach concerning the instructions given, which are in fact the counterpart of

those rejected. Assignments 14, 18, 19, 20, 21, 22, 24, 25, and 26 have reference to the construction given by the court to sections 1781 and 1782 of the Revised Statutes of the United States [U. S. Comp. St. 1901, pp. 1212, 1213], and to the ruling of the court concerning the sufficiency of the evidence to bring the plaintiff in error within the purview of said sections. These assignments are, in substance, disposed of by the construction we give the statutes mentioned, and therefore will not be again directly referred to.

We are of opinion that, so far as the motion to quash is concerned, that the court below followed the well-considered and well-settled rules applicable to criminal procedure, and that the motion was properly overruled. It is well to note the fact that a motion to quash is one addressed to the discretion of the court, and that in the courts of the United States, at least, the refusal to quash will not be reviewed in an appellate court. *U. S. v. Rosenberg*, 7 Wall. 580, 19 L. Ed. 263; *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, 10 Ency. P. & P. 567, and cases cited.

Counsel for the plaintiff in error present with much earnestness and confidence their objections to the action of the court below in refusing to quash the indictment because of the hearing by the grand jury of what they allege to be illegal and inadmissible testimony. It is alleged in the motion to quash that a statement made by the plaintiff in error, after he had been duly sworn, during an examination conducted by inspectors of the Post-Office Department, previous to the institution of criminal proceedings, concerning the purchase by the government of the mail pouches delivered by Charles E. Smith in furtherance of the alleged conspiracy, was submitted to the consideration of the grand jury, and that the same constituted part of the evidence upon which the jury acted in returning the indictment. It is further alleged in said motion that certain letters, checks, and bank entries were submitted to said jury, and considered by it, and that no competent and legal evidence of any character was in fact presented to and considered by said jury upon which to base the indictment. This motion was simply an effort to revise the judgment of the grand jury, and was in fact an appeal from the jury to the court for the purpose of determining whether or not the jury acted upon sufficient proof in finding the indictment. We have not been favored by counsel with any authority justifying such a procedure as was asked for concerning this matter in the court below, and if any case exists where such a course has been followed we are unable to find it. We do not mean to say that there are not cases where indictments have been quashed because of the irregular action of the grand jury, the improper conduct of witnesses before it, and because of the illegal use of admissions and depositions made by the party accused. But those cases are not at all similar to the one now under consideration, and we do not deem it necessary to explain them, as they rest upon circumstances peculiar to themselves, and entirely foreign to the facts found in the record now under consideration. The statement made by the plaintiff in error, and said to have been submitted to the grand jury, was one authorized by the statutes of the United States, was taken before an official designated by law for that purpose, and it does not appear from the motion that,

in order to secure said statement, any threats were resorted to or any promises made, but it plainly appears that at the time it was so made no criminal proceedings had been instituted, nor had any one been charged with the offense, but that the officials of the department were then making a preliminary investigation, in order to locate the crime from the facts so found. It is doubtless true that grand juries frequently consider testimony that would be held inadmissible by a trial court, for such juries are not usually well informed concerning the rules of evidence, nor the rights and privileges of the parties whose alleged offenses they are examining into. Such incompetent evidence, if subsequently offered at the trial, would be excluded, or, if admitted, would by an appellate court be held to be error, and any judgment founded thereon would be reversed. In cases like this, where the record discloses that many witnesses were examined, and much documentary evidence considered by the grand jury, it is quite apparent that it would be subversive of our criminal procedure, and destructive of the rules formulated to promote the due administration of justice, to establish a practice under which indictments might be quashed because of the consideration by the grand jury of the improper testimony given by one witness among many, or the reading by such jury of a statement irregularly submitted to it, which may likely have had but little influence in the conclusion reached by the jury.

Admitting that the statement of the plaintiff in error referred to in his motion to quash was improperly considered by the grand jury, we could not say, in the light of the record of this case, that said jury did not nevertheless have before it a sufficiency of legal and pertinent testimony to warrant the returning of the indictment, as such record discloses the fact that 11 witnesses were duly sworn and examined concerning the offenses alleged in the several counts of the indictment. The proceedings before a grand jury should always be conducted in secret, and should not be made public, unless in those peculiar and rare instances in which the ends of justice imperatively require it; this case, in our opinion, not being of that class. We think that the authorities bearing upon this question do not sustain the contention of counsel for the plaintiff in error that it was the duty of the trial court to investigate the character of the evidence taken by the grand jury, in order to ascertain if a portion of it was incompetent, if a part of it was illegal, or if all of it was insufficient to justify the finding of the indictment. The Circuit Court of Appeals for the Second Circuit recently passed upon some of the questions involved in this motion to quash. See the case of *Radford v. United States*, 129 Fed. 49, 63 C. C. A. 491. We quote:

"It is assigned as error that the court denied a motion to quash the indictments, which was based on the proposition that the grand jury acted upon incompetent evidence of the essential facts on which the charge was predicated, it appearing that a clerk in the office of the county clerk of Erie county (whose office is in Buffalo) attended before the grand jury in Lockport, and testified that upon a search of the records made by him he found certain deeds, mortgages, and judgments on file. It would be a sufficient answer to this assignment to call attention to the well-settled rule that such a motion is ordinarily addressed to the discretion of the trial court. The reason for entertaining motions to quash on grounds such as that above indicated is well set out in *U. S. v. Farrington* (D. C.) 5 Fed. 343: 'No person should be sub-

jected to the expense, vexation, and contumely of a trial for a criminal offense unless the charge has been investigated, and a reasonable foundation laid for indictment or information.' After conviction this reason no longer exists, because an intelligent and impartial jury of his peers, after a careful investigation, at which he has been represented by counsel, with full power to cross-examine, to introduce evidence, to tell his own story if he so choose, and to plead his cause, has reached the conclusion not only that there was a reasonable foundation for the charge, but that the charge was true. "The motion to quash was clearly determinable as a matter of discretion. It was preliminary in its character, and the denial of the motion could not finally decide any right of the defendant. The rule laid down by the elementary writers is that a motion to quash is directed to the sound discretion of the court, and, if refused, is not a proper subject of exception." *United States v. Rosenberg*, 7 Wall. 580, 19 L. Ed. 263."

The insistence of the plaintiff in error that the action of the court below in overruling the motion to quash the indictment for reasons before stated deprived him of certain of his constitutional rights, is in our judgment without merit.

The motion to quash the indictment for alleged duplicity is based on the fact that some of the counts charged that the defendants conspired to defraud the United States, and that other of the counts charged that the defendants, being officers and agents, or officers and clerks, violated sections 1781 and 1782 of the Revised Statutes by receiving money from their alleged co-conspirator, Smith, for procuring, or aiding to procure, a contract mentioned in the counts relating to the conspiracy. All of the offenses alleged in the different counts of the indictment were for acts connected together and bearing directly upon the conspiracy charged in the indictment, and consequently, under section 1024 of the Revised Statutes [U. S. Comp. St. 1901, p. 720], should have been united in the same indictment. *Logan v. United States*, 144 U. S. 263, 295, 12 Sup. Ct. 617, 36 L. Ed. 429.

The action of the court below in refusing to require the United States to elect under which counts of the indictment the trial should proceed was without error. The offenses charged were, as has been shown, directly connected together, and it was quite apparent to the trial judge that any evidence offered to sustain one count was also admissible and relevant to the other counts of the indictment. Such motions are addressed to the discretion of the court, and are not reviewable on writ of error. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; *Pierce v. United States*, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454.

The indictment was well drawn, and sufficient under the law, so it follows that the assignments of error relating to the court's action in overruling the demurrer to it as a whole and to its various counts cannot be sustained. In fact, counsel for the plaintiff in error do not seem to rely upon them, and it is quite clear that they were not well taken.

The special pleas to the first and second counts of the indictment, concerning which assignments 9, 10, and 13 relate, allege that the government had made purchases of pouches similar to those described in each of the said counts, at the price of 90 cents per pouch, from one Maurice Runkel, and aver that, if the pouches mentioned

in each of the said two counts had not been purchased from Charles E. Smith as therein alleged, others in equal number of no better grade or greater value would have been purchased of the said Maurice Runkel at the same price, so that the United States suffered no pecuniary or other loss or damages by reason of the said purchase having been made from Smith rather than from Runkel. The demurrer to the special pleas was properly sustained. To hold otherwise would require a strained—in fact, a false—construction of the statute under which the first and second counts of the indictment were framed. It may be true that no pecuniary loss would follow the consummation of the conspiracy, and still the result might be that the damage to the government would be serious and far-reaching. The language of the statute clearly contemplates that the loss or damage may be other than a pecuniary one susceptible of accurate calculation. The words “in any manner or for any purpose” are most comprehensive, and show that the intention of the lawmaking power was to have the statute as broad and as comprehensive as it could possibly be. It surely is a wrong and a great injury to the government when any officer or employé of one of its departments conspires with another to do an act the inevitable result of which will be to corrupt the efficiency and impair the usefulness of such department. To hold that such conduct would not be a fraud upon the government and a loss to it would be as reprehensible as such conduct itself. This statute has, in a number of well-considered cases, been given the construction placed upon it by the court below, and such construction has our approval. *United States v. Bunting et al.* (D. C.) 82 Fed. 883; *United States v. Curley et al.* (C. C.) 122 Fed. 738; *Palmer v. Colloday*, 18 App. D. C. 426; *Tyner and Barrett v. United States*, 23 App. D. C. 324.

The special pleas to the remaining counts of the indictment raise the question whether the plaintiff in error was such an employé of the government as is contemplated by the terms of sections 1781 and 1782 of the Revised Statutes. In a number of such counts the defendants are alleged to be “officers and agents” of the government, and in the residue they are averred to be “officers and clerks” in the employment of the government. The special pleas applicable to the counts drawn under sections 1781 and 1782 set forth that the plaintiff in error was a third-class clerk in the Post-Office Department of the United States, and was not an officer of the United States in the sense in which that term is used in the statute of the United States under which such counts had been framed. The contention of the plaintiff in error presented by these special pleas is without merit. The authorities cited in support of this contention relate principally to the construction of the state statutes, and, while interesting and instructive, are not applicable to the case we now consider. Each head of a department of the government is authorized to employ in his department a certain number of clerks of the several classes recognized by law, at such compensation as the Congress may from year to year appropriate, and these clerks, before they enter upon the discharge of their respective

duties, are required to take an oath, the terms of which show that they are about to commence to discharge the duties of the office to which they have been appointed. The plaintiff in error subscribed and swore to this oath, and entered upon the discharge of the duties of a clerk of the third class—a subordinate position, it is true, but nevertheless one clearly included within the legislation to which we have alluded. In *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830, the Supreme Court has disposed of this question. Under this decision the position held by the plaintiff in error in the Post-Office Department established the idea of "tenure, duration, emolument, and duties," and made him an officer of the government within the meaning of the legislation under which the said counts in the indictment were drawn. Concerning this question, see, also, the case of *United States v. McCrory*, 91 Fed. 295, 33 C. C. A. 515, and the cases therein cited.

We come now to the consideration of the assignment of error having reference to the special instructions of the court to the jury given during the argument made before the jury by counsel for the plaintiff in error. We find from the record that said counsel was contending in his argument that the evidence before the jury did not show that the defendants had intended to defraud the United States, as they might have thought that the government would suffer no loss by awarding the contract to Smith, because, if he had not furnished the pouches, Runkel would have furnished them at the same price; and that, if the defendants did not think they were defrauding the United States, they did not then have the corrupt motive, without which there could have been no intent to defraud; and that, while men like the judge on the bench, or counsel in the case, might know they were, under the circumstances set forth by the witnesses, defrauding the government, still men of the character and position of the defendants might not have so thought. It was during this argument and at this point that the court stated to counsel that he was making an improper argument, and gave to the jury the following instruction:

"The defendants are presumed to have intended the natural and necessary consequences of the acts they may be proved to have done with regard to obtaining the contract at an excessive price, and of obtaining a part of the excessive price when paid by the government; and if you find that the natural and necessary consequence of what they did was to defraud the United States, then they are presumed to have intended that result; and they cannot be acquitted on the conspiracy counts because they may not have thought their acts and the result of such acts to be a fraud on the government. Where the act intended to be accomplished is a fraud, it is the intent to do the criminal act which imparts to it the character of an offense."

Concerning this instruction counsel for the plaintiff in error insisted that by it the jury were told that it was not necessary to find the criminal intent, the law being that in conspiracies the corrupt motive is an element of the intent; and they claim that this corrupt motive cannot exist in a conspiracy to defraud if the conspirators do not think that what they agree to do amounts to a fraud.

This instruction of the court must be considered in connection with the instructions that had been given to the jury before the commencement of the argument. We find that the jury had been

instructed that they could not find the defendants guilty on the conspiracy counts unless they were satisfied from the evidence beyond a reasonable doubt not only that the accused did the acts charged in the first and second counts, but also that they did the same with the intent to defraud the United States. The jury had also been instructed that it was their duty to determine whether or not there was a conspiracy to defraud the United States, as set out in the indictment, and that, if they found such a conspiracy to exist, their finding must be based solely upon the evidence in the case; that the existence of the conspiracy was a question of fact exclusively submitted for the jury to determine; that they must find from the evidence that the conspiracy was formed, and that it was formed for the purpose charged in the indictment, and that at least one of the overt acts charged was done for the purpose and with the intent to carry into effect the object of the conspiracy; that there must have been the guilty intention to do the illegal thing charged, and that the act done must have been done to carry that intention into effect; that the issues to be determined were whether the alleged conspiracy was entered into with an actual intent to defraud the United States, and whether any one or more of the parties to such conspiracy, after it had been entered into, did an overt act with the intent to effect such object; that the jury were instructed that they were the exclusive judges of the weight to be given to the evidence of each witness, and that as to the weight of the testimony they were not to be bound by anything that might have been said by the court. The record thus discloses that the jury were, we may say, repeatedly charged by the court that the actual intention to defraud was an essential element of the crime, without which no offense could have been committed, and that, unless such intention was found by the jury from the evidence, the defendants should be found not guilty. As the record makes the case, this additional instruction of the court was not intended to modify or set aside any of the instructions theretofore given, but was intended to explain to the jury a method provided by law by which the jury might, from the evidence, find whether or not such intention existed. It is well settled that the law presumes that every man intends the legitimate consequence of his own acts, and that such acts, when knowingly done, cannot be excused on the ground of innocent intent. In both civil and criminal cases the intent with which an act is done is inferred from the result of the act itself, and the law presumes that every man intends the legitimate consequence of his own acts. *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; *McKnight v. United States*, 111 Fed. 735, 49 C. C. A. 594. It is, we think, quite clear, when all of the instructions given by the court to the jury are taken into consideration, in connection with the testimony which renders them applicable, that the court, by the instruction complained of, did not give the jury reason to think that it was not necessary for them to find the criminal intent before they could convict the defendants. While it is true that the intent to commit the crime is the essence of the offense, it is also true that such intent may be found from

the circumstances attending the act, which may show conclusively that the party charged could not have been ignorant of the criminal nature of his conduct; and the court below, in giving this instruction, on which the plaintiff in error seems so confidently to rely, simply called attention to this well-established principle of the criminal law.

We conclude that the judgment below should be affirmed.

WEST VIRGINIA NORTHERN R. CO. et al. v. UNITED STATES ex rel.
KINGWOOD COAL CO.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 541.

1. FEDERAL COURTS—TRIAL—WAIVER OF JURY—REVIEW.

Where an order of the court setting an application for a peremptory writ of mandamus for hearing disclosed an admission by counsel that "by consent of parties" a jury was waived and the cause submitted to the court for determination, but the record did not disclose any "stipulation in writing waiving a jury," as prescribed by statute, the only questions of law reviewable on error were the sufficiency of the alternative writ or of the findings to support the judgment.

2. SAME—TRIAL COURT—DETERMINATION OF FACTS—CONCLUSIVENESS.

On a trial by the court the court's determination of the facts is binding on error if there is any evidence to sustain it.

3. SAME—SPECIAL ISSUES OF FACT—FINDINGS.

On an application for a peremptory writ of mandamus tried to the court, the court could not be required to make findings on special issues of fact.

4. SAME—CARRIERS—DISCRIMINATION—ALTERNATIVE WRIT—AMENDMENT.

Where an alternative mandamus against a carrier commanded it to furnish relator, for the transportation of its coal, without discrimination, at least 33½ per cent. of the total car supply to be distributed by the carrier at the time the writ was served, or to show cause to the contrary, the court's power to issue the writ being statutory, was not within the strict rule of the common law with respect to amendments, so that, on the court's announcing its conclusion that relator was only entitled to 31 per cent. of the car supply, the court was authorized to permit relator to amend the alternative writ to conform to the facts as found.

5. SAME—PARTIES.

Where, on an application for mandamus against a carrier to prevent discrimination in the furnishing of cars to relator and two certain other coal companies, the petition alleged and the return admitted that the president of the railroad company was himself one of, and also largely interested in another of, the coal companies other than relator, and was, in effect, in control of the railroad company, and that what was done by such company was done through the president, he was a proper party to the proceedings.

6. SAME—SEVERAL JUDGMENT.

Where a mandamus proceeding was brought against a carrier and its president to prohibit discrimination, and, though the mandate was addressed to the railroad company and to its president, "and each of them according to their several and respective powers," the judgment for costs went against the carrier alone, such judgment was not joint, but should be taken distributively, as affecting the president only according to his powers.

7. SAME—MANDAMUS AGAINST OFFICERS.

The grant of power to federal courts to issue mandamus against a common carrier corporation to prevent discrimination necessarily embraced power to act on the officers of such corporation in control thereof, independent of Act Cong. Feb. 19, 1903, c. 708, § 2, 32 Stat. 848 [U. S. Comp. St. Supp. 1903, p. 363], providing that in any proceeding to enforce the statutes relating to interstate commerce it should be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the practice under consideration, etc.

8. SAME—DISCRIMINATION OF SERVICE—EXTENT OF SERVICE—POWER TO FIX.

Where, in a mandamus proceeding against a carrier to prevent discrimination in the distribution of cars among certain coal companies, it was admitted that the carrier owned no coal cars, but obtained them from another railroad, and allotted cars to the several mining districts according to a specified rating, the court had power to fix the percentage of cars which the carrier should distribute to relator in proportion to the present output of relator's mine, there being nothing to indicate any threatened or probable change in such output.

In Error to the Circuit Court of the United States for the Northern District of West Virginia.

For opinion below, see 125 Fed. 252.

The Kingwood Coal Company was a corporation engaged in the mining and shipping of coal in Preston county, W. Va., on the line of the West Virginia Northern Railroad Company, and the Irona Coal Company and the Atlantic Coal & Coke Company were also so engaged, the mines of the three companies being the only collieries so located and operated.

May 1, 1903, the Kingwood Coal Company, as relator, filed its petition in mandamus under the acts of Congress of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3158], and February 8, 1895, c. 61, 28 Stat. 643 [U. S. Comp. St. 1901, p. 3171], against the West Virginia Northern Railroad Company, J. H. Weaver, the Irona Coal Company, and the Atlantic Coal & Coke Company, in the Circuit Court of the United States for the Northern District of West Virginia, charging that the railroad company, in the transportation of the coal mined at said mines, which entered into and became part of the interstate commerce of the country, had been and was discriminating in favor of the Atlantic Coal & Coke Company and the Irona Coal Company and against the Kingwood Coal Company, and praying, on grounds set forth, that the court determine that the Kingwood Coal Company is entitled to 33½ per cent. of the total car supply furnished by the railroad company to shippers of coal along its lines, and that the railroad company and Weaver be required, "according to their several and respective powers," to cease to discriminate, and to furnish relator at least the percentage named.

An alternative writ of mandamus was thereupon issued to the railroad company and J. H. Weaver embodying the case stated in the petition; their codefendants being also summoned to appear.

To this writ the railroad company and Weaver filed their joint return and answer. It was admitted, among other things, that Weaver had no interest in the Kingwood Coal Company; that he held a majority of the stock of the Irona Coal Company; that he was the Atlantic Coal & Coke Company, which was a trading name adopted by him; that he owned a majority of the stock of the railroad company, was its president and a director, and exercised the powers and authority incident to the office "in controlling and directing the operation of said railroad, and as such was and is subject to the provisions of the hereinbefore recited act of Congress"; and that it was "the duty of the said railroad company, as a common carrier, and of the said J. H. Weaver, as an officer, to wit, president and director, of the said company, and his associates, according to their respective powers, to afford reasonable, proper, and equal facilities for the interchange of traffic between lines with which the said railroad company was and is connected, and for the receiving, for-

warding, and delivering of property and passengers to and from the several lines of the said railroad company, defendant, and to connections therewith."

Respondents denied all unlawful or unjust discrimination.

Issue having been joined, the cause was set for hearing on a day specified by an order of court which recited: "At which time, by consent of parties, the matters of law and fact arising herein shall be presented to and determined by the court upon testimony taken at the bar of the court, parties, both plaintiff and defendant, waiving their right to demand a jury herein." Hearing was accordingly had on pleadings and proofs, and the court announced its decision and opinion, whereupon relator obtained leave to amend and amended the alternative writ by striking out "thirty-three and one-third per cent." and inserting "thirty-one per cent.," to which respondent preserved an exception.

Judgment was thereupon entered "that the peremptory writ of mandamus do issue commanding the said West Virginia Northern Railroad Company and J. H. Weaver, according to their several and respective powers, to cease to make or give any undue or unreasonable preference or advantage to the Irona Coal Company or Atlantic Coal & Coke Company over the Kingwood Coal Company in the shipping and transportation of their coal, and to cease to subject the Kingwood Coal Company to any undue or unreasonable prejudice or disadvantage in the shipping and transportation of its said coal or in any respect whatsoever, and to move and transport the traffic of the said Kingwood Coal Company without preference or discrimination, and upon conditions as favorable as are given by the said West Virginia Northern Railroad Company to the said Irona Coal Company and Atlantic Coal & Coke Company, or for like traffic under similar conditions to any other shipper, its fair and reasonable percentage of cars furnished by the West Virginia Northern Railroad Company to shippers of like traffic along its railroad line, based upon the capacity of the several shippers; and to furnish to the said Kingwood Coal Company, for the transportation of its coal, without discrimination, and upon conditions as favorable as those given to other shippers, at least thirty-one per cent. of the total car supply at this time to be distributed by the said West Virginia Northern Railroad Company or J. H. Weaver among the several miners and shippers of coal along the railroad lines of the said West Virginia Northern Railroad Company"; and against the Railroad Company for costs.

Respondents duly excepted, and tendered a bill of exceptions containing the evidence, which was signed and filed. From this it appeared that respondents at the hearing moved the court to make and certify certain special findings of fact as set forth, "but the court, being of the opinion that the evidence heard upon said cause, the whole of the evidence being as hereinbefore set out, does not justify such special findings so prayed, refused to find the same, except in so far as a portion thereof deemed material by the court may be found in the written opinion of the court filed in this cause"; to which ruling respondents excepted. This writ of error was then allowed, and errors were assigned as follows: That the court erred (1) in entering judgment against the railroad company and Weaver jointly; (2) in entering judgment against the railroad company; (3) in entering judgment against Weaver; (4) in permitting the alternative writ to be amended; (5) in entering judgment compelling the delivery to the relator of 31 per cent. of the total of cars distributed, "for the evidence as heard and the facts as certified by the court show that the relator, the Kingwood Coal Company, has not a capacity equal to 31 per cent. of the total capacity of the three mines"; (6) "in refusing to certify the special findings of facts as prayed for"; (7) in entering the judgment rendered, "because the same takes as the sole basis and test of the capacity for the coal output of the Kingwood mine the number of working places therein, when its entire equipment, working places included, should have been considered in measuring its capacity."

P. J. Crogan and John H. Holt, for plaintiffs in error.

V. Gilpin Robinson and John W. Davis, for defendant in error.

Before FULLER, Circuit Justice, and MORRIS and PURNELL, District Judges.

FULLER, Circuit Justice (after stating the facts). Inasmuch as it appeared that the West Virginia Northern Railroad Company was not the owner of any of the cars used on its line for the transportation of coal, but that all such cars were furnished by the Baltimore & Ohio Railroad Company, over whose tracks the coal ultimately reached market, and that after the delivery of the cars to the West Virginia Northern Railroad Company they were distributed by it among the mines along its line, the question to be determined under the pleadings was stated in the careful opinion of Goff, Circuit Judge, returned as part of the record before us, and reported in 125 Fed. 252, to be whether the West Virginia Northern Railroad Company, in distributing the cars, made a just allotment of them among the three mines, or so assigned them as to unlawfully discriminate in favor of two of the mines against the other.

After pointing out that railroad companies could, by discrimination in distribution among competing coal companies, build up some and eventually destroy others, since the output was largely controlled by the number of cars available for use in sending the coal to market, prudent management requiring that no more coal should be mined at any time than could be promptly forwarded, and remarking on the danger of discrimination where the power of controlling the car supply happened to be dominated by an interest in the output and profits of some mines as contradistinguished from others, the Circuit Court ruled that in reaching a proper basis for the distribution of railroad cars it was necessary that the different elements which were essential factors in the finding of the daily output of the respective mines to share in the allotment should be carefully examined and considered, and this embraced such matters as "the working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the hauling system and the power used, the number of miners and other employes, the mine openings and the miners' houses"; and that, while none of these elements could be safely said to be absolutely controlling, the working places, the available points at which coal could be profitably mined, were likely to be the most important, for "at each true working place a certain quantity of coal, to be determined by the thickness of the seam and conditions peculiar to the different coal fields, can be excavated and removed during stated periods of time; and so it follows that, if other essentials are adequate, the daily output of a mine can be computed by the number of its available working places." And the court said:

"The capacity of a coal mine for rating purposes is the amount of coal it is able to place in the railroad cars in a given time, and that depends on its working places, the thickness of its coal seams, its switches, workmen, mine cars and tipples, its general equipment, and its management. The output of a mine is the amount of coal it in fact places in the railroad cars for shipment, and that is regulated by the number of such cars it is able to secure, provided its general equipment is efficient; and it may be and generally is less than its capacity, but can never exceed it."

The Circuit Court found from the evidence that the three mines had all the mining paraphernalia requisite for the excavating and load-

ing of more coal than could be transported in the railroad cars allotted to them respectively; that each mine possessed all of the equipment required to handle all of the coal that could be mined from its working places; and that at the time the suit was instituted the Kingwood Coal Company could fairly count and work at least 65 working places, the Irona Coal Company at least 103, and the Atlantic Coal & Coke Company at least 45; and concluded that the distribution should have allotted to the Kingwood Coal Company 31 per cent., to the Irona Coal Company 48 per cent., and to the Atlantic Coal & Coke Company 21 per cent. of the cars allowed the West Virginia Northern Railroad by the Baltimore & Ohio Railroad Company, whereas the West Virginia Northern Railroad Company apportioned to the Kingwood Coal Company 18 per cent., to the Irona Coal Company 56 per cent., and to the Atlantic Coal & Coke Company 26 per cent. The court held upon the facts that this allotment was not in accordance with the actual conditions, and that thereby the West Virginia Northern Railroad Company had arbitrarily increased the number of cars the Irona Coal Company was entitled to receive from 48 to 56 per cent., and the number to which the Atlantic Coal & Coke Company was entitled from 21 to 26 per cent., while it unjustly reduced the number due the Kingwood Coal Company from 31 to 18 per cent.

The order of court setting the cause for hearing shows, and it is admitted by counsel, that "by consent of parties" a jury was waived, and the cause submitted to the court for determination; but the record does not disclose any "stipulation in writing waiving a jury," as prescribed by statute, and the only question of law reviewable on error would be the sufficiency of the alternative writ, or of the findings to support the judgment. *Andes v. Slauson*, 130 U. S. 435, 9 Sup. Ct. 573, 32 L. Ed. 989; *Spalding v. Manasse*, 131 U. S. 65, 9 Sup. Ct. 649, 33 L. Ed. 86. And even waiving the rigor of this rule, it is also well settled that on trial by the court the determination of the facts is binding if there be any evidence to sustain it. *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457. The fifth and seventh alleged errors may therefore be dismissed as without merit, and are indeed not pressed by counsel.

As to the sixth, it appears from the bill of exceptions, which is unavailing if the rule laid down in *Andes v. Slauson* be applied, that the Circuit Court was requested to make certain special findings of fact, which the court, being of the opinion that they were not justified by the evidence, refused to do "except in so far as a portion thereof deemed material by the court may be found in the written opinion of the court filed in this cause." We do not understand that the court could be required to make findings of special issues of fact; and, moreover, the ground of complaint is that the judgment of the court was "founded alone upon the working spaces of the mine," whereas, as already seen, the court took into consideration all the factors asserted to be essential to a proper conclusion. This brings us to the other assignments of error, which involve the questions whether the Circuit Court erred (1) in allowing

the alternative writ to be amended, (2) in rendering judgment against the railroad company and Weaver jointly, or (3) against Weaver, or (4) against the railroad company.

1. The alternative writ, pursuing the terms of the petition, commanded respondents, "according to their several and respective powers," among other things, "to furnish to the said Kingwood Coal Company for the transportation of its coal, without discrimination, and upon conditions as favorable as those given to other shippers, at least thirty-three and one-third per cent. of the total car supply at this time to be distributed by you, or either of you, among the several miners and shippers of coal along the railroad lines of the said West Virginia Northern Railroad," or to show cause to the contrary. When the Circuit Court announced its conclusion that relator was entitled to 31 per cent. of the car supply, relator asked leave to amend, and on leave did amend, the alternative writ so as to conform to the facts as the court found them to be. We are of opinion that the court did not err in allowing the amendment to be made. The power to issue the writ is derived from the statute, and the strict rule of the common law in respect of amendments is not applicable in cases where the writ is ordinary process, and not prerogative. No reason exists why proceedings in mandamus under the statute should not be governed by the rules obtaining in the instance of ordinary legal remedies. *High, Extr. Leg. Rem.* (3d Ed.) § 519; *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717; *United States v. Union Pacific R. R. Company*, 4 Dill. 479, Fed. Cas. No. 16,601; *Mexican Central Railway Company v. Duthie*, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715.

2. Weaver was unquestionably a proper party to the petition, and it was not objected below that the alternative writ should not have been directed to him as well as the railroad company. On the contrary, the return to that writ was a joint return, and admitted that Weaver was, in effect, in control of the railroad company; that what was done by the company was done through him as its executive head; and that it was his duty as the company's officer, as well as its duty, not to discriminate. The mandate was addressed to "the railroad company and J. H. Weaver, and each of them, according to their several and respective powers," while the judgment for costs went against the company alone. Such a mandatory order against a company and its officers and agents is not a joint judgment in the technical sense. The writ of mandamus may, indeed, be taken distributively when the action of several is necessary to the accomplishment of the end sought; and here Weaver was the controlling actor in the premises, and the order affected him only according to his powers.

3. These considerations dispose of the contention that the judgment, so far as operating on Weaver, was unauthorized, because he was not a common carrier; for, even if the acts of Congress were confined to common carriers, and assuming pro argumento that Weaver did not come within that category, which, under the circumstances, is not admitted, and aside from the provisions of the

act of February 19, 1903¹, the grant of the power to issue the writ of mandamus in respect of discrimination against a common carrier corporation necessarily embraced the power to act on the officers in control. Clearly, we cannot hold, on the face of this record, that the Circuit Court erred in holding Weaver, who was the Atlantic Company, the largest stockholder in the Irona Company and in the railroad company and the executive head of the latter, responsible for the discrimination, and in commanding him to refrain therefrom to the extent of his powers.

4. In support of the allegation of error in entering judgment against the railroad company it is insisted "that the court had no power in a proceeding of this character to fix the percentage of cars the relator should have, and to command that such percentage of cars should be furnished to the relator." The acts of Congress forbade discrimination, and made it unlawful to give any undue or unreasonable preference or advantage to particular persons, companies, corporations, or localities, or any particular description of traffic, or to subject them "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," and vested jurisdiction in the Circuit and District Courts to proceed by mandamus as a cumulative remedy for violations of the statutory provisions. The West Virginia Company owned no coal cars itself, but obtained them from the Baltimore & Ohio Railroad Company. That company could not and did not undertake to furnish all the cars demanded by shippers of coal over its lines, but allotted its cars to the several mining districts according to a specified rating. It was the admitted duty of the West Virginia Company to distribute the cars it received without unreasonable preference or prejudice. The determination of the percentage of the car supply to which the Kingwood Company was entitled as between it and the other collieries determined that less than that percentage would be unreasonably prejudicial to it, and unduly preferential to the others. From the pleadings and findings it must be assumed that each mine would be worked up to the supply of cars obtained by its owner, and it is evident that by discrimination one mine might be made to develop faster than another, while without discrimination the relative output of each mine would equitably regulate the apportionment. We are unable to accept the view that Congress intended to confine the scope of the writ to admonition merely, or to a general command to desist from discrimination, rather than from the particular action in which the discrimination consisted. By the

¹Act Feb. 19, 1903, c. 708, § 2: "That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any Circuit Court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers." 32 Stat. 848 [U. S. Comp. St. Supp. 1903, p. 363].

findings the delivery to relator of any less than 31 per cent. of the supply amounted to unlawful discrimination, and the judgment of the court did no more than to correct it.

The peremptory writ was ordered to issue commanding respondents to cease discrimination, "and to furnish to the said Kingwood Coal Company for the transportation of its coal, without discrimination, and upon conditions as favorable as those given to other shippers at least thirty-one per cent. of the total car supply at this time to be distributed by the said West Virginia Northern Railroad Company or J. H. Weaver among the several miners and shippers of coal along the railroad lines of the said West Virginia Northern Railroad Company." The writ related to the total car supply to be then distributed, and it is objected that because there might be changes in the output of the mines the mandate was impracticable of execution, and therefore erroneous. It is true that proceedings in equity are more elastic than proceedings at law, but the question before us is whether the order was justified when it was entered, and we perceive no reason for holding that it was not. Doubtless temporary causes may from time to time affect the output of a mine, yet the basis of distribution would remain unchanged. There is nothing in the present case to indicate any such threatened or probable change in the output of these mines as to impart weight to the argument *ab inconvenienti*.

Granting that the discrimination has resulted in diminishing the relative output of the Kingwood mine for lack of its just proportion of cars, that discrimination was unlawful, and the correct distribution and rating cannot be allowed to be affected by conduct contrary to law.

Judgment affirmed.

YOCUM et al. v. PARKER et al.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1904.)

No. 1,964.

1. WILLS—CONSTRUCTION OF DEVISE—ESTATE OF DEVISEE.

Rev. St. Mo. 1845, c. 32, § 5, provides that, where any conveyance or devise shall be made whereby the grantee or devisee shall become seised of such estate in lands as under the statute of entails would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only in the grantee or devisee. Section 6 provides that where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, "the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." A will contained the following devise of land in Missouri: "To my beloved son, * * * my natural son, I bequeath absolutely [the land described], * * * with the express understanding and restriction, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said lands shall pass to" other persons named. *Held* that, construed as required by said section 6 of the statute, such will vested the son with the estate in fee simple, subject to be divested on the happening of a contingency definite in point of time, to wit, upon his death without living legitimate

issue, and that, since under such construction an estate tail would in no event have been created, section 5 of the statute had no application.

2. SAME—STATUTORY PROVISIONS.

In the interpretation of a will resort should not be had to one part of a statute, to the exclusion of another which has a direct bearing upon the question, and by applying which both may be given effect in proper cases, and the statute rendered harmonious.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF LOCAL STATUTES.

It is the settled rule that the courts of the United States will follow the decisions of the highest court of a state in the interpretation of its local statutes, and especially when they concern the descent and alienation of lands and the construction of wills and conveyances, and where there is a conflict of decision on such a matter the federal court will follow the latest, when no intervening contract rights are involved.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71, and *Hill v. Hite*, 29 C. C. A. 553.]

In Error to the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 130 Fed. 722.

An order was heretofore entered reversing the judgment of the Circuit Court and remanding this cause, with directions to dismiss unless by appropriate proceedings jurisdiction was made to appear. 130 Fed. 770. The grounds of the opinion were (a) that the requisite diversity of citizenship did not appear in the petition, it being merely averred that the two plaintiffs were, respectively, residents of Colorado and Idaho, and that defendants were citizens of Missouri; and (b) that, as the answer denied that the plaintiffs were even residents as averred, and also denied that the defendants themselves were citizens of Missouri, and as no evidence was introduced, the case having been determined upon defendants' motion for a judgment upon the pleadings, there was, within the doctrine of *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579, no affirmative showing in the record of jurisdiction. Upon motion for rehearing it was satisfactorily shown that in the preparation of the transcript of the record of the Circuit Court an error had been made in the copy of the petition, and that in fact it had been affirmatively and specifically averred therein that the plaintiffs were, respectively, citizens of the states of which they were residents. The record in this court was therefore allowed to be corrected. This disposed of the principal ground upon which the action of this court proceeded. Upon reconsideration of the other it is considered that, as the motion for judgment upon the pleadings was made by the defendants, they should be held to have admitted, for the purposes of such motion, that all of the well-pleaded averments of the plaintiffs' petition and replication were true. Therefore the application of the rule of *Roberts v. Lewis*, supra, to the situation presented in this case, is not adhered to. This renders necessary a consideration of the merits of the controversy.

The action was one in ejectment, brought by Oscar M. Yocum and John W. Yocum against J. W. Parker, Andrew B. Siler, and Susan Siler, to recover the possession of a tract of land in Platte county, Mo. Both plaintiffs and defendants claim title through George W. Yocum, who died seised of the premises in 1854, leaving a will, the fifth paragraph of which contains all that is material in this case. The paragraph, somewhat abridged, is as follows: "To my beloved son, William Franklin Yocum, my natural son, I bequeath absolutely" a tract of land embracing that in controversy, "with the express understanding and restriction, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said land shall pass to" certain collateral relatives, who were named. In 1858 William Franklin Yocum, the first taker under the will, conveyed the property by warranty deed to one Norris, and by mesne conveyances his title became vested in Susan Siler, one of the defendants, under whom the other defendants hold. William Franklin Yocum died in 1892. The plaintiffs are his sons, born in lawful wedlock, and are now

his only surviving issue. In 1897 a prior action in ejectment between the same parties or their privies, and for the recovery of the possession of the same premises, was brought in a state court of Missouri. It resulted in a judgment for Susan Siler and her tenants, and the judgment was affirmed by the Supreme Court of Missouri. *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208. Upon this state of facts the Circuit Court rendered judgment for the defendants.

Vinton Pike and J. B. Shackelford, for plaintiffs in error.

J. W. Coburn and B. R. Vineyard, for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The land in controversy was devised to William Franklin Yocum absolutely, but with the restriction that, if he died without legitimate issue of his body, it should pass to collateral relatives of the testator. The plaintiffs claim title under the will as the sons, lawful issue, of William Franklin Yocum. The defendants claim under a warranty deed made by him in his lifetime. The plaintiffs contend that through the application to the devise of a section of a Missouri statute, to which further reference will presently be made, their father took but a life estate, and the fee simple passed to them, and that therefore the title conveyed by his deed terminated at his death. The defendants contend that the estate devised to William Franklin Yocum was a determinable fee (*Britton v. Thornton*, 112 U. S. 526, 532, 5 Sup. Ct. 291, 28 L. Ed. 816), the contingency being the nonsurvival of legitimate issue of his body, and that by the birth and survival of the plaintiffs, his sons, the title, which was theretofore defeasible, became absolute, and its confirmation inured to the benefit of those who claimed under the warranty deed made in his lifetime. It is conceded that if William Franklin Yocum took under the will a life estate only, which was terminable at his death, the defendants' motion for judgment on the pleadings should have been overruled, and that, on the other hand, if his title became a fee-simple absolute, because of the failure of the condition which would have determined it, the defendants should prevail.

Under the laws of Missouri no particular form of words was necessary for the creation of an estate in fee simple. It is clear that William Franklin Yocum would have taken such an estate, were it not for the limiting words respecting a failure of issue, and particularly is this so because of the employment by the testator of the term "absolutely" in connection with the devise to him. But the testator added to this otherwise absolute devise the express provision that, if his said son died without legitimate issue of his body, the estate should then pass to certain collateral relatives. It will be observed, therefore, that the case turns upon the interpretation and effect to be given to the restricting or limiting clause. At the time the will took effect sections 5 and 6 of an act of the General Assembly of the state of Missouri, approved March 25, 1845, were in force. Rev. St. 1845, c. 32. They are as follows:

"Sec. 5. That from and after the passage of this act, where any conveyance or devise shall be made, whereby the grantee or devisee shall become seised

in law or equity, of such estate, in any lands or tenements, as under the statute of the thirteenth of Edward the First (called the statute of entails), would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over, and right in such premises, and no other, as a tenant for life thereof would have by law, and upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common, in fee, and if there be only one child, then to that one, in fee, and if any child be dead, the part which would have come to him or her, shall go to his or her issue, and if there be no issue, then to his or her heirs.

"Sec. 6. Where a remainder in lands or tenements, goods or chattels, shall be limited, by deed or otherwise, to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor."

In the very act by which in 1816 the common law of England was adopted in Missouri there was a brief provision abolishing entails. Laws 1816, c. 260, § 2. It was repealed in 1825, and another of similar import enacted (1 Laws 1825, p. 216, § 4); and this was in turn displaced by section 5 above quoted. These various acts were dissimilar in respect of the language employed, but they were alike in that they transformed each estate upon which they operated into an estate for life in the first taker and a fee simple in the person or persons who had the first remainder. The provisions of section 6 above quoted appeared in the laws of Missouri for the first time in 1845.

Section 5 of the act of 1845 is applicable only when the devisee has "become seised" of such an estate as under St. 13 Edw. I would have been an estate in fee tail. No other character of estate is within the scope of its provisions. If William Franklin Yocum "became seised" of an estate which would have been an entail under the English statute, then by force of section 5 it became an estate for life in him, with remainder in fee to the plaintiffs; but, if he did not "become seised" of such an estate, the section referred to is inapplicable, and the plaintiffs would take nothing. The primary inquiry, therefore, is, what was the estate of which William Franklin Yocum became seised? The answer should be sought in the legal significance of the language with which the devise was clothed. In a consideration of this matter other legislative provisions which have a direct bearing should not be ignored. All pertinent parts of the Missouri laws necessarily enter into, qualify, and fix the character of an estate of which a devisee of lands in that jurisdiction becomes seised under the provisions of a will. Section 5 only affects those estates which, were it not in existence, would be estates tail under St. 13 Edw. I. It leaves wholly free for application all other relevant statutory provisions, and this for the reason that they constitute rules by which is determined the character of an estate devised. Turning, now, to section 6 of the act of 1845, we find that it provides that in cases of the precise character of the one before us the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor. Applying this statutory interpretation to the paragraph of the will under consideration, it would then contain a devise of

land to William Franklin Yocum in fee, upon the condition, however, that if he should die leaving, at the time of his death, no surviving legitimate issue of his body, then it should pass to collateral relatives. This would make definite in point of time the contingency which would otherwise have been indefinite and uncertain. The survival of issue would not be an indefinite one, but would necessarily be determinable at the time of the death of the first taker. It is well settled that an estate in fee tail under St. 13 Edw. I could not be created by the force of such language. It was observed in *Abbott v. Essex Company*, 18 How. 202, 213, 15 L. Ed. 352, that the rule relating to estates tail "has never been construed, either in England or this country, to include cases where the title of the first taker is a fee simple and the contingency is definite." Justice Curtis, who decided this case at the circuit, said:

"If the first taker was to have a fee simple, and the estate is given over on a definite failure of issue—that is to say, in this case, a failure at the decease of the first taker—then the limitation over may take effect as an executory devise, because the contingency is determinable within those reasonable limits established by law to prevent perpetuities. This has been the law since the case of *Pells v. Brown*, Cro. Jac. 590." *Abbott v. Essex Co.*, 2 Curt. 126, Fed. Cas. No. 11.

In *Underhill on the Law of Wills*, § 650, it is said that the doctrine of estates tail—

"Has no application whatever where an estate is a fee simple, with a limitation over upon a failure of issue, and it appears from the will itself, or where the common-law rule is modified by statute, that the failure of issue referred to is the failure of issue living at the death of the first taker."

Suppose, then, that at the time the will of George W. Yocum took effect section 5 had never been enacted, or that, having been enacted, it had been repealed, and that there was existing no statutory or other obstacle to the creation of estates tail in Missouri save that found in section 6, what would have been the estate devised by the fifth paragraph of the will? It would seem that in such case there could be no escape from the conclusion that section 6 was applicable; that it prevented the creation of an estate tail; that William Franklin Yocum by virtue of its provisions would take a fee simple, subject to divestment by the failure of issue at the time of his death; and that the collateral relatives of the testator would take an executory devise limited upon such contingency. Thus is presented a condition which determines the inapplicability of section 5. It cannot reasonably be said that the purpose of that section was the creation of an estate tail which otherwise was not one, merely that it might in turn demolish it. Its activity arose only when, under other rules and other laws, an estate tail existed—when some one had "become seised" of such an estate. A course of reasoning somewhat similar to this was adopted by Justice Curtis (*Abbott v. Essex Co.*, supra) in considering the rule laid down by Lord Hale in *Purefoy v. Rogers*, 2 Saund. 388, for determining whether a limitation over was an executory devise or a contingent remainder. He said:

"But this rule does not operate until it is ascertained what the particular estate is and that it is capable of supporting a contingent remainder. I do

not understand it to be a rule of construction to be used in determining what particular estate the testator intended to devise, but a rule of law which determines the kind of estate which must be deemed to be limited over after the particular estate intended to be devised has been ascertained."

The plaintiffs contend that the design of section 6 was not to destroy estates tail, as that was accomplished by section 5, but that, on the contrary, it was solely to give validity to a certain class of estates limited upon a failure of issue, by making the contingency upon which they depended a definite one, and thus obviate the objection that they would otherwise be violative of the rule against perpetuities. At common law an executory devise limited upon a general or indefinite failure of issue was void. But it was not so of such a devise depending upon the failure of issue at the time of the death of the first taker, for in such case it would be known at that precise time, and within the limit of the rule against perpetuities, whether or not the first devisee left issue surviving him. 2 Washburn on Real Property, 758 et seq.; *Sears v. Russell*, 8 Gray, 86; *Chism's Adm'r v. Williams*, 29 Mo. 288; *Lockridge v. Mace*, 109 Mo. 167, 18 S. W. 1145. Plaintiffs say that section 6 was enacted to meet this condition of the common law, and that it performed no other office than to validate limitations upon a failure of "heirs" or "issue," by declaring that those words shall mean heirs or issue living at the death of the ancestor. But it is not clear that section 6 was at all necessary to secure this particular result, nor that if, in its absence, the language of section 5 were read into those devises which would then be within its scope, the same object would not have been attained which plaintiffs claim was the peculiar and exclusive office of section 6. *Daniel v. Whartenby*, 17 Wall. 639, 21 L. Ed. 661; *Wead v. Gray*, 8 Mo. App. 515, 520; *Morgan v. Morgan*, 5 Day, 517; *Daley v. Koons*, 90 Pa. 246.

In the interpretation of the will, resort should not be had to one part of the statute to the exclusion of another which has a direct bearing upon the question. A harmony should be established between them, if it may be fairly done. Such an adjustment is called for by the elementary rules of interpretation, whether we treat the sections as different statutes in *pari materia* or as parts of the same statute relating to the same subject-matter. If we apply section 6 to the will according to the plain import of its terms, giving to the words their legal significance, a result would be reached which would be decisive of this controversy, but which would, at the same time, leave room for the application of the preceding section to other cases. Nor would this be in any true sense a repeal of section 5. It would be merely a narrowing of the ground which it covers, made necessary by the plain letter of other provisions of the law. The conclusion which we have reached is that section 6 of the act of 1845 rules the paragraph of the will under consideration. The result is that William Franklin Yocum took an estate in fee simple, subject to its divestment in the event that he left no legitimate issue, but that, having left such issue, his title became an absolute one, which by a chain of conveyances was ultimately vested in the defendant Susan Siler.

In *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208, the Supreme Court of that state reached the same result in a controversy between substantially the same parties, over the same property, and involving the interpretation of the same paragraph of the will of George W. Yocum; and the foregoing considerations constitute the principal ground upon which the decision of that court was based. It is claimed, however, that there is in that case a complete departure from the rule announced in earlier decisions of the same court, and that it is not to be considered as binding in this jurisdiction. The earlier cases relied upon by the plaintiffs are *Farrar v. Christy*, 24 Mo. 453, *Harbison v. Swan*, 58 Mo. 147, *Thompson v. Craig*, 64 Mo. 312, and *Cross v. Hoch*, 149 Mo. 325, 50 S. W. 786. The deed which was construed in *Farrar v. Christy* was executed prior to the passage of the act of 1845 and consequently before the provisions of section 6 became embodied in the laws of that state. *Harbison v. Swan* was decided upon the authority of *Farrar v. Christy*. The same may be said of *Thompson v. Craig*, but it is difficult to reconcile the doctrine there announced with that of the later case of *Prosser v. Hardesty*, 101 Mo. 593, 14 S. W. 628. It may be observed in passing that in none of these cases did the learned court attach any importance to the use of the word "survivor" in the limitation of an estate over to the survivor of two grantees or devisees. It appears to have been at an early day quite generally determined, particularly in this country, that the employment of that term under such circumstances indicated a definite failure of issue at the death of the first taker, and therefore defeated the creation of an estate tail. *Cross v. Hoch* is not in conflict with *Yocum v. Siler*. The peculiar structure of the will involved in that case enabled the court to ascertain very satisfactorily the intention of the testator and to give effect to it, although perhaps the technical meaning of some words therein was modified to secure that result. There was no consideration of the doctrine of entails and the effect thereon of the Missouri laws. Moreover, the will was executed and took effect prior to the passage of the act of 1845.

An attentive examination of these older cases discloses the fact that in none of them was there notice of section 6 of the act of 1845, or any consideration of its effect in determining whether a devisee became seised of an estate tail, so as to permit of the operation of section 5. But, notwithstanding what has been said, we should recognize the existence of a conflict between *Harbison v. Swan* and *Thompson v. Craig* and the case of *Yocum v. Siler*. If the doctrine of the latter had been applied in the earlier cases, a different result would have ensued. What, then, should be done? The principle is firmly established that the courts of the United States will follow the decisions of the highest judicial tribunal of a state in the interpretation of its local statutes, and especially when they concern the descent and alienation of lands and the construction of wills and conveyances. *Warburton v. White*, 176 U. S. 484, 496, 20 Sup. Ct. 404, 44 L. Ed. 555; *De Vaughn v. Hutchinson*, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827. This has been the rule since the time of *Pollard v. Dwight*, 4 Cranch, 421, 2 L. Ed. 666, and it

has since been announced in a multitude of cases. The decisions of the highest court of a state upon such questions are as much a part of the statute law as the enactments of the Legislature, and are equally binding upon the federal tribunals. Thus in *Van Rensselaer v. Kearney*, 11 How. 297, 318, 13 L. Ed. 703, the Supreme Court adopted, without question, the interpretation by the highest judicial authority of New York of a statute of that state which abolished estates tail and converted them into absolute fees.

It is also the general rule in such cases that, where there is a conflict in the decisions of the state court, the latest will be followed by the federal courts. It was held by the Supreme Court in *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402, that, having once followed the doctrine of some earlier decisions of the state court, it would afterwards follow a subsequent reversal thereof. In *King v. Wilson*, 1 Dill. 556, Fed. Cas. No. 7,810, the constitutionality of an Iowa law was involved. There had been a long line of decisions of the Supreme Court of that state in which it had been held that legislation of that character was forbidden by the state Constitution, but there was a recent decision of the same court announcing a contrary doctrine. Although, as Chief Justice of the state court, he had delivered the opinion in one of the earlier cases and disapproved of the last decision, Judge Dillon, then Circuit Judge, met the situation in this way:

"Upon the best reflection I have been able to give the matter I have failed to persuade myself that I would be justified in disregarding and refusing to follow the latest decision of the Supreme Court. The question, it will be observed, relates solely to the validity of the statute under the state Constitution, and it is this law which the bill seeks to have nullified by the federal court. Now, where questions arising in the federal courts depend upon state statutes, these courts sit in the state to administer state laws, and these laws are expressly made rules of decision therein. Overruled decisions, how sound soever in principle, are nugatory in law. If the federal courts should follow overruled decisions because they believed them right, the result would be the intolerable mischief that would flow from the consequent confusion of rights, and the conflict of opinion leading to conflict of jurisdiction. A party would have a title in the one court and none in the other. Moreover, the federal courts might, by disregarding the adjudications of the state court, set up and support in the state a domestic policy repugnant to that recognized or established by the state court."

In *Lippincott v. Mitchell*, 94 U. S. 767, 24 L. Ed. 315, an old rule in Alabama relating to the power of a married woman over her property had been overturned by some decisions of the Supreme Court of that state. The controlling authority of these decisions was recognized by the Circuit Court, but while the cause was pending on appeal in the Supreme Court, the state court of last resort overruled the preceding decisions and re-established the first rule. In referring to the last decision the Supreme Court said:

"This construction is a rule of property of the state, and we are as much bound by it as if it were a part of the statute. It is our duty to apply the law of the state, as if we were sitting there as a local court, and this case were before us as such a tribunal."

See, also, *Wade v. Travis County*, 174 U. S. 499, 508, 19 Sup. Ct. 715, 43 L. Ed. 1060; *Water Power Co. v. Water Commissioners*,

168 U. S. 349, 366, 18 Sup. Ct. 157, 42 L. Ed. 497; *Leffingwell v. Warren*, 2 Black, 599, 603, 17 L. Ed. 261; *Mitchell v. Lippincott*, 2 Woods, 467, Fed. Cas. No. 9,665.

A well-defined distinction exists, however, between the establishment of a rule of property by means of the interpretation by the highest court of a state of the general principles of the common law, and the construction by such a court of a local statute. *Ryan v. Staples*, 76 Fed. 721, 727, 23 C. C. A. 541. In the former case a settled course of decisions of the state court is generally requisite. A single decision, though always persuasive, may not be controlling.

The cases upon which the plaintiffs rely are not in conflict with the foregoing views. Most of them relate to contract rights which had become vested, either in conformity with the then prevailing decisions of the state courts, or in the absence of any decision whatever. The rights of the parties to this action are not founded upon contract. No decisive question of general jurisprudence and no question of commercial or mercantile law is involved. The Constitution, laws, and treaties of the United States have no application. The case turns upon the construction of the statutes of Missouri relating to the devise of lands within its borders—a subject-matter peculiarly of local concern. In *Barber v. Railway*, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925, no state statute was construed or applied. In *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, the question was of the liability of a pledgee of stock for the debts of the corporation, and at the time the status of the parties was fixed there was no decision of the highest court of the state upon the subject.

Much has been said about the intention of the testator and the doctrine that such intention is the dominant factor in the interpretation of the will. We recognize the controlling influence of the rule, but it is of no assistance to a conclusion contrary to that which we have reached. The testator employed technical phrases to which the Legislature of Missouri had attached a specific meaning. He did not add any qualifying or explanatory expressions indicative of a contrary intent. And when he devised the land in controversy to the one nearest to him in affection, his son, not for life, but absolutely, upon a condition expressed in his will, we cannot say that he did not intend that the devisee should own the property absolutely with full power of disposition, the condition having been fulfilled.

The judgment of the Circuit Court will be affirmed.

CITY OF FT. MADISON et al. v. FT. MADISON WATER CO.

(Circuit Court of Appeals, Eighth Circuit. November 17, 1904.)

No. 1,884.

1. MUNICIPAL CORPORATIONS—CONTRACTS—STATUTORY REDUCTION OF POWER OF TAXATION.

Where a statute has invested a municipal corporation with the power of local taxation to enable it to meet its engagements under a contract which it is thereby authorized to make, the power of taxation thus conferred enters into and becomes a part of the contract, and may not be withdrawn or lessened until its obligations are satisfied.

2. SAME—IOWA STATUTE—REDUCTION OF ASSESSED VALUE OF PROPERTY.

Code Iowa 1897, § 1305, which provides that for purposes of taxation "all property shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent. of such actual value," is invalid in so far as it affects the ability of a city to meet a pre-existing contract to pay water rentals, made when the statute required property to be assessed at its "true cash value," and when the city was authorized to levy a special tax to pay water rentals, not exceeding five mills on the dollar on property benefited, and the city may be compelled to levy a tax based on the actual value of such property, as shown by the assessment roll, where it is necessary to meet its contract.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

See 110 Fed. 901.

This was an application by the Ft. Madison Water Company for a writ of mandamus to compel the municipal authorities of the City of Ft. Madison, Iowa, to levy and collect a tax sufficient to pay a judgment which the water company had obtained against the city for unpaid hydrant rental. In 1885 the city and one Inman entered into a contract, by means of an ordinance and its acceptance, whereby the former rented certain hydrants, to be installed in connection with a system of waterworks, and obligated itself to pay a specified rental therefor. The water company succeeded to all of the rights of Inman. The contract was fully authorized by the existing laws of Iowa, and the city was empowered to levy and collect annually a special tax to meet the rental agreed to be paid. McClain's Iowa Code, §§ 641, 643. A statutory limitation upon this power was expressed in these words: "Said tax shall not exceed the sum of five mills on the dollar for any one year, nor shall the same be levied upon the taxable property of said city or town which lies wholly without the limits of the benefit or protection of such works, which limit shall be fixed by the city council or board of trustees each year before making said levy." The ordinance which embraced the terms of the contract contained this clause: "Said hydrant rental to be paid quarterly out of the special tax fund to be levied and collected as other taxes of the city are for this purpose." The municipal authorities duly designated as the property which was benefited and protected all that lying within a district bounded by an encircling line drawn 1,000 feet beyond the outlying hydrants. This was the district which was, primarily, at least, subject to the annual five mill tax levy to provide a fund to meet the hydrant rental.

In 1897 an act of the Legislature of Iowa was passed which provided: "All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent. of such actual value. Such assessed value shall be entered in a separate column opposite each item, and is to be taken and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made." Section 1305, Code 1897.

The five mill levy upon 25 per centum of the actual value of the property within the taxing district did not yield sufficient revenue to fully satisfy

the obligations of the city. The water company sued the city, and recovered a judgment against it for \$4,528.90, being for unpaid rentals for a period of six months ending September 30, 1900.

The water company seeks the payment of this judgment through an enforced levy and collection of taxes. In the prayer of its petition it asks that the municipal authorities be required to levy and collect either a general tax upon all of the property within the city or a special tax upon the full value of the property within the taxing district instead of one upon 25 per centum of such value as contemplated by the act of 1897. The Circuit Court rendered judgment for the issuance of a writ commanding the municipal authorities to levy and collect a sufficient tax "upon all property subject to taxation within the limits of the city of Ft. Madison as shall be necessary to pay off and discharge the judgment." The city prosecutes this proceeding in error.

Omar E. Herminghausen (Edwin C. Weber, on the brief), for plaintiffs in error.

James C. Davis, for defendant in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

HOOK, Circuit Judge (after stating the case as above). The judgment upon which is predicated the application of the water company for a writ of mandamus was affirmed by this court in *City of Ft. Madison v. Ft. Madison Water Co.*, 114 Fed. 292, 52 C. C. A. 204. It was there said:

"Whether the water company can by mandamus compel the city to levy either a general or special tax to pay such judgment is a question not raised by this record. The right to a judgment against the city for the debt, and the right to a mandamus to compel the city to levy a tax to pay the judgment, are separate and distinct questions, the latter of which is not now before us, and concerning which it will be distinctly understood we express no opinion."

The questions then unnecessary to be determined are now presented. Is it the duty of the city, under the contract and under the laws of the state, to levy a tax to pay the judgment? If the duty exists, should the tax be a special one upon the property benefited and protected by the location of the hydrants and embraced within the taxing district established as required by the statute, or a general tax upon all of the property in the city? The city contends that since it has levied a five-mill special tax upon the property within the benefited district, assessed at 25 per centum of its actual value, and has paid the money arising therefrom to the water company, it has exhausted its power in that direction. And while it does not deny that, under the construction of the Iowa law adopted by the Supreme Court of that state (*Waterworks Co. v. Creston*, 101 Iowa, 694, 70 N. W. 739), it might by express contract have pledged its general revenues and its power of general taxation to the payment of any deficiency, it insists that in fact it has not done so, but that, on the contrary, it expressly contracted that its liability should be limited to the fund raised by the special tax. We will assume, without further consideration, that this latter contention is correct.

It is clear that it was the legislative intent that the levy of a special tax upon the property within the benefited district should at least constitute the primary duty of the city and the primary remedy of the water company. The theory of the legislation is, and it is a correct one,

that the owners of the property most benefited should stand the burden of the cost.

When the contract between the city and the water company was made and the rights of the parties became vested, the laws of Iowa concerning the assessment of property for purpose of taxation contained this provision:

"Real property shall be listed and * * * assessed at its true cash value, having regard to its quality, location and natural advantages, the general improvement of the vicinity and all other elements of its value." McClain's Code, § 1288.

We need not, therefore, consider what rule of assessment would prevail in the absence of such affirmative legislation. Afterwards, and while the contract, executory in character, was still in force, the Legislature of Iowa passed an act providing that, while property subject to taxation should be valued at its actual value, the same to be entered opposite each described item upon the records, it should be assessed for taxation, not at its actual value, but at 25 per centum thereof. Section 1305, Code 1897.

Under the law existing when the contract was made the special tax, which was limited to five mills, should have been imposed upon property assessed at its actual value. Under the Code of 1897 the special tax, still limited to five mills, was imposed upon the same property assessed at one-fourth of its actual value. The resultant effect would have been the same had the latter statute operated directly upon the tax rate itself and reduced it to one-fourth of five mills upon the dollar of valuation. The statute should be judged in the light of its necessary effect upon existing contracts.

Where a statute has invested a municipal corporation with the power of local taxation to enable it to meet its engagements under a contract which it is thereby authorized to make, the power of taxation thus conferred enters into and becomes a part of the contract, and may not be withdrawn or lessened until its obligations are satisfied. *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; *Louisiana v. St. Martin's Parish*, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. Ed. 1220; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *Butz v. Muscatine*, 8 Wall. 575, 19 L. Ed. 490; *Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560; *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Padgett v. Post*, 106 Fed. 600, 45 C. C. A. 488; *Hicks v. Cleveland*, 106 Fed. 459, 45 C. C. A. 429; *In re Copenhaver (C. C.)* 54 Fed. 660; *United States v. Judges, etc. (C. C.)* 32 Fed. 715; *United States v. Howard County (C. C.)* 2 Fed. 1.

A right without a remedy for its enforcement, save in the forum of conscience, is of little practical value. From the standpoint of the law, the remedy is the vital element in the worth of a contract, and whatever destroys or lessens it impairs the obligation. The power of taxation is the usual and frequently the sole means by which municipal bodies are enabled to meet their pecuniary engagements, and, where a contract is entered into upon the faith of its exercise, subse-

quent legislation, which so modifies it as to deprive one of the contracting parties of every efficacious remedy, is violative of the contract clause of the Constitution. Tested by these rules, which are fundamental, the invalidity of the act of 1897, as applied to the contract between the city and the water company, is apparent.

The actual value of each item of property in the taxing district has been officially ascertained and extended upon the tax rolls. A five-mill levy upon 25 per centum of such value has been found to be insufficient to meet the just indebtedness of the city. The deficiency has been reduced to judgment. The statutory reduction of the valuation of the property for the purpose of assessment being equivalent to a reduction of the rate of tax levy is invalid as applied to the pre-existing contract between the parties. It appears from the record that a completion of the levy to the full measure authorized by the law and contracted for by the parties will more than suffice to pay the claim of the water company. Under these circumstances the duty of the city is plain.

The judgment of the Circuit Court will be modified so that the writ of mandamus to issue shall command the levy and collection of a special tax sufficient to pay the judgment of the water company, with interest and costs, but not exceeding five mills on the dollar of assessed valuation, such tax to be imposed upon the property within the benefited district as heretofore established, assessed for the purpose of the levy at three-fourths of the actual value thereof. As so modified the judgment of the Circuit Court will be affirmed.

MICHIGAN CENT. R. CO. v. HARSHA, Clerk.

(Circuit Court of Appeals, Sixth Circuit. December 1, 1904.)

No. 1,313.

1. CLERKS OF CIRCUIT COURTS—COMMISSION.

A clerk of a Circuit Court is not entitled under Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], to a commission on the proceeds of mortgaged property sold under a foreclosure decree, which by order of the court is paid by the master making the sale directly to the mortgagee.

2. SAME.

To entitle a clerk of a Circuit Court to a commission for "receiving, keeping, and paying out money," under Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], such money must be paid to him or be subject to his order, so that he becomes responsible for its keeping and payment. A fund paid by a master into a United States depository, pursuant to an order of the court, and subject to be withdrawn on its order, is neither actually nor constructively in the keeping of the clerk, and he is not entitled to a commission thereon when it is so paid out.

3. SAME.

Railroad bonds deposited in a Circuit Court as collateral security by its order, and kept in a bank vault to which the clerk kept the key, are not "money," and the clerk is not entitled to a commission thereon, under Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], when by order of the court he takes them from the bank and surrenders them to the depositor; nor is there any authority outside of the statute for the allowance of such a commission.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Geo. E. Tegart (Henry Russel, of counsel), for appellant.

Henry M. Duffield, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from an order of the court below requiring the appellant to pay to W. D. Harsha, as clerk of the Circuit Court, \$2,660 for receiving, keeping, and paying out \$266,000, within the meaning and intent of section 828, Rev. St. [U. S. Comp. St. 1901, p. 635]. This order was made upon a petition filed by the clerk praying that the Michigan Central Railroad Company be required to show cause why it should not be required to pay certain costs claimed by him, consisting of three items, to wit:

| | |
|--------------------------------------------------------------------------------------------------|------------------|
| "One per cent on \$266,000.00..... | \$2,660 00 |
| For special services in examining, identifying, checking, canceling, and assigning bonds..... | 50 00 |
| For service as clerk filing papers and entering orders..... | 85 |
| | <hr/> \$2,710 85 |

The railroad company appeared in pursuance of the order to show cause, and did not contest the item of \$50, nor that of 85 cents, but filed a demurrer to the claim for a commission of 1 per cent. upon \$266,000. The demurrer was overruled, and, the defendant declining to plead further, there was a decree as prayed, with direction that execution should issue in favor of said Harsha. An appeal from this order was denied, upon the ground "that no appeal lies from an order or decree allowing costs only." Upon application to this court and full argument we held that the appeal had been wrongly denied, and awarded a writ of mandamus. The appeal is now heard upon the merits. The question arises upon the petition and demurrer.

The petition stated the facts and circumstances upon which Mr. Harsha's claim must stand or fall, and the substantial averments of that petition, together with those orders and decrees which were exhibits thereto, are stated in our opinion in the mandamus proceeding, reported as *In re Michigan Central Railroad Company*, 124 Fed. 727, 59 C. C. A. 643, and reference is now made to that opinion for a more detailed statement of the history of the claim now in question.

1. The motion to dismiss, upon the ground that the appeal is from a decree or order for costs only, must be overruled. The appealability of the decree, whether for technical costs or an allowance for special services, was fully considered and decided in the contest over the issuance of a mandamus.

2. Section 828, Rev. St. [U. S. Comp. St. 1901, p. 635], provides, among other clerk's fees, that he may receive "for receiving, keeping, and paying out money, in pursuance of any statute or order, one per centum on the amount so received, kept, and paid." The foreclosure sale out of which this controversy arises was made by a special master. By the decree of sale the master was ordered to pay the proceeds of sale, except enough to pay costs, etc., to the mortgage trustee, complainant in the cause, the Farmers' Loan & Trust Company, as trus-

tee for the bondholders. This the master did. The clerk, therefore, neither received, kept, nor paid out one dollar of the proceeds of sale thus received, kept, and paid out by the master, and was not entitled to any commission under the provision quoted. Whether, under section 995 [U. S. Comp. St. 1901, p. 711], the court should have made a different disposition and brought the fund into the care and under the responsibility of the clerk, and had it paid out by the clerk, we need not consider. A clerk's commissions do not attach, as they did prior to this act, whenever money is subject to the order of the court, as was the case when *Ex parte Prescott*, 2 Gall. 146, Fed. Cas. No. 11,388, was decided, but only when he has actually received, kept, and paid it out.

In *Re Goodrich*, 4 Dill. 230, 10 Fed. Cas. 603, the order was that the defendant pay the money "into the registry of the court for the purpose of satisfying judgment and costs." The defendant paid direct to the plaintiff's attorneys. The clerk claimed 1 per cent. commission, under section 828, *supra*, upon the sums so paid. Judge Dillon disallowed the claim, saying that the 1 per cent. allowed by the statute "is for compensation to the clerk for the trouble and responsibility of actually receiving, keeping, and paying out money," and that he "was not entitled to a commission on moneys which, although ordered to be, were not in fact, paid to him under the writs of mandamus." In this construction, Judge Dillon followed Justice Miller in *Upton v. Tribilcock*, 10 Fed. Cas. 604, note. In *Farmers' Loan & Trust Co. v. Dart*, 91 Fed. 451, 33 C. C. A. 572, an opinion by the Circuit Court of Appeals for the Fifth Circuit, the claim of the clerk for a commission upon the surplus earnings of a receivership deposited by the receiver, by direction of the court, in a designated depository of the United States, to be paid out by the receiver under orders of the court, was disallowed. The ground of the decision was that, although deposited in the registry of the court, the fund was not subject to the clerk's check, nor was he under any responsibility for it. To the same effect are the cases of *Ex parte Plitt*, 2 Wall. Jr. 453, Fed. Cas. No. 11,228; *Leech v. Kay* (C. C.) 4 Fed. 72; *Easton v. Houston, etc., Ry. Co.* (C. C.) 44 Fed. 718; *N. W. Life Ins. Co. v. Quinn* (C. C.) 69 Fed. 462; *Johnson v. Southern B. & L. Ass'n* (C. C.) 95 Fed. 922. This also seems to be the view of the Supreme Court. *U. S. v. Kurtz*, 164 U. S. 49, 53, 17 Sup. Ct. 15, 41 L. Ed. 346.

3. After the proceeds of sales had reached the hands of the mortgagee, it was found that the holders of bonds aggregating \$424,000 would not receive payment; those bonds not maturing until 1902, 20 years after the foreclosure, bearing 8 per cent. interest, and guarantied as to principal and interest by the Michigan Central Railroad Company. In this situation the railroad applied to have the money applicable to the unpaid bonds paid over to it, upon giving satisfactory security to pay the unpaid bonds, principal and interest, as they matured. For the purpose of complying with this most reasonable application, the court below ordered the trust company to replace in the hands of its master, Addison Mandell, \$424,000, and that Mandell "should deposit same to the credit of the court in the National Bank of Commerce in New York, a designated depository of the United States." Mandell

made the deposit, and reported to the court that he had received a certificate of deposit certifying that he had "deposited in said bank \$424,000, payable to the order of the said master on the surrender of said certificate properly indorsed and accompanied by an order of the judge or judges of the court," etc. On December 2, 1882, the court made an order which directed that "the said master in chancery do pay over to the Michigan Central Railroad Company the sum of \$424,000," when the said company "shall deliver to the said master in chancery its bond," in the penal sum of \$800,000, conditioned to pay to the holders of said 424 bonds, "the interest as it becomes due and the principal thereof at its maturity, * * * or to repay the said sum of \$424,000, or any part thereof which the court may direct, into the registry of said court, * * * and shall also deliver to the said master in chancery, in pledge for collateral security to the said bond," \$424,000 in registered mortgage bonds of the said company, said collateral bonds to be registered in the name of the clerk of the circuit court, "transferable only upon the order of said court, and that said \$800,000 bond and said last-described bonds be deposited in a safe of the Trust, Security & Safe Deposit Company, of Detroit, under the control of and only to be opened upon the order of this court, and that the use of said safe be furnished at the expense of said Michigan Central Railroad Company."

In accordance with this order the special master, Addison Mandell, paid over said \$424,000 and received from the railroad company the principal bond and the collateral bonds to secure same, and both were deposited as required by the order, and have since remained in the said safe of said trust company subject to the order of the court. Twenty years afterwards the railroad company paid off 266 of the mortgage bonds upon which it was liable as guarantor, and filed its petition, accompanied by the canceled bonds, asking that its collateral to a like amount might be returned. The court very properly directed its clerk to open the vault and return 266 of the company's bonds so held as collateral. This was done. The clerk thereupon filed his petition, already referred to, in which he asked that the railroad company be required to pay him the costs now in controversy. The paragraph of his petition setting out his claim is as follows:

That your petitioner claims compensation for the receiving, keeping, and paying out of the \$424,000 aforesaid paid back to the master, Addison Mandell, by the Farmers' Loan & Trust Company, and subsequently deposited in a designated United States depository, subject to the order of the court, which was subsequently withdrawn from the court and paid to the Michigan Central Railroad Company, as above set forth; that he claims compensation also for other special services as clerk in identifying, canceling, transferring, and assigning said bonds, and for clerk's fees as follows:

| | |
|-----------------------------------------------------------------------------------------------|------------------|
| One per cent. (1 per cent.) on \$266,000..... | \$2,660 00 |
| For special services in examining, identifying, checking, canceling, and assigning bonds..... | 50 00 |
| For other services as clerk, above referred to, for filing papers and entering orders | 85 |
| | <hr/> \$2,710 85 |

This sum of \$424,000 was never received, kept, or paid out by the clerk. It was never subject to his check, and he never became in any

way responsible for it. But it is said that, when it was paid by the master in chancery into the New York depository, it was within the "registry" of the court and constructively within the possession of the clerk. If being subject to the order of the court is to be within the "registry" of the court, then this money, from the time it was paid into the hands of the master in chancery, was within the "registry" of the court. But being subject to the order of the court does not necessarily place it in the keeping of the clerk, either actually or constructively. To entitle the clerk to this commission of 1 per cent., it must be paid to him or be subject to his order, so that he becomes responsible for its keeping and payment. The test is, did the clerk receive, keep, and pay this fund over to the railroad company? The answer is, he did not. The court described the money as "in the hands" of Mandell, and it was withdrawn upon Mandell's indorsement, and was by Mandell paid over to the railroad company. It was never actually or constructively in the clerk's custody, or paid out by him.

4. The suggestion that he did have the constructive possession of the collateral bonds of the railroad company and paid them out when he returned them to the railroad company, and that for this service the clerk is entitled to the commission of 1 per cent., has nothing in it. Section 995, *supra*, only requires that "money" shall be deposited as therein prescribed, and section 828, *supra*, only allows the payment of 1 per cent. on "moneys" received, kept, and paid out. This is recognized in *Thomas v. Chicago, etc., Ry. Co.* (C. C.) 37 Fed. 548, 550.

5. We know of no authority for the allowance of such a commission outside of the statute. The clerk's only service, aside from those matters for which he has asked and been allowed \$50 without contest, was in keeping the key to a vault rented by the railroad company in which nonnegotiable securities were deposited. This vault could not be opened without the order of the court, and the bonds could not be collected or disposed of without a like order.

The order must be reversed, with directions to set aside the judgment and to render judgment of \$50.85, the amount of the two items uncontested, and to dismiss the petition in so far as any further fees, allowance, or costs is prayed.

HINDS v. MOORE.

(Circuit Court of Appeals, Sixth Circuit. January 11, 1905.)

No. 1,347.

1. BANKRUPTCY—VALUE OF GOODS—PROCEEDINGS BY TRUSTEE—APPEAL.

Where goods in possession of the bankrupt were delivered to a claimant, and he was thereafter ordered to pay the value of the goods to the trustee, in summary proceedings brought against him on an order to show cause, he was entitled to appeal from such order to the Circuit Court of Appeals, under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431], authorizing appeals in "controversies arising in bankruptcy proceedings," though the order was not appealable under section 25a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), giving such court revisory and superintending powers over the "proceedings of the several inferior courts of bankruptcy," etc.

2. SAME—PROCEEDINGS—ORDER TO SHOW CAUSE.

Where a receiver in bankruptcy delivered certain goods in the possession of a bankrupt to a claimant on the ground that the title to the property was in the claimant, and not in the bankrupt, the court's custody of the property was thereby surrendered, and the bankrupt's trustee was not thereafter entitled to recover the value of the property against the claimant in summary proceedings on an order to show cause.

Appeal from the District Court of the United States for the Western District of Tennessee.

For opinion below, see 129 Fed. 922.

This is an appeal from a judgment of the District Court requiring the appellant, Isaac Hinds, to pay to the trustee in bankruptcy of the Leeds Woolen Mills Company the sum of \$500, with interest and all the costs of the proceeding. The Leeds Woolen Mills Company, a corporation engaged in business as tailor and dealer in clothes at Memphis, Tenn., was adjudged a bankrupt, and F. E. Moore duly appointed trustee. Thereupon Moore, as trustee, filed November 15, 1902, a petition in the bankruptcy cause against the appellant, Issac Hinds, in which it was alleged that the woolen mills company was adjudged a bankrupt April 8, 1902, and the proceedings referred to R. D. Jordan, as referee; that under a rule of the bankrupt court for the Western District of Tennessee the said referee qualified as receiver, and took possession of the assets of the bankrupt, consisting of a stock of cloth goods, trimmings, etc., not itemized, being in a certain storeroom; that among the goods in said storeroom were two boxes of cloth which were claimed by appellant as never having been sold or delivered to the bankrupt; that the officers and agents of the bankrupt also represented that the bankrupt had not bought or received said two boxes of goods, same having been shipped by said Isaac Hinds to himself, care of the Leeds Woolen Mills Company. The petition then alleges that the said referee and receiver, relying upon the representations of the said Hinds and of the bankrupt, permitted Hinds to receive said goods, and remove them from the storeroom in which was the bankrupt's stock. It is then, in substance, charged that in fact these goods had been sold and delivered to the bankrupt, and that title had passed; that the same goods so recovered by Hinds had been subsequently disposed of by him to another establishment at Memphis. It is then averred that these facts constitute a wrongful taking of the goods from the possession of the bankrupt court. The petition concludes with a prayer for an order on Hinds "to show cause why he should not be compelled to account to the trustee of said bankrupt and to the court for the value of said goods," which is averred to be \$500. An order to show cause was accordingly made. Hinds appeared, and specially demurred upon the ground that the court had no jurisdiction to proceed against him for the value of said goods by an order to show cause, nor in any other way, in said court, without his consent. This demurrer was overruled, and Hinds required to file an answer, with leave to rely on same in his answer. Thereupon Hinds, not consenting to the jurisdiction, but still relying on his demurrer, answered, in which he denies that he ever sold the goods in question to the bankrupt, and that same had been shipped to his own order, care of the bankrupt, and had not been received or opened by the bankrupt, and that his claim made to the referee and receiver was true, and the delivery to him rightful. The issue made upon the title to the goods by the petition and answer was referred to a master to take proof and report. The master reported in favor of the contention of the trustee that the title had passed to the bankrupt, and that the value of the goods was \$500. Exceptions by the appellant were overruled, and the report confirmed, and appellant directed to pay to the trustee \$500 and interest, as the value of the goods.

Robert W. Mobray, for appellant.

D. W. De Haven, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The motion of the appellee to dismiss the appeal must be denied. The motion is grounded upon the contention that the proceeding is not an appeal under section 25, Bankr. Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], nor an appeal such as is cognizable under the general appeal powers of this court from "controversies arising in bankruptcy proceedings," under section 24a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]), but, if reviewable at all, is so only under section 24b, giving this court revisory and superintending powers over "the proceedings of the several inferior courts of bankruptcy," etc. That this is not an appeal in one of the special cases mentioned in section 25a must be conceded. The petition of the trustee, and the answer of the defendant thereto, raised a distinct and separable controversy over certain property adversely held and claimed by the defendant thereto. It may therefore be well treated as one of those "controversies arising in bankruptcy proceedings," over which this court may exercise general appellate jurisdiction, as in other cases under section 24a. *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 300, 24 Sup. Ct. 690, 48 L. Ed. 986; *In re First National Bank of Canton* (decided by this court at present session) 135 Fed. 62; *Boonville Bank v. Blakey*, 107 Fed. 891, 47 C. C. A. 43; *Steele v. Buel*, 104 Fed. 968, 44 C. C. A. 287.

But we are of opinion that the demurrer should have been sustained to the petition of the bankrupt's trustee. The learned trial judge thought the case fell under *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. In that case a stock of merchandise belonging to the bankrupt, and in the possession of the referee—no trustee having been appointed—was held to be in the custody of the bankrupt court, and that the District Court had jurisdiction to compel, by summary process, the return of goods taken from the referee's possession by a writ of replevin issuing from a state court. The opinion or answer to the questions certified by the Court of Appeals is carefully limited. Thus it is said:

"Not going beyond what the decision of the case before us requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession, as part of the bankrupt's property, to restore that property to its custody."

As observed by Chief Justice Fuller in the subsequent case of *Metcalf v. Barker*, 187 U. S. 165, 176, 23 Sup. Ct. 67, 71, 47 L. Ed. 122, *White v. Schloerb* "proceeded on the familiar doctrine that property in the custody of a court of the United States cannot be taken out of that custody by any process from a state court, and the jurisdiction of the District Court sitting in bankruptcy by summary proceedings to maintain such custody was upheld." In the case at bar, property has not been taken from the custody of the court under process from a state court. Neither has it been taken by force or fraud. Neither does the petition in this case seek the

mere redelivery to the court of property formerly in its custody. The property in controversy was once technically in possession of the bankruptcy court through its referee, who, under rule of the court, had power to hold the bankrupt's estate, as receiver, until a trustee should be selected. But the bankrupt proceedings, after adjudication, had been referred to this referee, who had, therefore, "much of the judicial authority of the court." *White v. Schloerb*, supra, and *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. The goods in question were in closed boxes. They had been consigned by appellant to his own address, care of the bankrupt. Appellant claimed that he had never sold or delivered these goods, and the bankrupt disclaimed title. What should the referee do? He had no other possession than such as resulted from having locked the door of the storeroom which had been occupied by the bankrupt. He had neither the authority nor the purpose to take and hold property which was not the bankrupt's. Thus situated, he allowed appellant to remove these boxes as his own. This was a voluntary surrender of whatever possession the court had had—a surrender by one having much of the judicial authority of the court and the court's custodian. Conceding that he did not have authority—being a mere custodian, without title, to conclude the bankrupt's trustee—does it follow that, after waiting seven months, as the trustee did, and until the goods themselves had been again sold, the trustee may now assert the bankrupt's title by a summary proceeding, not to bring about a restoration of the goods to the court's custody, but to recover, under a rule to show cause, the value of the goods so surrendered voluntarily to the appellant. The case is distinguishable in its facts and upon principle from *White v. Schloerb*. There has been no use of the writ of another court. There has been no taking by force or fraud. Neither is it possible to restore the goods themselves to the custody of the court. A money judgment for the value of the goods is the relief sought, and the only relief possible. To obtain that relief, the trustee concedes that the question of title and value must be tried out under a rule to show cause. The trustee's claim is that the goods in question had been bought from appellant, and that the title had passed, although the goods had confessedly never been paid for, and the voluminous evidence in the case involves only this question, and no more. The claim made to the referee is precisely the claim preferred now by the appellant. Whether the title had or had not passed is a close question of law and fact. The master, upon a view of all the evidence, has reported both ways. Confining ourselves to the case before us, we think the bankrupt court did not have jurisdiction to require the appellant to show cause why he should not pay to the bankrupt's estate the value of the goods so voluntarily surrendered by the referee to him. The court, having voluntarily parted with the custody of the goods, has not the jurisdiction to proceed summarily for their value. The most that can be said is that the referee and receiver made a mistake and exceeded his legal power, the title not being in him. But conceding this, and conceding that the trustee is not thereby concluded, we are of opinion that the appellant cannot be dealt with as if he were a trespasser, a thief, or had proceeded under an unlawful writ. He re-

fused to consent to the court's jurisdiction, and at no time waived his right to be proceeded against regularly and in a court having jurisdiction.

Reverse the judgment, and remand, with direction to sustain the demurrer to the jurisdiction.

In re UNITED STATES HOTEL CO.

UNITED STATES HOTEL CO. v. NILES et al.

(Circuit Court of Appeals, Sixth Circuit. December 6, 1904.)

No. 1,331.

1. BANKRUPTCY—HOTELS.

A hotel company engaged in furnishing rooms and meals to guests is not a corporation principally engaged in trading or mercantile pursuits, and therefore cannot be adjudged a bankrupt, within Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423].

[Ed. Note.—What persons are subject to bankruptcy laws, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

Appeal from the District Court of the United States for the Northern District of Ohio.

E. J. Thobaben, for petitioners.

Amos Burt Thompson, for respondent.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. Appeal from an adjudication of involuntary bankruptcy. The only question is whether a corporation which is engaged in the business of keeping a hotel is a corporation which may become an involuntary bankrupt, under the provisions of section 4 of the bankrupt act (Act July 1, 1898, 30 Stat. 547, c. 541 [U. S. Comp. St. 1901, p. 3423]). The hotel company is a corporation of the state of Ohio, engaged in operating a hotel in Cleveland, Ohio, known as the "Weddell House." The referee reported that the management of "the hotel gave dinner, supper, and breakfast and furnished meals for a consideration; and liquors were sold in its barroom over the counter to be drunk on the premises; the same being furnished to guests of the hotel and to others coming for that purpose. The hotel also supplied lodgings. The regular rates were 75 cents for each meal and 75 cents for lodging." Upon this description of the business of the United States Hotel Company the question is whether it is a "corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits," within the meaning of section 4 of the bankrupt act.

Allegation of the petition was that it was "a corporation engaged principally in trading." That it was not a corporation engaged principally in "manufacturing," "printing," "publishing" or "mercantile pursuits" is clear, and, if it is a corporation subject to being proceeded against as an involuntary bankrupt, it must be because it was engaged in "trading" within the meaning of that term of

the law. In the ordinary meaning of the term, "a trader is one who makes it his business to buy merchandise or goods or chattels and to sell same for the purpose of making a profit." 2 Bouv. Law Dict. 741. In Black's Law Dictionary a trader is said to be "one whose business is to buy and sell merchandise or any class of goods, deriving a profit from his dealings." That one engaged principally in "trading" is one whose chief business is to buy and sell for profit goods and chattels is well settled. In re Smith, 2 Low. 69, Fed. Cas. No. 12,981; In re Cameron Ins. Co. (D. C.) 96 Fed. 756, 757; In re New York, etc., Water Co. (D. C.) 98 Fed. 711; In re Surety, etc., Co., 121 Fed. 73, 56 C. C. A. 654.

The present bankrupt act is confessedly narrower in its application to corporations than the act of 1867. The older act applied "to all money, business, or commercial" corporations. The present is restricted to such as are "principally engaged in manufacturing, trading, printing, publishing, or mercantile pursuits." This change in terms is significant of a purpose to restrict the act, and this purpose must be taken into account in the interpretation of the terms used to describe the kind of corporation to which the new act applies. That the business of keeping a hotel involves the buying and selling of articles of food and drink is true only in a very limited sense. Such a business does not involve the buying of goods or merchandise in such sense as is understood when we say one is engaged in trading. The articles which are bought are not bought to be sold again as merchandise or goods merely for the profit between cost and sale price. They are bought to be made up into edible food or drink, and in that form to be served to guests as food, and the price includes rent, service, heat, light, etc.

Until changed by a statutory declaration of the persons comprehended by the term "trader," an innkeeper was held not to be a trader. *Newton v. Trigg*, 1 Showers, 96; *Luton v. Bigg*, *Skinner*, 276, 291; *Willitt v. Thomas*, 2 Chitty, 691; *Harman v. Clarkson*, 22 U. C. Com. Pl. 291. Thus in *Luton v. Bigg*, cited above, it was said of an innkeeper:

"He is in the nature of a public person, and his house and occupation a thing of necessity, and his gain does not arise from the victuals which he sells, but from his furniture and attendance."

In *Newton v. Trigg*, cited above, it was said:

"An innkeeper cannot get his own prices, but is bound to a reasonable price. A tradesman may sell to whom he pleases. An innkeeper cannot refuse his guest. He doth not get by buying and selling. He gets by the price and hire of his lodging, also by the profit on the ale of kitchen. The profits from his stables do not arise from hay alone, but from the standing."

In view of the fact that the popular meaning of the term "trader" and its technical meaning, as defined by the courts prior to any statutory definition of the persons comprehended by the term "trader," did not include one who keeps a hotel or inn, is there anything in the act of 1898 which requires so broad a meaning as is now insisted upon? The act of 1867 forbids a discharge to a "merchant or tradesman" who had not kept proper books. Blatchford, District Judge, held that a livery stable keeper was a tradesman

within the meaning of this clause, because he bought and sold grain and hay when he fed horses boarded with him. In *re Odell*, Fed. Cas. No. 10,426. It also appeared in that case that he bought and sold horses and vehicles, buying to carry on the business and trading or selling when the animal or vehicle was no longer suitable for hiring. This fact doubtless influenced the result. This is claimed to be a judicial construction of the term "trader," which we are to presume was adopted by Congress in the enactment of the present law. A single decision resting upon peculiar facts would be slender authority for assuming that Congress meant to include livery stable keepers as persons "principally engaged in trading," because horses were fed with provender bought for that purpose. In *re Morton Boarding Stables* (D. C.) 108 Fed. 791, District Judge Brown, while expressing a different view, followed the case as a judicial interpretation of the term "trader" under the old law, which it was reasonable to suppose was adopted by Congress as a proper characterization of a trader under the new law. Following the case out to its extreme results, Judge Wellborn held that a corporation maintaining a private hospital for consumptives, furnishing them the usual accommodations of a hotel, was a corporation principally engaged in trading or mercantile pursuits. In *re Sanitorium Co.* (D. C.) 95 Fed. 271.

But In *re Odell* was not the only definition of "tradesman" under the old bankrupt laws. Thus in *Hall v. Cooley*, Fed. Cas. No. 5,928, Judge Conkling held that livery stable keepers, as such, were not "merchants or persons using the trade of merchandise," under the bankrupt law of 1841. He also held that the owner of timber lands, who cut his trees and made them into lumber, was neither a merchant nor a trader. In this case Judge Conkling refers to Act 6 Geo. IV, c. 16, passed in 1825, as having extended the scope of the bankrupt laws by a list of persons included as tradesmen or merchants. Among these classes brought under the law were "persons who seek their living by buying and letting for hire." But, said the judge:

"Congress not having seen fit to adopt this provision, it is entirely clear that any decisions founded on it are inapplicable here."

Judge Lowell twice defined a "tradesman" under the act of 1867. After referring to the perplexities growing out of the indefiniteness of the class called "tradesmen" or "traders" under English usages, and to the fact that the Parliament had put to rest many troublesome questions by the act already referred to, by giving a list of the occupations which should constitute trading within the English bankrupt laws, said that our Congress had not defined a tradesman, and that "the question is, therefore, addressed to the common usage of this country, and to the judge's knowledge of his own language. The meaning of 'tradesman,' said he, 'is substantially the same as 'shopkeeper.' 'Merchant,' in this connection, contrasts with 'tradesman,' as the greater with the less, and not vice versa." He held, therefore, in *Re Cote*, 2 Low. 374, Fed. Cas. No. 3,267, that a farmer who occasionally bought and sold horses, cattle, and hay

was not bound to keep books as a tradesman. In the case of *In re Smith*, 2 Low. 69, Fed. Cas. No. 12,981, Judge Lowell again defined a tradesman as "one who makes it his business to buy merchandise or goods and chattels to sell the same for the purpose of making a profit." A railway contractor was held not to be a tradesman. In the case of *In re Stickney*, Fed. Cas. No. 13,439, Judge Dillon held that the word "tradesman" in the act of 1867 must be given the narrow meaning originally attached to it under the English bankrupt laws, and meant a small shopkeeper or merchant.

It follows that, if any importance is to be attached to the meaning of the word "tradesman" under the prior bankrupt laws by reason of judicial construction of the term by the inferior courts, the great weight of authority was in favor of a construction which accorded with the popular meaning of the term and with the opinion of the English judges prior to the British act of 1825, which specifically prescribed the occupations embraced under the term "trader." The Congress has not seen fit to define the occupations which are meant to be included under the description of corporations "engaged principally in trading." That its "principal business" shall be "trading" is required, for if trading be a minor object, wholly incidental to some greater purpose, it is not then embraced among the corporations subject to the law. Then, again, it is inferable that Congress intended that the term "trading" should mean an occupation different from that of a "manufacturer," or of one engaged in "mercantile pursuits." Otherwise the different terms would not have been used.

In view of the manifest intention of Congress to restrict the operation of this law in respect of its application to involuntary proceedings against corporations, and to the fact that the word "trading" is used in contradistinction to the words descriptive of other occupations, we conclude that the term "trading" is used in its well-defined, limited sense as understood before the English parliamentary act of 1825, and that a corporation engaged in keeping an inn or hotel is not a corporation principally engaged in trading or mercantile pursuits. The general trend of opinion has favored such a limited interpretation. In *re Surety Guarantee & Trust Co.*, 121 Fed. 73, 75, 56 C. C. A. 654; *Philpot v. O'Brien*, 126 Fed. 167, 61 C. C. A. 111; In *re New York Water Co.* (D. C.) 98 Fed. 711. In *re Pacific Coast Warehouse Co.* (D. C.) 123 Fed. 749, a warehouse company was held not to be a trading corporation. A company to buy and sell stocks and bonds was held not to be a trading company in *re Surety Guarantee & Trust Co.*, cited above. Nor a fire insurance company. In *re Cameron Co.* (D. C.) 96 Fed. 756. Nor a building and loan association. In *re New York Building-Loan Banking Co.* (D. C.) 127 Fed. 471. Nor a water company. 98 Fed. 711. Nor a theatrical company. In *re Oriental Society* (D. C.) 104 Fed. 975. Nor a laundry company. In *re White Star Laundry Co.* (D. C.) 117 Fed. 570. Nor a transportation company. In *re Phil. Transp. Co.* (D. C.) 114 Fed. 403. Nor a freight forwarding company, although it did some trading. In *re Quimby Forwarding Co.* (D. C.) 121 Fed. 139. Nor a public circulating library. In *re*

Parmelee Library, 120 Fed. 235, 56 C. C. A. 583. Nor a social club. In re Fulton Club (D. C.) 113 Fed. 997. Nor a mining company. In re Elk Park Mining & Milling Co. (D. C.) 101 Fed. 422; In re Woodside Coal Co. (D. C.) 105 Fed. 56; In re Keystone Coal Co. (D. C.) 109 Fed. 872.

By amendments mining companies have recently been brought within the act, "not by the use of broad general language, but by the addition of 'mining' to the pursuits mentioned in the original act." "The positive inclusion of mining companies, and mining companies alone, indicates a recognition by Congress that the words 'trading' and 'mercantile' in the original act were not intended to be the equivalent of 'moneyed business or commercial corporations' under the act of 1867." In re Quimby Forwarding Co. (D. C.) 121 Fed. 139, 141.

In the case of In re Chesapeake Oyster & Fish Co. (D. C.) 112 Fed. 961, Judge Hallett held that a corporation engaged in keeping a restaurant and saloon was not a trading corporation, and distinctly disapproved of In re San Gabriel Sanatorium Co. (D. C.) 95 Fed. 271, and In re Morton Boarding Stables (D. C.) 108 Fed. 791. In Re Barton Hotel Co., 12 Am. Bankr. Rep. 335, Justice Stafford of the Supreme Court of the District of Columbia said "that the principal and distinguishing features of the hotel business was not the purchase and sale of commodities, but the furnishing of the traveling public with a temporary home, with bed and board and service, and the ordinary comforts of an abiding place," and that it would be "a great stretch of language which could enable us to speak of such a business as a trading or mercantile business."

Reverse the adjudication, and remand, with direction to dismiss the petition, with costs.

WOODS v. LITTLE.

(Circuit Court of Appeals, Third Circuit. January 9, 1905.)

No. 30.

1. BANKRUPTCY—VESTED REMAINDERS—DUTY TO SCHEDULE.

A bankrupt's grandfather bequeathed two-thirds of the income of his estate to his widow for life, and the other one-third to his daughter E. for life or before marriage, and that in the event of the death of the widow before the marriage or death of E. two-thirds of the income should be paid to E. and the balance to his daughter M. A subsequent clause of the will provided that at the marriage or death of E. the remainder of the estate should be sold, and the proceeds divided equally among all of his children, share and share alike, except his son G., and that, if other of his children should die, leaving children living at testator's death, the share of such deceased child should be given to his or her child or children. Testator left him surviving a widow and five children. One of the testator's sons other than G. thereafter died intestate, unmarried, and without issue, as did his daughter M., who left four children, one of whom was the bankrupt. *Held*, that the bankrupt had a vested interest in his grandfather's estate, which he was required to schedule as a part of his estate in bankruptcy.

2. SAME—INTEREST IN ESTATES—FAILURE TO SCHEDULE—FRAUD—DISCHARGE.

Where the question whether a bankrupt's interest in his grandfather's estate was vested or contingent was difficult of solution, and the bankrupt had previously been advised by counsel that he had no interest in his grandfather's estate on which he could raise money, his failure to schedule such interest as a part of his estate in bankruptcy did not preclude his discharge on the ground that he had "knowingly and fraudulently" concealed, while a bankrupt, property belonging to his estate in bankruptcy.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Charles A. Woods, for appellant.

H. H. Rowand, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The appellee, Frederick Vogel Little, on November 9, 1902, filed his voluntary petition in bankruptcy. With his petition were filed schedules in due form. The debtor was duly adjudged a bankrupt, and the matter referred to a referee. On February 18, 1903, the bankrupt filed his petition for discharge. On proceedings had thereon, opposition was made to the said discharge by the appellant, Edward A. Woods, the principal creditor of the bankrupt. Formal objections to the discharge of the bankrupt were filed March 24, 1903, two of which were as follows:

"2nd. Knowingly and fraudulently concealed while a bankrupt, from his trustee, property belonging to his estate in bankruptcy, viz., valuable interests in the estate of his mother, Martha J. Little, deceased, and his grandfather, William Agnew, deceased, now in the hands of the Girard Trust Company, of Philadelphia, Pa., executor and trustee, said interests consisting of both real and personal property."

"Fourth. Knowingly and fraudulently made a false oath in relation to said proceedings in bankruptcy, viz., in his said schedules, signed and sworn to, Schedule B. Form 4, in averring that he has no property in reversion, remainder or expectancy, including property held in trust for the debtor, or subject to any right or power to dispose of or to charge whereas said averments were false and untrue, said bankrupt having valuable interests in both real and personal property, through the said estates of his grandfather, William Agnew, deceased, and his mother, Martha J. Little, deceased, which said bankrupt well knew."

These objections were referred to the referee, as a special master to take testimony and make report thereof to the court and of his findings of fact, together with his recommendation in favor of or against said discharge. Pursuant to said order, a hearing was had before the referee, and testimony taken pertinent to the questions raised by said second and fourth objections. Pending this reference, a petition was presented to the referee, by the trustee, for an order on the bankrupt to execute an assignment or conveyance of his interest in certain property referred to in the second objection above recited. From the evidence before the referee, the following facts appear:

William Agnew, the grandfather of the bankrupt, died in or about the year 1866, having made and executed his last will and testament, which was after his death duly admitted to probate. It appears that the estate of the said testator consisted of personal property worth.

approximately, \$33,000, and certain real estate, consisting of a house and lot in the city of Philadelphia. The will, after first bequeathing the sum of \$500 to his wife and his daughter, Elizabeth, respectively, devises the house and lot to his wife for life, and after her death to his daughter, Elizabeth, for life, or until her marriage, and provides that at the marriage or death of his daughter, Elizabeth, the said house and lot shall fall back as part of the residue of the estate and be sold, and the proceeds divided amongst his children as afterwards in said will is directed. The will further provides:

"Fifth. I give and bequeath to my dear wife and to my daughter, Elizabeth, the income of my whole estate to be enjoyed by my said wife during her lifetime and by my daughter, Elizabeth, until she marries, in the proportion of $\frac{2}{3}$ of said income to be for the sole use of my said widow, and $\frac{1}{3}$ for the sole use of my said daughter, Elizabeth, and in the event of the death of my said widow before the marriage or death of my said daughter, Elizabeth, then my will is that I direct that $\frac{2}{3}$ of the income of my said estate be for the use of my said daughter, Elizabeth, and given to her so long as she remains unmarried, and the remaining $\frac{1}{3}$ be paid to my daughter, Mary Jane Little. But at the marriage of my said daughter, Elizabeth, or at her death, then I direct that my whole estate, both real and personal, not disposed of by this will, shall be sold by my executors, and the proceeds of it divided equally amongst all my children, share and share alike, except my son, George. * * * And if other of my children should die leaving children living at my death, I desire and direct that the share of each deceased child shall be given to his or her child or children, as the case may be."

There were living at William Agnew's death, a widow and five children, viz., Elizabeth Agnew, Martha Jane Little (the bankrupt's mother), George W. Agnew, James B. Agnew, and Harris S. Agnew. The said James B. Agnew has since died, intestate, unmarried, and without issue, and said Elizabeth Agnew is living and unmarried, and about the age of 56 years. The testator's widow died in the year 1874. Martha Jane Little died about the year 1875, leaving four children, one of whom was the bankrupt. The referee, in his report, says:

"The learned counsel for the bankrupt strenuously contends that the interest of the bankrupt under the will of his grandfather, William Agnew, was contingent and of such a character as did not pass to his trustee under the provisions of the bankruptcy law. After a careful consideration of the very numerous and in some instances seemingly conflicting authorities upon the subject of contingent interests, I am of opinion that the interests of the children of William Agnew in his estate were vested interests and not contingent under the terms of his will, and that the interest of said Martha Jane Little at her death descended to and became the property of her children, including the bankrupt in this case. See, *In re Twaddell*, 6 Am. Bankr. Rep. 539, 110 Fed. 145, where most of the cases on the subject of vested and contingent interests are cited and discussed by Judge Bradford, in delivering the opinion. An order may be drawn directing the bankrupt to execute a transfer and conveyance of his interest in the property, found by this opinion to belong to him, in such form as may be approved by counsel and the court hereafter."

This finding and order of the referee was afterwards approved by the learned judge of the District Court, and the said bankrupt ordered and directed to execute and deliver to the said trustee in bankruptcy a proper assignment and conveyance of his interest in the property referred to.

In the matter of the petition of the bankrupt, for his discharge, the said referee, as special master, took testimony, in addition to that already recited, bearing upon the right of the bankrupt to claim his discharge, including that of the bankrupt himself. From this testimony, it appears that from the time the bankrupt came of age, in 1877, until the death of his father, in 1899, the income from the one-third interest of his mother in her father's personal estate, was, by assignment, paid to his father, or for his father's use in keeping up certain policies of life insurance. At all events, the bankrupt's one-twelfth interest in said income was not paid to him until after his father's death. Between that time and the filing of his petition, the bankrupt says he received half-yearly installments of \$60 or \$70 from the Girard Trust Company, the trustee of his grandfather's estate. He also acknowledges having told the said Woods, the objecting creditor, that he had some contingent interest in his grandfather's estate. He also testifies that in '93 or '94, he had applied to counsel in Philadelphia, to see whether he could raise money upon his interest in his grandfather's estate, and received the opinion that he had no interest which he could transfer or convey; in other words, that his interest was a contingent and not a vested interest. That this opinion was given him, is not denied.

The sole question to be determined upon the petition for the bankrupt's discharge, was, whether he honestly believed, at the time of making his schedule, that he had no vested interest in his grandfather's estate, which he could assign or transfer to the trustee, and that his interest was only a contingent one, as stated to him by his counsel, and not available for his creditors. Whether the bankrupt "knowingly" and "fraudulently" concealed his interest in his grandfather's estate, under the circumstances, is a question of intent addressed to the sound judgment of the court. The learned judge of the court below filed the following opinion upon the exceptions to the referee's report:

"After a careful consideration we are constrained to differ from the conclusion reached and recommended by the special commissioner. Without discussing in detail the particular facts and circumstances of this case, we are of opinion the failure of the bankrupt to return in his schedules the interest complained of, is not necessarily attributable to a fraudulent purpose. Indeed the question of whether he had such an interest as passed under the bankrupt law was not easy of solution. The question of his right to discharge is a close one, but on the whole, we incline to the opinion a discharge should be granted. It may accordingly be prepared."

This judgment of the court below, involving as it does a reversal of the opinion of the learned referee, was presumably the result of a more than ordinarily thorough consideration of the whole case. The question of discharge is one addressed to the sound judicial discretion of the judge. With that discretion, we would be loth to interfere, except in a case amounting to an abuse thereof. A careful review of all the evidence in this case does not convince us that a reversal of the judgment below is required at our hands.

The order of discharge is therefore affirmed.

TOMLINSON v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, December 7, 1904.)

No. 2,010.

1. RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE OF PERSON KILLED.

Plaintiff's intestate, who was riding alone in a buggy a short time after dark, drove upon a railroad crossing immediately in front of a passing train, and was killed. The highway crossed the railroad track practically at right angles, and the deceased was acquainted with the crossing. The view was unobstructed, and the locomotive headlight could have been seen when the train was at any point on the track within half a mile or more of the crossing by a traveler upon the highway at any point within 300 feet or more therefrom. *Held*, that the presumption that deceased exercised due care was negated by the physical facts, which clearly showed that he was guilty of contributory negligence, which, as matter of law, precluded a recovery from the railroad company for his death.

In Error to the Circuit Court of the United States for the District of South Dakota.

About six o'clock in the evening of the 26th of November, 1901, Edwin K. Tomlinson, a traveler upon a country highway in South Dakota, was killed at a railroad crossing by a passenger train of the Chicago, Milwaukee & St. Paul Railway Company. An action was brought under a statute of that state by Hattie Tomlinson, his widow, to recover damages upon the ground that the accident was caused by the negligence of the railway company. The evidence at the trial developed no negligent act or omission, excepting the failure of the engineer to give proper warning of the approach of the train. A prolonged blast of the whistle was blown at least 80 rods from the crossing, but it was not continuously sounded, nor was the bell continuously rung up to the crossing; the duty to do either one of which being prescribed by the state law. The case turned upon the defense of contributory negligence on the part of the deceased.

The highway was laid out upon the section line, and extended east and west. The track of the railway company, in the center of a right of way 100 feet in width, intersected the highway approximately at right angles. Its course varied but slightly from due north and south. Tomlinson, driving a span of horses hitched to a buggy, approached the crossing from the west. No one was with him, and there was no witness who testified concerning any precautions taken by him as he approached the track. The passenger train, with the headlight burning, came from the south, and was running on its schedule time. The deceased was acquainted with the crossing.

Aside from the darkness of the hour, and a mist or fog which it is claimed existed, there was nothing whatever to obstruct the view, for a long distance either northward or southward, of a traveler who was at any point upon the highway within several hundred feet west of the crossing. From the crossing southward the railroad track extended in a straight line for more than half a mile. The adjacent field south of the highway and west of the railroad, over which a view of the approaching train could be had, was separated from the right of way and the highway by a post and wire fence, and was practically level. The railroad track was upon a slight fill, several feet higher than the surrounding country. At a point 100 feet west of the crossing the surface of the highway was but $5\frac{1}{2}$ feet below, and thence arose to the elevation of, the track. The glare of the headlight could easily have been seen when the train was at any point upon the track within half a mile or more south of the crossing, by a traveler upon the highway at any point within 300 feet or more thereof. About a quarter of a mile north of the crossing was Spotswood, a flag station.

The witnesses testified that when the accident occurred—a few minutes before 6 o'clock—it was very dark, but that fact alone would not have prevented the observation of the headlight. One witness, who lived at a town about five miles southeast of the crossing, was called out of his house about half past 6 by news of the accident. He said that a fog or mist seemed to be rising from the ground, but he testified to nothing concerning the circumstances of the accident. Another witness lived a short distance east of the track at Spotswood. From where he stood, a little lower than the track, and about a quarter of a mile north of the crossing, he saw the headlight of the approaching train when it was about four miles away. He also heard the noise of its movement just before it reached the crossing. Though busy about his chores, he noticed that the arrival of the train at Spotswood was delayed for some reason. So he went over to the railroad track, looked southward, and saw and observed for some time the headlight while the train stopped at the crossing after the accident. A third witness testified that a mist was rising from the ground, and that it was foggy, particularly in low places. But although he was about three miles northwest of Spotswood, he saw the headlight plainly while the train stopped at that station, shortly after the accident occurred. The fireman, whose customary position was on the west or left side of the cab of the engine, was busy at the coal, and saw nothing of the accident. The engineer testified that when he was about 50 feet from the crossing he discovered the heads of the horses immediately in front of the engine. They came from the west, and appeared to be walking. From his position on the right side of the cab, he was unable to see them sooner. The speed of the train was such that it could not have been stopped in time to have averted the accident.

There was no conflict or contradiction in the evidence. All of the facts were elicited from the plaintiff's witnesses. No witness testified that there was sufficient mist to have obscured a view of the headlight, nor did the evidence warrant even a probability of the existence of such a condition. On the other hand, the proof was direct and positive that the headlight was seen a long distance by witnesses whose positions for that purpose were no more favorable than that of the deceased. At the conclusion of the plaintiff's case, the trial court directed a verdict for the railway company.

T. H. Null, for plaintiff in error.

H. H. Field and John H. Perry, for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The plaintiff relies upon the presumption that, in the absence of evidence upon the subject, the deceased exercised due care to preserve his safety. *Texas, etc., Railway v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Northern Pacific Railway v. Spike*, 121 Fed. 44, 57 C. C. A. 384. But this presumption cannot stand against positive and uncontradicted proof, such as was presented in this case, that, had he taken those precautions which the law required of him, he could plainly have seen the approach of the train in time to avoid the danger. *Northern Pacific Railroad v. Freeman*, 174 U. S. 379, 383, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Baltimore, etc., Railroad v. Landrigan*, 191 U. S. 461, 474, 24 Sup. Ct. 137, 48 L. Ed. 262.

The presumption of the exercise of due care is at variance with the physical facts. The evidence was so clear as to warrant no other conclusion than that the deceased, by the use of his senses, could have learned of the approach of the train before he reached the crossing; and the necessary inference is that he either did not look, or, having

looked, he endeavored to cross in front of it. He was therefore, as matter of law, guilty of contributory negligence. *Garlich v. Railway*, (C. C. A.) 131 Fed. 837; *Chicago, etc., Ry. v. Andrews* (C. C. A.) 130 Fed. 65; *Chicago, etc., Ry. v. Rossow*, 117 Fed. 491, 54 C. C. A. 313; *Chicago, etc., Ry. v. Pounds*, 82 Fed. 217, 27 C. C. A. 112; *Pyle v. Clark*, 79 Fed. 744, 25 C. C. A. 190.

The judgment is affirmed.

LIPMAN v. STEIN.

(Circuit Court of Appeals, Third Circuit. January 16, 1905.)

No. 18.

1. BANKRUPTCY—EXEMPTIONS—WHAT LAW GOVERNS.

While a bankrupt's right to exemptions must be deduced from the state law, it can be made available only in the manner prescribed by Bankr. Act July 1, 1898, c. 541, § 7, cl. 8, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425].

2. SAME—SALE OF PROPERTY.

Where a bankrupt claimed her exemptions within the 10 days prescribed by Bankr. Act July 1, 1898, c. 541, § 7, cl. 8, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], she could not be deprived thereof by a receiver's sale of all of the assets before her claim was made, rendering it impossible to appropriate specific property to such exemptions.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 130 Fed. 629.

H. N. Wessel, for appellant.

Charles S. Wagoner, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is a petition invoking the exercise of the authority conferred upon this court by section 24, cl. "b," Bankr. Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], to revise in matter of law the proceedings of the several courts of bankruptcy within its jurisdiction; and the question presented by it is whether an order which was made by the District Court for the Eastern District of Pennsylvania, sustaining the bankrupt's claim for the exemption of \$300 in cash out of the proceeds of a receiver's sale, was erroneous. That a bankrupt's right to exemption must be deduced from the state law is unquestionable; but it is no less true that, where the right exists, it is to be asserted in the manner which the bankruptcy act itself prescribes. The only pertinent provision of that act is that the bankrupt, if an involuntary one, as in this case, shall file, within 10 days after the adjudication, a schedule of his property, showing, among other things, "a claim for such exemptions as he may be entitled to." Section 7 (8), 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]. This the present bankrupt did, and she could not have been required to do more. The fact that a receiver was appointed by the court, who, by its authorization, sold all the assets of the bankrupt's

estate before her claim was made or the time allowed for making it had expired, rendered it impossible to appropriate specific property to its liquidation; but her right to its allowance was not thereby extinguished. The order complained of was not violative of the terms of the statute, and could not have been refused without disregarding its spirit. It is therefore affirmed.

In re GEORGE HALBERT CO.

(Circuit Court of Appeals, Second Circuit, November 22, 1904.)

1. **BANKRUPTCY—TRUSTEES—COMPENSATION—LEGAL SERVICES.**

Under Bankr. Act July 1, 1898, c. 541, § 48, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439], providing that trustees shall receive "as full compensation for their services," payable after they are rendered, the various percentages specified, a trustee who was also an attorney at law was not entitled to extra compensation for legal services rendered by him to the estate.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of New York, in Bankruptcy.

This cause comes here upon petition to review an order of the District Court affirming a ruling of the referee in bankruptcy to the effect that the trustee, who happens to be an attorney and counselor at law, is entitled to extra compensation for legal services rendered to the estate.

Charles T. Ferry, for petitioners.

F. W. Park, for respondents.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. In support of the order sought to be reviewed, reference is made to two decisions: In re Mitchell, 1 Am. Bankr. Rep. 687, and In re Welge (D. C.) 1 Fed. 216. Both of these were under the bankruptcy act of March 2, 1867, c. 176, 14 Stat. 517, which provides that: "In addition to all expenses necessarily incurred by him in the execution of his trust in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him thus: [Giving various percentages.]" It must be assumed that Congress was advised of the fact that, under the language above cited, there had been occasions when trustees in bankruptcy who happened to be lawyers were allowed compensation for legal services in addition to their commissions, contrary to the almost universal practice, which refuses such allowances in the case of executors or of trustees generally. Presumably, it was to provide against such allowances being made under the bankrupt act of July 1, 1898, that Congress, in section 48 of such act (chapter 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439]), provided as follows: "Trustees shall receive as full compensation for their services, payable after they are rendered [the various percentages therein stated]." This language

is so precise, so unambiguous, and so explicit as to preclude the allowance of additional compensation upon any theory of a dual personality.

The order of the District Court is reversed, and the claim for extra services is disallowed.

In re LACOV.

(Circuit Court of Appeals, Second Circuit. November 25, 1904.)

No. 68.

1. BANKRUPTCY—INVOLUNTARY PETITION—DETERMINATION—REFERENCE.

Where an answer is interposed to an involuntary petition in bankruptcy the judge may refer the proceeding to a special commissioner to take the testimony and return the same to the judge, with his opinion, notwithstanding Bankr. Act July 1, 1898, c. 541, § 18, subd. "d," 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429], providing that the judge shall determine as soon as may be the issues presented by the pleadings without the intervention of a jury, except in cases where a jury trial is given by the act, and section 1a, cl. 16, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], defining "judge" to mean a judge of a court of bankruptcy, not including a referee.

2. SAME—TAKING TESTIMONY—EXPENSE.

The fact that the taking of testimony before a commissioner was more expensive than a hearing before the judge was not of itself sufficient to prevent such reference.

3. SAME—FORMER PROCEEDINGS.

Where the issues raised on an involuntary bankruptcy petition were submitted to a special commissioner only for the purpose of taking testimony to be submitted to the judge with the commissioner's opinion, it was no objection to such reference that a former involuntary petition by other creditors had been determined by the judge in favor of the alleged bankrupt.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

This cause comes here upon petition by the alleged bankrupt to review an order of the District Judge, Southern District of New York, which provided that the "issues of law and fact raised by the answer to the involuntary petition herein be, and the same hereby are, referred to E. F. Smith, Esq., as special commissioner to take testimony therein, and report this, with his opinion, to this court."

John Bogart (Wm. Jno. Barr, of counsel), for alleged bankrupt.
Epstein Brothers (Jesse S. Epstein, of counsel), for respondent.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. This is a proceeding in involuntary bankruptcy instituted by three petitioning creditors, alleging four different acts of bankruptcy. Answer was interposed, and, the cause coming on for trial before the District Judge, the alleged bankrupt made application that the issue be tried by the judge without the intervention of a jury, as prescribed by section 18, subd. "d," of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]). Said application was denied, and the order now under review was entered.

In criticism of the order it is contended that the section referred to provides that "the judge shall determine, as soon as may be, the issues

presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and makes [sic] the adjudication or dismiss the petition." And section 1a, cl. 16, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], defines "judge" as follows: "Judge' shall mean a judge of a court of bankruptcy not including the referee." But the order complained of does not even purport to give the determination of the issues to the special commissioner. The special commissioner, like a special master in equity, is merely a ministerial officer appointed by the court to assist in the performance of various services of a clerical character in the progress of the cause, such as the examination of long accounts and the taking of evidence upon issues of fact. When the evidence has been taken and returned to the judge with the opinion of the special commissioner, the judge will then consider the issues and determine the same. This method of taking testimony is the usual one in courts of equity, and the act does not provide that all the testimony shall be taken in the presence and hearing of the judge.

It is further suggested that this mode of taking testimony is more expensive. No doubt the courts should give due weight to the consideration that bankruptcy proceedings, as indeed all other litigation, should not be allowed to become an unreasonable burden to the litigants; but other considerations are also to be taken into account. In districts where the calendars are heavy the judge, if he should undertake personally to attend the examination of witnesses, would be wholly unable to keep up with the other branches of his judicial work, and delays would result so serious as to amount to a denial of justice.

Reference is made in the brief to the circumstance that the answer avers that the acts of bankruptcy now alleged were set forth in a former petition brought by three other creditors, were denied, and the issues thereon raised considered by the judge, who determined them in the bankrupt's favor. It is not contended that there cannot be another trial of the same issues, when different petitioning creditors appear, but only that "the bankrupt is seriously prejudiced by a trial of them over again before a special commissioner." The sole argument presented in support of this contention is that, the judge having determined the issues one way under the first petition, the special commissioner might determine them another way under the next one. But, as we have seen, the special commissioner, under the order now before us, has nothing to do with the determination of the issues. That is reserved for the judge who heard the issues under the earlier petition.

The order of the District Court is affirmed.

UNITED SHOE MACHINERY CO. v. CAUNT.

(Circuit Court, D. Massachusetts. December 26, 1904.)

No. 1,939.

1. PATENTS—COVENANT NOT TO CONTEST VALIDITY—CONSTRUCTION.

A covenant in a lease of patented machinery that the lessee will not contest the validity of the patent must be construed with reference to the grant expressed on the face of the patent, and, where it is for the full term of 17 years, the covenantor is debarred from setting up as a defense to a suit for infringement that the patent expired before the expiration of such term by reason of the expiration of a prior foreign patent for the same invention.

In Equity. On exceptions to answer.

Benjamin Phillips and Elmer P. Howe, for complainant.

T. Hart Anderson, for defendant.

LOWELL, District Judge. Complainant brought a bill in equity to restrain the infringement of letters patent No. 461,793, granted October 20, 1891. The bill alleged a covenant of the defendant, dated January 2, 1902, admitting the validity of the patent. The covenant in question (contained in a lease for the term of 17 years, which may be referred to by agreement of counsel) is as follows:

"Ten. The lessee admits the validity of each and every of the letters patent of the United States of America, owned by the lessor or under which it is licensed, any of the inventions of which are or hereafter may be embodied in the leased machinery. The lessee also agrees that he will not directly or indirectly infringe or contest the validity of or the title of the lessor to any of the patents referred to in the 'Schedule of Patents' hereto annexed. The termination or cesser of this lease and license from any cause whatever shall not in any way affect the provisions of this clause or release or discharge the lessee from the admission and estoppel herein set forth."

"Schedule of Patents

"(Referred to in Article Ten herein).

"461,793, October 20, 1891."

The defendant answered, setting up a British patent dated September 17, 1888, "for said alleged improvements set forth and claimed in said letters patent No. 461,793." The complainant excepted to the allegation in the defendant's answer above referred to as impertinent, and prayed that it be expunged. The case was thereupon referred to a master, who carefully considered the question presented for decision, and found that the portion of the answer objected to was not in violation of the defendant's covenant. The complainant duly excepted to the master's report.

Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], reads in part as follows:

"Every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent; * * * and in no case shall it be in force more than seventeen years."

The sole question thus presented to the court is this: Did the defendant covenant that he would not contest the valid duration

of letters patent No. 461,793 for the full term of 17 years expressed therein, or was his covenant binding only for the term as limited by the prior English patent? That expired 14 years from its date. There was much discussion by counsel, both before the master and at the bar, whether section 4887 should be construed as forfeiting a part of the term otherwise granted by the patent, or as a limitation implied in the grant itself. Cases were referred to in support of one construction or the other of the statute. See *Brush Electric Co. v. Julien Electric Co.* (C. C.) 41 Fed. 679; *Brush Electric Co. v. Electric Accumulator Co.* (C. C.) 47 Fed. 48; *Bate Refrigerating Co. v. Hammond*, 129 U. S. 151, 9 Sup. Ct. 225, 32 L. Ed. 645; *Edison Electric Light Co. v. United States Electric Lighting Co.*, 52 Fed. 300, 3 C. C. A. 83; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601. But after the decisions of the Supreme Court there can be no controversy about the substantial meaning of section 4887. Under the conditions there stated, the patentee obtains a monopoly limited by the term of the foreign patent. Whether that limitation works in derogation of the grant or otherwise is little more than a question of words. The real question presented in the case at bar does not concern the classification of the statute, or its technical method of operation, but the meaning reasonably to be attached to the defendant's covenant. Had the patent in question been limited on its face (as in *Pohl v. Anchor Brewing Co.*, 134 U. S. 381, 10 Sup. Ct. 577, 33 L. Ed. 953), "subject to the limitation prescribed by section 4887, Rev. St., by reason of British patent dated September 17, 1888," there can be no doubt that the defendant's answer would state a valid defense to the bill. This would be true whether the limitation thus expressed worked by way of forfeiture or otherwise. But where the patent is expressed to grant a monopoly for 17 years, without qualification, the defendant's covenant must be construed with reference to this language, and he must be taken to agree not to dispute the monopoly defined in the patent.

Inconvenience would follow from adopting the defendant's construction. The identity of the invention described in the foreign patent and in the patent in suit may be matter of serious dispute. If the defendant can set up the term of the foreign patent, the covenant might fail to afford the complainant that protection from litigation for which it was obviously designed. By the construction of the covenant here adopted, its meaning may be gathered from the terms of the instrument itself and from the patents therein referred to.

The exceptions to the master's report are therefore sustained, and the allegation excepted to in the defendant's answer must be deemed impertinent and expunged therefrom.

CROCKER-WHEELER CO. v. BULLOCK.

(Circuit Court, S. D. Ohio, W. D. December 28, 1904.)

1. DEPOSITIONS DE BENE ESSE—FEDERAL STATUTE—AUTHORITY OF CLERK TO ISSUE SUBPENA DUCES TECUM.

A clerk of a Circuit Court has authority, when so directed by an order of the court, to issue a subpoena duces tecum to require the production of documents on the taking of depositions de bene esse before him, pursuant to Rev. St. § 863 [U. S. Comp. St. 1901, p. 661].

2. SAME—CLAIM OF PRIVILEGE BY WITNESS—JURISDICTION TO DETERMINE.

On the taking of a deposition de bene esse in another federal district under Rev. St. § 863 [U. S. Comp. St. 1901, p. 661], the witness may assert his legal privilege to refuse to give testimony or to produce documents called for the same as though examined in open court, and in such case he has a right to be heard before the court in such district, and to have his claim of privilege determined by such court, before being compelled to answer or produce the documents.

3. WITNESS—PRIVILEGE—DISCLOSURE OF TRADE SECRETS.

A witness has a legal privilege to refuse to give testimony sought, or to produce documents called for, where such testimony or documents will disclose trade secrets, and where the evidence is irrelevant or otherwise inadmissible in the case.

[Ed. Note.—Disclosure of trade secrets, see note to *S. Jarvis Adams Co. v. Knapp*, 58 C. C. A. 8.]

4. SAME—RELEVANCY OF DOCUMENTS CALLED FOR.

The issues in an action by a corporation against an individual to recover damages for breach of a contract by which the defendant agreed to sell to plaintiff the stock of another corporation of which he was president discussed, and held not such as to render the books of the latter corporation relevant or admissible in evidence, so as to entitle the plaintiff to compel the officer having them in charge to produce the same on the taking of his deposition in another federal district, in compliance with a subpoena duces tecum, against his claim of privilege, it being further shown that the two corporations were competitors in business, and that the disclosures would be detrimental to the corporation of which the witness was an officer.

5. SAME.

The fact that the defendant in such action at the time of the making of the contract was the owner of all the stock of the corporation which he undertook to sell could not enlarge the rights of the plaintiff as against the claim of privilege of the officer of such corporation, whom plaintiff had made a witness.

On application for attachment against a witness for refusal to produce books in compliance with a subpoena duces tecum on the taking of his deposition.

Noble, Jackson & Hubbard, Augustine D. Humes, and Harmon, Colston, Goldsmith & Hoadly, for applicant.

Morrison R. Waite, for witness.

COCHRAN, District Judge. This is a proceeding in an action pending in the Circuit Court of the United States for the district of New Jersey. The action is at law, and was brought by the Crocker-Wheeler Company against George Bullock to recover damages for breach of contract made April 27, 1900, by and between S. S. Wheeler, then president of said Crocker-Wheeler Company, and said George Bullock, the

president of the Bullock Electric Manufacturing Company, whereby said Bullock agreed to sell to said Crocker-Wheeler Company all the outstanding stock of said Bullock Electric Manufacturing Company in exchange for stock of the former company. The proceeding in this court in said action is an application by the plaintiff therein, said Crocker-Wheeler Company, for an attachment against Joseph S. Neave, a resident of this district, and vice president of said Bullock Electric Manufacturing Company, for contempt in refusing to produce the journals, ledgers, cash, sales, and invoice books, and all other books of account of said company for the years 1899, 1900, 1901, 1902, 1903, and 1904, before the clerk of this court in obedience to a subpoena duces tecum commanding him to do so, issued by said clerk pursuant to an order thereof made after notice to said defendant Bullock. The refusal to produce was upon advice of counsel, and the witness, through said counsel, resists and objects to the granting of said application. It is urged upon his behalf, in the first place, that the clerk, though directed by this court to do so, was without authority to issue the subpoena. It is not claimed by the plaintiff that he had any authority to issue it, save so far as it was conferred by section 863 of the Revised Statutes [U. S. Comp. St. 1901, p. 661]. This position of the witness therefore amounts to a denial that said section conferred such authority upon the clerk. He contends that a subpoena duces tecum for the production of documents out of court in an action at law can only be obtained under sections 866-869, inclusive [U. S. Comp. St. 1901, pp. 663-665]. I do not find it necessary to consider this contention on its merits. It has been so considered by able federal judges; and, so far as their reported decisions go, they have invariably held that a subpoena duces tecum for such purposes can be obtained under section 863. It has been so held by Judges Choate, Jenkins, Lowell, and Colt in the following cases, to wit: *U. S. v. Tilden*, Fed. Cas. No. 16,522; *Lowrey v. Kusworm* (C. C.) 66 Fed. 539; *Davis v. Davis* (C. C.) 90 Fed. 791; *Dancel v. Goodyear Shoe Mfg. Co.* (C. C.) 128 Fed. 753. In the case of *Ex parte Peck*, 3 Blatchf. 113, Fed. Cas. No. 10,885, Judge Betts expressed a doubt as to whether said section authorized a subpoena duces tecum, but this all the farther that any federal judge has gone in the direction of holding that it did not. Counsel for witness claims that Judge Adams, in the case of *Stevens v. M. K. & T. Ry. Co.* (C. C.) 104 Fed. 934, "squarely" decided in accordance with his contention. But I do not so read that decision. Two things were decided therein. One was that in an equity suit a deposition cannot be taken under said action before the cause is at issue. The other was that the clerk of a circuit court cannot issue an ordinary subpoena under that section commanding a witness to appear and testify before a notary public, one of the officers authorized to take depositions thereunder. Why he so held does not appear. It is certainly not because he thought that an ordinary subpoena cannot be obtained under said section. It could only have been because he thought either that the subpoena in such a case should have been issued by the notary himself or pursuant to a direction of the court. I can conceive of no other reason. The likelihood is that it was for the latter reason. In the case of *Dancel v. Goodyear Shoe Mfg. Co.* (C. C.) 128 Fed. 753. Judge Colt held that the clerk had no au-

thority to issue a subpoena duces tecum under section 863 without an order from the court for him to do so. In the case, however, of *Henning v. Boyle* (C. C.) 112 Fed. 397, Judge Lacombe held that the clerk had authority to issue an ordinary subpoena to testify without such previous order. But the holding of Judge Adams in the *Stevens Case* can have no application here, because the subpoena duces tecum in question commanded the appearance of the witness and production of said books before the clerk himself, who is authorized to take depositions under said section, and was issued pursuant to the direction of this court after notice to the defendant.

In view, then, of this state of the decision, I hold that this position of the witness is not well taken. Besides, the allowance of the subpoena by Judge Thompson must be treated as a holding by him that said statute authorized its issuance; and, even if I had any doubt on the subject—which I have not—comity requires that I follow him.

All else that is urged on behalf of the witness against the application for an attachment may be reduced to a single contention, and that is that the witness has a legal privilege to withhold the books called for. It is not thus directly put, but that is what it amounts to. It is only in the assertion of a legal privilege to withhold that a witness can refuse to testify or produce documents in obedience to a subpoena regularly issued, or be heard upon an application for contempt in so refusing. Counsel for plaintiff seemingly ignore this question of privilege, and treat the matter as if the only parties interested in the disposition of this application were the parties to the action. It is in this view that they urge that this court, in acting thereon, does so simply in aid of the trial court, and should compel the production of the books called for if it is possible under any circumstances, that they may be admissible in evidence, and thus as it were pass the question of their admissibility on to the trial court for its determination. Of course, if this view were correct, such a subordinate attitude on the part of this court might be proper; for, as stated by counsel, if the books were inadmissible in evidence, they could be excluded by the trial court, whereas, if they were admissible, and this court were not to compel their production, there would be no way to get them in evidence. But upon the idea that the witness has an interest in the disposition of the application, and his resistance thereto is in the assertion of a legal privilege to withhold, this court cannot occupy such attitude toward the application, but should dispose thereof as if it were the trial court and the question arose in the course of the proceedings before it; for otherwise the privilege would be denied without hearing, or treated as if it were a light matter, when it is of equal dignity with the right asserted by plaintiff in the action. And so it was held in the case of *In re Judson*, Fed. Cas. No. 7,563, involving a proceeding similar to this. Judge Betts there said:

"The counsel for the motion urges that it belongs to the court in Massachusetts, on the return of the deposition, to determine whether the evidence is pertinent to the case, and that the court will exclude the evidence if it is found not to be pertinent. This argument is correct in so far as it relates to the conduct of the commissioner. That officer must write down and return to the court any species of evidence offered before him, and the court will

receive or reject it, according to the rights of the parties. But most serious mischief may be in that way effected if a witness is compellable in all cases to answer, in the first instance, all questions put to him. He may be compelled to make public important secrets in relation to the rights or character of himself or others, which the party extorting them has no title to or interest in, and which are drawn out through a course of interrogation that would have been pre-emptorily arrested had the examination taken place in open court. These ex parte examinations cannot claim privileges or powers which the court they are designed to aid could never exercise itself. This court imposes its authority to attend before commissioners and give evidence there under the provisions of the thirtieth section of the judiciary act of 1789 [Act Sept. 24, 1789, c. 20, 1 Stat. 88], which declares that any person may be compelled to appear and depose before a commissioner in the same manner as to appear and testify in court. Accordingly, a refractory or reluctant witness who has been duly subpoenaed to attend for examination before a commissioner will be made to obey the order to the same extent as if the writ of subpoena had been returnable to this court. There is nothing in the law or the reason of the case which supplies a different authority in respect to ex parte evidence taken out of court from that which legally appertains to the court in proceedings before it. The act places both on the same footing."

The thirtieth section of the judiciary act of 1799 referred to was subsequently embodied in section 863. In the case of *In re Allis* (C. C.) 44 Fed. 216, which was a proceeding to compel the production of documents by a witness whose deposition was being taken under equity rule 67 in a district foreign to that where a suit in equity was pending, Judge Jenkins said:

"It is insisted that the rule contemplates that all questions must be referred as to their relevance to the court having jurisdiction of the cause. Undoubtedly that court has the ultimate control of a decision upon the materiality of the examination. But it is quite another matter with respect to the compulsion of a witness to answer. In such case the court or judge must be satisfied of the contumacy of the witness. The witness responds to the authority dominant at his residence. He is beyond the coercive power of the court entertaining the cause. His disobedience is to the mandate of the court issuing the writ of subpoena, not the court issuing the commission. The question of disobedience involves both the materiality of the interrogatories and the privilege of the witness, and both must be considered by the court exercising jurisdiction of the witness; and this for the protection of the witness as well as for the proper conduct of the examination."

Of course, if the existence of the privilege depends upon or is affected by any question in the action which has been heretofore determined by the trial court, comity might require that its determination thereof be accepted as correct.

Has, then, the witness a legal privilege to withhold the books called for in the subpoena? The privilege asserted is not to withhold testimony, but to withhold documents. It seems to be settled that ordinarily, at least, no witness has a legal privilege to withhold testimony simply because it is irrelevant or otherwise inadmissible in evidence. The party against whom such testimony is offered can alone make such objection to its introduction. Wigmore on Evidence, vol. 3, § 2210, says:

"The witness has no privilege to refuse to disclose matter irrelevant to the issue in hand—First, because irrelevancy is a concern of the parties alone, and may be obviated as a ground for exclusion by their consent or failure to object; and, secondly, because there is in the mere circumstance of irrelevancy nothing which creates for the witness a detriment or inconvenience such as should suffice to override his general duty to disclose what the court requires.

However, the recognition of a privilege of this sort would add innumerable opportunities to make a claim of privilege, and would thus tend to complicate the trial, and add to the uncertainty of the event."

Gamble, J., in *Ex parte McKee*, 18 Mo. 599, said:

"The objection to the relevancy or competency of evidence is for the parties litigant to make, and not for the witness."

But it is possible that the witness has a legal privilege to withhold documents called for simply because they are irrelevant or otherwise inadmissible. And it would seem probable that he has such privilege to withhold either—i. e., testimony or documents—if the introduction of it or them would be prejudicial to him, and it or they are irrelevant or otherwise inadmissible in evidence. As to discovery from a defendant, Lord Chancellor Hatherly, in the case of *Moore v. Craven*, 7 Ch. App. 94, said:

"The court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but when the nature of the discovery required is such that the giving of it may be prejudicial to the defendant the court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery that can be of use to him, on the other it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the cause made by the plaintiff's pleadings and to what will be in issue at the hearing."

But, however it may be as to these two quotations, there can be no question but that, if the giving of the testimony sought or the production of the documents called for will disclose what are characterized as "trade secrets," the witness has a legal privilege to withhold if it or they are irrelevant or otherwise inadmissible in evidence. Wigmore on Evidence, vol. 3, § 2212, says:

"In a day of prolific industrial invention and free economic competitions it may be of extraordinary consequence to the master of an industry that his process be kept unknown from his competitors, and that the duty of a witness be not allowed to become by indirection the means of ruining an honest and profitable enterprise. This rule, and the necessity of guarding against it, may extend not merely to the chemical and physical composition of substances employed and to the mechanical structure of tools and machines, but also to such other facts of possibly private nature, as the names of customers, the subjects and amounts of expenses, and the like. Accordingly there ought to be, and there is, in some degree, a recognition of the privilege not to disclose that class of facts which, for lack of a better term, have come to be known as 'trade secrets.'"

And further on in the same section it is said:

"What the state of the law actually is would be difficult to disclose precisely. It is clear that no absolute privilege for trade secrets is recognized. On the other hand, courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. More than this in definition can as yet hardly be ventured."

The only serious question here is whether disclosure of trade secrets should be enforced if they are relevant and admissible in evidence. The last quotation from Wigmore indicates that in his opinion it should be, provided they are indispensable for the "ascertainment of truth." This

is further indicated by this statement in the same section between the two quotations made therefrom, to wit:

"No privilege of secrecy should be recognized if the right of possibly innocent persons depends essentially or chiefly upon the disclosure in question."

None of the decisions relied on by counsel for plaintiff hold that the giving of testimony or the production of documents will be enforced when such action will cause the disclosure of trade secrets, if it or they are irrelevant or otherwise inadmissible in evidence. In the case of *Wertheim v. Continental R. & Trust Co.* (C. C.) 15 Fed. 717, it was held that the officer of a corporation not a party to the suit should be compelled by a subpoena duces tecum and process of contempt therein to produce certain books and papers. But it was only claimed that the production of the books and papers would inconvenience the corporation, and it seems to have been conceded that they were necessary and vital to the rights of the litigants. Judge Wallace said:

"Considerations of inconvenience must give way to the paramount rights of litigants to resort to evidence which it may be in the power of witness to produce, and without which grave interests might be jeopardized, and the administration of justice thwarted."

In the case of *Robinson v. Philadelphia & R. R. Co.* (C. C.) 28 Fed. 340, in referring to applications such as that involved herein, Judge Butler said, as quoted by counsel for plaintiff, that:

"The court generally inclines towards the application, and requires an answer wherever it seems probable the testimony may be relevant."

But there the privilege asserted was to withhold testimony, not documents, and the privilege was upheld because the testimony was irrelevant, and its giving would have been prejudicial to the witness. Judge Butler added to the foregoing quotation these words:

"Care, however, must be exercised to avoid unnecessary and improper inquiry into private affairs."

The favoring attitude expressed in the quotation relied on therefore could only have had reference to testimony that is a "matter of indifference," the materiality or immateriality of which, as expressed by Lord Hatherly, the court will not "weigh in golden scales." In the case of *Johnson Steel S. R. Co. v. North Branch S. Co.* (C. C.) 48 Fed. 195, Judge Reed went further than was gone in either of the two foregoing cases, and held that the production of certain drawings should be enforced, notwithstanding their production would be prejudicial to the company of which the witness was an officer. But no question was made as to the relevance and materiality of the drawings to the controversy involved in that case. This is in accord with the position of Prof. Wigmore. The authorities relied on by counsel for witness, to wit, *In re Pacific Ry. Com.* (C. C.) 32 Fed. 241, 250; *Henry v. Insurance Co.* (C. C.) 35 Fed. 15; *Southern Ry. Co. v. North Carolina Com.* (C. C.) 104 Fed. 700; *In re Horgan* (D. C.) 97 Fed. 319—are possibly against such an advanced position. It should be accepted, therefore, as correct law, that a witness should not be compelled to disclose trade secrets embedded in his head or in documents in his possession, when

their disclosure will be prejudicial to him or his company, and they are not relevant to the controversy in the suit or action in which he is a witness, or otherwise admissible in evidence therein.

Thus far the consideration of the matter in hand has had no special reference to a proceeding under section 863, as this is. Limiting it thereto, we find that it has never been held that the giving of testimony, subject only to the complaint that it was irrelevant or otherwise inadmissible in evidence, should be enforced by process of contempt. And it has been held that the production of documents should never be so enforced in proceedings thereunder unless they were relevant.

In the case of *Ex parte Peck*, supra, Judge Betts said:

"It must also be shown that the witness was called to testify to facts material and relevant to the issue in the case. The court will interfere in this summary way only to aid the plain demands of justice, and will not attach a witness for neglecting to testify without evidence that his testimony is pertinent to the cause, and such as the party is entitled by law to demand. In this case the object seems to be to obtain access to papers in the possession of the witness to be used in the case."

In the case of *In re Judson*, supra, the same learned judge said:

"I see no reason why any more stringent obligation should be imposed upon a witness in these outside examinations than is enforced in court. Before the court will adjudge a witness to be in contempt, or commit him therefore, it will require more than proof that he declines to respond to a question. It will inquire whether the question is relevant and material to the case or hearing, and also whether the witness is legally exempt from answering it. No contumacy can be imputed to him until these points are determined. The law gives no color to the practice which not infrequently intrudes upon judicial proceedings, of besetting a witness with impertinent inquiries calculated to pry into his private affairs or into his own character or that of other persons, or to subject him to personal liability, when the inquiries are not shown to have a legitimate bearing upon the cause on trial; and it is guarded in coercing answers to questions when their materiality is not clearly manifest."

In the case of *Dancel v. Goodyear Shoe Mfg. Co.*, supra, which was an application in the United States Circuit Court for the District of Massachusetts for an order directing the clerk to issue a subpoena duces tecum under section 863 in an action pending in the United States Circuit Court of the District of New York, S. D., Judge Colt, said:

"A party undoubtedly has the right to invoke the process of the court to compel the attendance of witness and the production of such papers as are material to his case; but neither the right of a party nor the power of the court extends beyond this. A party has no right, and the court has no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case. Any practice which sanctions such a proceeding is unwarranted, and an infringement upon a fundamental personal right guaranteed by the federal Constitution. The courts have always recognized this protection to the individual, secured by our organic law. Such recognition is seen in the distinction which is made between a subpoena ad testificandum and a subpoena duces tecum. The former is a process of right, while the latter is addressed to the discretion of the court. Discretion here does not mean that the court has power to refuse the compulsory production of a paper which is material evidence in the case, but that, before compelling its production by a subpoena duces tecum, it will sufficiently inquire into the matter to determine if the evidence appears to be material, and, if not satisfied on this point, will decline to issue a writ."

The application was denied, notwithstanding it was stated therein that the documents called for were "material and necessary," because it did not appear *prima facie* that such was the case.

With this presentation of the law as to the privilege of a witness to withhold documents called for in a subpoena duces tecum, we are prepared to take up and dispose of the privilege asserted here.

The Crocker-Wheeler Company and the Bullock Electric Manufacturing Company were New Jersey corporations engaged in the business of making and selling electrical apparatus. They were therefore rivals in business. The works of the former were located in New Jersey, and those of the latter in Ohio, near Cincinnati. The books called for, if produced in evidence, will disclose to the Crocker-Wheeler Company, and any other having an opportunity to inspect them, certain of the trade secrets of the Bullock Company, to wit, at least, who are its customers, what are its methods of doing business, and what are its expenses of operating; and such disclosure cannot but be prejudicial to that company. If, then, said books are not relevant to the controversy between the Crocker-Wheeler Company and George Bullock in the action pending in the Circuit Court of the United States for the District of New Jersey, there exists the strongest possible case for the witness having a legal privilege to withhold them. In order to determine whether they are relevant thereto, it is necessary to understand what are the issues in that action. To enlighten the court on this subject, copies of the pleadings therein and of the opinion of Judge Gray delivered upon overruling demurrer to the declaration have been filed. From the declaration it appears that said action is, as heretofore stated, one to recover damages for a breach of the contract heretofore referred to. That contract did not provide how much stock of the Crocker-Wheeler Company Bullock was to receive in exchange for the stock of the Bullock Company. It therefore did not fix the price that Bullock was to get therefor. If this had been all the contract contained on the subject of price, it would have been an incomplete contract, and void for uncertainty; for the price at which property is sold is an essential term in the contract of sale thereof. *Mechem on Sales*, vol. 1, §§ 204, 205, says:

"A distinguishing feature of a sale, as has been seen, is that it is a transfer of the absolute title to a thing for a price in money or its equivalent. There can therefore be no valid sale unless the price has been determined upon by the parties themselves, either expressly or impliedly, or unless some means or method be agreed upon by the parties or established by law by which the price may be determined. Hence, in the case of executory contracts, where parties are negotiating in respect of a sale and of the price to be paid thereon, the contract of sale cannot be deemed to be completed so long as the price remains undetermined. There will therefore be no sale if the parties, though apparently agreed, are really mutually mistaken as to the price to be paid. There will also be no sale if the price is left to be afterwards agreed upon, and the parties fail afterwards to agree; though, if the sale be for a reasonable price to be afterwards agreed upon, and the parties cannot agree, the law will supply the method."

In the recent case of *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288, it was held that a contract to take

press reports for a term of years at not more than \$300 per week, without making any other provision as to price, is too indefinite to permit a recovery of anything more than nominal damages for its breach.

The contract, however, did provide a mode of determining how much stock of the Crocker-Wheeler Company Bullock was to get in exchange for the stock of the Bullock Company. It provided several alternative methods of determining the value of the stock of both companies, one of which did not contemplate any further agreement by the parties, and another of which called for a valuation by an appraiser to be agreed on subsequently by both of them, and that Bullock should receive as many shares of stock of the Crocker-Wheeler Company, thus valued, as equaled in value the stock of the Bullock Company, thus valued. This provision made the contract potentially certain; as much so as if the number of shares of stock that Bullock was to receive had been named in the contract; for in the eye of the law that is certain which can be made certain. *Mechem on Sales*, vol. 1, p. 212, says:

"It is also competent for the parties to provide that the price shall be such as may thereafter be fixed by valuers, and in case it is so fixed they are as much bound by it as if they had fixed it themselves."

The contract further provided that each party thereto should assist said appraiser in making a valuation of the stock of their respective companies by providing him with a certain statement, and permitting him to have free access to their properties and books. It was alleged in the declaration that said parties had, subsequent to the making of the contract, agreed on an appraiser; that the Crocker-Wheeler Company had rendered the stipulated assistance to the appraiser to enable him to make a valuation of its stock; that Bullock had failed and refused to furnish such assistance; and that because of such failure and refusal no valuation was made of either of said stocks by said appraiser. It follows from this that said contract has never been made complete and certain in the particular in which it was incomplete and uncertain when executed, and that it remains as incomplete and uncertain as it was at that time. What then, if any, are the rights of the Crocker-Wheeler Company against said Bullock under said contract? If the latter had not prevented the making of the valuation by the failing and refusing to assist the appraiser, no one would contend that the Crocker-Wheeler Company had a right of action against him on the contract.

Mechem on Sales, vol. 1, § 213, says:

"But in order that the contract shall take effect it is essential that the price shall be fixed as provided in the agreement, for, if the parties fail to appoint valuers, or the latter fail or refuse to act, the contract, if executory, must fail."

Benjamin on Sales (6th Ed.) § 87, says:

"It is not uncommon for the parties to agree that the price of the goods sold shall be fixed by valuers appointed by them. In such cases they are, of course, bound by their bargain, and the price, when so fixed, is as much part of the contract as if fixed by themselves. But it is essential to the formation of the contract that the price shall be fixed in accordance with their agreement; and, if the persons appointed as valuers fail or refuse to act, there is no contract in the case of an executory agreement."

Burdick on Sales, p. 89, says:

"Until the agreed person names the price, no obligation attaches to either seller or buyer; and the latter has no interest in the goods which may have been set apart by the seller for him, nor has he a right of action arising out of the contract."

Slight reflection will show that in the very nature of things this could not be otherwise. A court of equity will not specifically enforce a contract of sale against the seller where specific performance is a proper remedy without providing that he gets his price. But where the price is to be fixed by a valuer, the seller's price is not a price fixed by any good man, or any other price than that fixed by the named valuer. Hence, until he has fixed the price, no provision can be made for the seller getting his price, and the contract cannot be specifically enforced against him. Again, a court of law will not adjudge a seller liable in damages on a contract of sale unless the buyer is at least able, ready, and willing to give him his price, and will only, as a general rule, at least, make him liable for the difference between such price and the market price, if there is one, or, if not, the actual value thereof. But his price, where it is to be fixed by a valuer, is not a price fixed by 12 good men, or any other price than that fixed by the valuer. Hence, until the price is so fixed, the seller cannot be liable at law.

What, then, was the effect of the circumstance that Bullock prevented the valuation by the agreed appraiser in the manner charged? Was it to give the Crocker-Wheeler Company a right of action against him on so much of the contract as related to the agreement to sell? It is not entirely clear that Judge Gray was not of the opinion that it did, and thought that possibly a valuation could be had by 12 good men, to wit, a jury, in substitution for that of the agreed appraiser, in order to fix the Crocker-Wheeler Co.'s rights on said portion of the contract. But, to say the least, such a position is open to question. Mr. Benjamin concludes the quotation from his work heretofore made with the statement that, if the valuers "fail or refuse to act, there is no contract in the case of an executory agreement," and adds thereto these words, "even though one of the parties should himself be the cause of preventing the valuation." And such would seem to be the necessary implication from the decision of Sir George Jessel in the case of *Smith v. Peter*, L. P. 30 Eq. 511, referred to by Judge Gray. That was a suit for specific performance of a contract for the sale of a house and the fixtures and furniture at a price to be fixed by a person named therein. The person named undertook the valuation, but was refused permission by the vendor to enter the premises for that purpose. Specific performance was enforced, but not without a price being fixed, nor upon a price fixed by a good man named by the court. It was enforced upon a price fixed by the person who was named in the contract. The vendor was compelled to permit him to fix the price, and, upon its being so fixed, he was compelled to accept it and convey the property.

The general principle that, where performance by plaintiff of his part of the contract is a condition precedent to performance by defendant of his part, and had been prevented by defendant, the nonperformance thereof is excused, and a right of action accrues to plaintiff without

performance, can hardly have application to a case like the one under consideration, and determine the rights of the parties. That principle finds room for application in the case of complete contracts—contracts complete at the start, or subsequently made so. Where the contract was not complete at the start, and has never been made so since, the valuation by the appraiser was not the performance of a condition precedent in a complete contract. It was the fixing of a term in an incomplete contract, the making of an incomplete contract complete, without which there was no valid subsisting contract so far as the agreement to sell was concerned. But, though the Crocker-Wheeler Company may not have a right of action on so much of the contract as relates to Bullock's agreement to sell because of his preventing the valuation, it does not follow that it did not have a right of action against him on the contract. It seems to me that in every contract to sell property for a price to be fixed by an appraiser it should be held that it is an implied term of the contract that neither party is to do anything to prevent the fixing of the price by him. But, however this may be, the contract involved herein expressly provided that each party should assist the appraiser agreed upon by them in making the valuation of their respective stocks by furnishing to him a certain statement and permitting him free access to their respective properties and books. Bullock therefore agreed not only to sell said stock at the valuation fixed by said appraiser, but also to so assist in the valuation thereof. The latter was as much an agreement on his part as the other. And no good reason can be conceived of why he should not be liable for a failure to comply with that much of his contract. The fact that he may not be made liable on so much of the contract as related to his agreement to sell for want of a price is no good reason for his not being so liable. If this position is correct, then his preventing the valuation did give the Crocker-Wheeler Company a right of action against him, and the declaration stated a good cause of action.

Burdick on Sales, p. 30, says:

"And if the failure of the arbiter to act is due to the fault of either party, he is liable in damages to the other."

And again, on page 88:

"If either party, however wrongfully, prevents a valuation of the goods by the appraiser, he renders himself liable to an action for damages."

Judge Gray held, in his ruling on the demurrer to the declaration, that it stated a good cause of action, and hence overruled the demurrer. So that, even if I had any doubt on this subject, his opinion should be accepted as correct for the purposes of this application. And, though he did not base the cause of action distinctly upon Bullock's agreement to assist in making the valuation, and expressly confine it thereto, I do not think his opinion requires that I should not so base and limit it.

The only other part of the Crocker-Wheeler Company's case is the claim for damages. The amount claimed is the sum of \$500,000, which is made up of three separate items as follows, to wit: (1) \$40,000 for expenses incurred in performing its part of said contract as to rendering assistance to the appraiser. (2) \$300,000 for increased gains and profits and saving in expense in operation of which it was deprived

by Bullock's failure to carry out his agreement in said contract. (3) \$160,000 increased gains and profits in addition to the foregoing, which would have resulted from arrangements depending upon the carrying out of the combination and consolidation provided by said contract. This claim presents the question whether, assuming that the Crocker-Wheeler Company will be able to make out a case of liability on the part of said Bullock to it for his failure and refusal to assist in making the valuation, it will be entitled to recover damages on account of either one of these items. Before considering the items separately, two general observations are to be made. In the first place, it would seem that, if there is no liability on account of Bullock's agreement to sell, but only on account of his agreement to assist in making the valuation, the damages which he is liable for are only such as grow out of the breach of the latter agreement, and are not any on account of the former agreement. To allow as damages for the breach of the one what could be recovered only for breach of the other would be to treat the latter agreement as valid and actionable. This excludes, therefore, from plaintiff's right of recovery, the ordinary measure of damages for breach of an agreement to sell personal property, to wit, the difference between the contract price and the market price of the property sold at the time and place of delivery, if it has a market value, and, if not, the difference between such price and its actual value at such time and place. It also excludes therefrom as a measure of recovery the dividends or other income, if any, which have been received from said stock in the Bullock Company since the breach of the agreement to permit and assist in the valuation. Even if there had been a valuation, and then a breach of the agreement to sell, there could have been no recovery on this score. As a matter of fact, however, I do not understand that either item of plaintiff's claim for damages embraces any claim therefor on account of either one of these matters. The first item certainly does not, and the second and third items are limited to the benefits which it is claimed would have accrued to the plaintiff by the putting an end to competition between it and the Bullock Company through the acquisition by it of the entire stock of said company, i. e., by the fact of the combination of the two companies effected thereby.

The other general remark to be made is that it would seem that, assuming that the plaintiff, if it makes out a case of liability on part of defendant, will be entitled to recover damages on account of either item itself, it is not entitled to recover damages on account of all the items together. In other words, it is not entitled to recover damages on account of the expenses incurred in performing its part of the contract, and at the same time damages for the benefits that would have accrued to it by the carrying out of the contract. When it entered into the contract it was willing to expend the first item of its claim in order that it might obtain the second and third items. To give it all would be to give it more than it bargained for when it made the contract.

With these general observations out of the way, it is in order to consider the items separately—at least the first by itself, and the second and third together, they being of the same general nature. So far as the first item is concerned, it would seem that it is a legitimate ground for recovery for a breach of the agreement to assist in the valuation. The

sums sought to be recovered in the other two items are in their essence lost anticipated profits growing out of the mere fact of the combination between the two companies, and thus putting an end to the competition between them. As to the right to recover lost anticipated profits, Judge Sanborn, in the case of *Central Trust Co. v. Clark*, 92 Fed. 293, 34 C. A. 354, has this to say:

"In the argument and briefs in this case our attention is sharply and repeatedly called to the fact that the damages sought consist entirely of losses of anticipated profits. The mere fact, however, that the damages claimed as a result of the breach of a contract consist of anticipated profits neither establishes the right nor bars the claim to their recovery. Some profits may be and others may not be allowed. The rules which govern their recovery do not differ materially from those which measure the recovery of expenses incurred or other losses sustained through the breach of an agreement."

The question here, then, is to which class of lost anticipated profits this case belongs—those that may or those that may not be allowed. In determining to which class they belong, as well as determining to which class any loss sustained through the breach of an agreement belongs, three things are to be taken into consideration. They are (1) whether the loss sustained was within the contemplation of the parties when the agreement was made as a measure of liability in the event of its breach; (2) whether the breach of the agreement was the proximate cause of the loss; and (3) whether the loss can be made out with reasonable certainty. In order that there may be a recovery for the loss, it is essential that each of these three questions be answered in the affirmative. None of the authorities relied on by plaintiff's counsel hold otherwise. Possibly the first two questions may be answered here in the affirmative. How as to the third or last question: Can it be made out with reasonable certainty that, if the combination contemplated by the contract had been effected, any profits would have been received by the enlarged company due to the fact of the combination, and, if so, their extent, or is this a matter of mere speculation? If it would have received any profits on account of the combination, this could have been only because of increased business, higher prices, or saved expenses due to the combination. Possibly it can be made out with a greater degree of certainty what profits would have been received, and the extent of them because of saved expenses, than because of either of the other two matters; and counsel for the plaintiff in argument lay greater stress upon them. They claim that the combination would have saved expenses to the enlarged company in the following particulars, to wit, in closing out and preventing the establishment of unnecessary branch offices, preventing double advertising and displays at expositions, agents' traveling expenses, engineering, designing, and draughting expenses in originating and building two sets of apparatus to do the same work, administrative expenses, and purchase of new machinery and maintenance of tools in two shops, instead of one, to manufacture exactly the same apparatus. Just what would have been saved on account of all or any one of these several items of expense depended entirely on the judgment of the board of directors and executive committee provided for in the contract, and their judgment as to this would have been affected by at least two considerations. One was that by the contract it was

agreed that both plants should be enlarged and operated; that the name of the Bullock Company should be preserved and attached to all types of apparatus manufactured by it; and that such other plan as might be agreed on by the parties to said contract to secure to the combined company the good will of the Bullock Company and apparatus should be preserved. The other consideration was the increased business that might have grown out of the enlargement of the plants and the fact of the combination. Is it possible, then, that any data can be obtained from which it can logically and legally be inferred what the judgment of the board of directors and executive committee of the enlarged company, affected by these two considerations, would have been? I do not think such data can be obtained. It is well settled in this matter of lost profits that profits which it was anticipated might or would grow out of a new business cannot be recovered, and that because they cannot be made out with reasonable certainty. This is nowhere better put than by Judge Sanborn in the case of *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244. Here he said:

"Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given, which will form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of damages which resulted from it, before a judgment recovery can be lawfully rendered. These are the fundamental principles of the law of damages. Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. *Howard v. Manufacturing Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 205, 14 Sup. Ct. 523, 38 L. Ed. 411; *Trust Co. v. Clark*, 92 Fed. 293, 296, 298, 34 C. C. A. 354, 357, 359; *Simmer v. City of St. Paul*, 23 Minn. 408, 410; *Griffin v. Colver*, 16 N. Y. 489, 491, 69 Am. Dec. 718. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly income he derives from it for a long time before and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during that time, and this actual net income, compared with that which the jury infers, from the data to which reference has been made, the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff has lost. One, however, who would avail himself of this exception of the general rule, must bring his proof

within the reason which warrants the exception. He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced."

It may be said that the business of the two companies involved here was established. That may be true. But the business to be conducted by the two together was not established. It was new, entirely in the future, and it is the profits which would have grown out of this new business, due to the fact of the combination and the shutting out of competition, that is sought to be recovered. Besides, the certainty of the claim for such lost anticipated profits is affected by two other considerations. One is the period of time it covers. Is it for a day, or a week, or a year, or during the life of the corporation, though it may be forever, or is it limited by the accident as to the time when the action was brought or a trial thereof may be had? In the case of *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147, recovery of profits of a new business was denied, even though the claim covered a definite period of time, to wit, from the date of the breach of the contract to furnishing the flour mill machinery to the date when it was actually furnished. Possibly this consideration has greater bearing on the question as to whether the lost profits could have reasonably been within the contemplation of the parties when the contract was made. The other consideration is the determination of the plaintiff's proper proportion of such lost profits. The action in New Jersey is brought not by the enlarged Crocker-Wheeler Company contemplated by the contract, to which the entire profits growing out of the combination provided therein would have gone if the combination had been effected. It is brought by the old Crocker-Wheeler Company, one of the constituents in the combination. As it would not have received all the profits growing out of the combination, had it gone through, now that it has fallen through, it cannot recover all of them. It can only recover, if it can recover at all, its proper proportion thereof. This is the proportion it bargained for in the contract, and the proportion it so bargained for was the proportion that the valuation placed upon its stock by the agreed appraiser bore to the sum of the valuation of both stocks by said appraiser. But said appraiser has never made any valuation. Hence its proper proportion of said lost profits—the proportion it bargained for in the contract—is incapable of ascertainment.

Such, then, are the questions involved in the action in which the documents called for are desired to be used as evidence. My consideration thereof has led me to the conclusion that recovery can be had in that action only for breach of Bullock's agreement to assist in the valuation of the stock of the Bullock Company, and the only damages that can be recovered therein are the expenses incurred by the Crocker-Wheeler Company in performing its part of the contract sued on. If this conclusion is correct, the books called for have no relevancy to the basis of recovery or the measure of recovery therein. They will shed no light on either of these matters. The only matter on which it is asserted that they will shed light is the claim to lost profits, and particularly such part thereof as is specifically termed "saved expenses,"

and for which there can be no recovery. And I cannot make out how it is that the books of the Bullock Company, showing the business transacted by it subsequent to the making of the contract, can throw any light on the profits, if any, that would have been caused by or arisen out of the combination. Since that time, as appears from the testimony of Mr. Neave, the capital stock of the Bullock Company has been increased about 500 per cent.—whether by stock dividends or fresh investment of money not appearing—and its business has increased 670 per cent. This increase of business has been due to the management of the Bullock Company in connection with a possible increase in capital invested. The only books of the Bullock Company which it seems to me could possibly shed any light on what profits would have been made by the combination growing out of the fact of the combination are the books showing the business done by the Bullock Company prior to the making of the contract. At any rate, it is only the profits which those books indicated would accrue to the combination on account thereof that could have been within the contemplation of the parties as forming the basis of liability in case the contract was broken. The books called for, then, are not relevant to any right which the Crocker-Wheeler Company had in said action, and their production will be prejudicial to the Bullock Company, as whose agent the witness has possession of them. It is therefore a clear case where the witness has the legal privilege of withholding them. Counsel for witness contends that the books, if produced, will not be admissible in evidence in said action, apart from their relevancy. Of course, if this contention is correct, it is an additional reason for sustaining the privilege. But, inasmuch as I hold that they are not relevant if otherwise admissible, it is not necessary for me to pass on this question.

It is urged by counsel for plaintiff that Bullock at the time of the making of the contract, if not now, was the owner of the entire capital stock of the Bullock Company, so that their interests were identical. Assuming that to have been the case, I see nothing in that consideration to cause a different ruling. The plaintiff has seen fit to make a witness out of an officer of the Bullock Company, and through him as a witness obtain the production in evidence of the books. It cannot make him a witness and deny him the privilege of any other witness. Had the Bullock Company been a party to the contract, instead of Bullock, and the action been brought against it, production of the books could not be enforced under section 724 of the Revised Statutes [U. S. Comp. St. 1901, p. 583]. It is only documents "which contain evidence pertinent to the issue" whose production can be enforced thereunder, and according to the conclusion we have already reached the books in question here are not pertinent to any legal issue in the action in which they are sought to be introduced in evidence.

Nor is plaintiff's position advantaged by the fact alluded to by its counsel that the defendant, Bullock, has pleaded in the action by way of set-off a claim for damages identical with that asserted by the plaintiff. It does not follow from this that the plaintiff's claim for damages is any more meritorious than heretofore determined. The claim on part of Bullock seems to have been put forward for buffer pur-

poses only, and there is no reason to believe that it will be seriously insisted on otherwise.

I am perfectly aware of the delicacy of my position in passing on a question in an action pending in another court, of which this court has no jurisdiction. But I only do so in disposing of a legal privilege asserted by the witness, over whom and his question of privilege this court has jurisdiction, and that court has, and can have, no jurisdiction. The proper disposition of this question of privilege necessitates a determination of said question pending in said action. Hence I cannot shirk it, and must dispose of it in accordance with my convictions. I have but two alternatives before me—to so dispose of that question, or to deny the witness his privilege without a hearing. Between the two there ought to be no question as to which should be chosen. It is true that the question is one in relation to the measure of damages—a question that is usually disposed of at the trial—and that I am disposing of it in advance of the trial upon the disposition of a question as to the introduction of evidence. There is nothing, however, in this why I should not dispose of it. Questions as to measure of damages may, and often are, decided in ruling on the admissibility of evidence. In the case of *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U. S. 547, 23 Sup. Ct. 754, 47 L. Ed. 1171, the Supreme Court of the United States sanctioned the practice of passing on the question of measure of damages on a motion to dismiss for want of jurisdiction as to the amount in controversy.

My conclusion, then, is that the production of the books called for would be prejudicial to the company whom the witness represents, and that they are not relevant to any relief which the Crocker-Wheeler Company can obtain in said action; that, therefore, the witness has a legal privilege to withhold them; and that the application for an attachment should be denied.

BEALMEAR v. HUTCHINS et al.

(Circuit Court, W. D. North Carolina. November Term, 1904.)

1. PUBLIC LANDS—CHEROKEE LANDS OF NORTH CAROLINA—MANNER OF PRIVATE ENTRY.

The lands acquired by the state of North Carolina by treaties between the United States and the Cherokee Indians, known as "Cherokee Lands," lying west of the line run by Meigs & Freeman in 1802, were by the subsequent legislation of the state to and including 1852 kept separate and distinct from the public lands of the state, and were not subject to private acquisition under the general entry and grant laws, but only under special laws applicable to them alone, and grants issued upon and entry of such lands under the general laws are unauthorized and void, and convey no title.

2. SAME.

The provision of Rev. St. N. C. 1837, c. 42, § 1, that "it shall not be lawful for any entry taker to receive an entry for lands lying to the westward of the line run by Meigs & Freeman in the year 1802. * * * except the vacant and unsurveyed lands that have been acquired by treaty from the Cherokee Indians in the years 1817 and 1819," if construed to authorize the entry of any of the Cherokee lands under the general entry and grant laws then in force, casts the burden upon

one claiming under such an entry to show on the face of the grant itself that the land was at the time "vacant and unsurveyed," and so within the exception.

3. SAME—VALIDITY OF GRANT.

Under the law of North Carolina in force in 1852 (Rev. St. 1837, c. 42, § 4), which authorized the justices of the peace of a county, when they deemed it necessary, to elect one person "to receive entries of claims for lands within such county," an entry taker had no authority to receive an entry of lands lying in another county, and a grant based on such an entry is void.

4. SAME—CONSTRUCTION OF STATUTE—POWERS OF ENTRY TAKER.

Pub. Laws N. C. 1850-51, p. 99, c. 39, which extended the jurisdiction of the courts and sheriffs of Macon and Haywood counties over the territory of the newly created county of Jackson, and also the authority of the "justices of the peace, constables, and other public officers heretofore appointed and living within the territory of Jackson," cannot be extended by construction to extend the authority of the entry taker of public land claims of Macon county over lands lying in Jackson county, when he is not shown to have resided within such county.

Action of Ejectment.

George H. Smathers, for plaintiff.

James H. Merrimon, for defendants.

BOYD, District Judge. This is an action of ejectment, brought by the plaintiff, who seeks thereby to recover two tracts of land, each containing 640 acres, alleging that he is the owner and entitled to the immediate possession thereof, and that the defendants are in wrongful possession. Defendants in their answer deny plaintiff's title. The lands are now located in Swain county, N. C., but at the time of the entries and grants hereinafter mentioned they were located in Jackson county, N. C.; Swain being a new county, since erected from part of the said county of Jackson. The issues which arise upon the pleadings are these: First. Is the plaintiff the owner in fee, as alleged in his complaint, of the land described therein, and entitled to the possession thereof? Second. Are the defendants in the wrongful possession, as alleged in the complaint? Third. What damage is the plaintiff entitled to recover?

After the jury was impaneled the plaintiff, in order to prove his title, offered in evidence two grants from the state of North Carolina to one J. L. Moore, each dated January 5, 1854. These grants showed upon their face that they were based upon an entry dated the 26th day of July, 1852, and that the amount per acre paid to the state by the grantee was 10 cents. Attached to the grants are copies of the survey of the entries, from which it appears that the surveys were made by the surveyor of Jackson county, by virtue of a warrant from the entry taker's office of Macon county. The surveyor certifies that he has surveyed each of the 640-acre tracts of land "in the county of Jackson, in which said lands now lie, October 31, 1853." The defendants objected to these grants as evidence, on the ground, first, that they were void, for the reason that the lands embraced in them were a part of the lands acquired by the state of North Carolina, under the treaties of 1817 and 1819 between the United States and the Cherokee Nation of Indians,

which lands, as defendants insist, were not subject to entry and grant under the general laws of the state of North Carolina at the date of the said entries, to wit, July 26, 1852, and could only be acquired by citizens of the state, at said date and at the date of the said grant, under and in pursuance of the provisions of the special legislation of the state in relation to the said lands; and, second, because of the fact, as appeared upon the face of the grants, that said grants were issued for lands located in the county of Jackson, upon entries and warrants made and issued by the entry taker of Macon county. The counsel for the plaintiff admits that these grants are the sole basis of his title, and, if they are invalid, he cannot recover, and that the lands covered by the grants were a part of what were known as "Cherokee Lands."

In the course of the very learned and exhaustive discussion of the question of the validity of these grants, the counsel have furnished the court with the treaties made between the United States and the Cherokee Indians, under which these lands were derived to the state of North Carolina; also the several acts of the General Assembly of North Carolina, both general and special, pertaining to the Cherokee lands; and, in addition thereto, numerous decisions of the Supreme Court of the state in relation to the question involved. It is well to state, in the outset, that the lands of which those in controversy are a part, from the earliest history of the treaties in relation thereto between the United States and the Cherokee Nation of Indians, were known as and called "Cherokee Lands," and the General Assembly of the state of North Carolina, by special acts and provisions of acts, put them upon a special and different footing from all other public lands in respect to the method of their disposition to private individuals. The following is a history of this legislation:

The first act that needs to be noticed is that of 1783, found in 1 Potter's Revisal, c. 185, §§ 5-8. By this act no land within the boundary allotted to the Indians could be entered or granted. The next act was passed in 1809, and was entitled "An act to prevent speculations in obtaining lands which may hereafter accrue to this state by purchase from the Indians." It provides, first, that the land lying west of the line run by Meigs & Freeman, within the bounds of this state, shall not be subject to be entered under the entry laws of this state, but the same, when the Indian title shall be extinct, shall remain and inure to the sole use and benefit of the state, any law to the contrary notwithstanding; second, that all entries made or grants obtained, or which may hereafter be made or obtained, shall be null and void. See chapter 774, 2 Potter's Revisal. In 1817 an act was passed, supplementary to the one last cited, forbidding entries west of the Meigs & Freeman line, in Haywood county, under a heavy penalty. 2 Potter's Revisal, c. 950. Then came the act of 1819 (2 Rev. St. 1837, p. 189), entitled "An act prescribing the mode of surveying and selling the lands lately acquired by treaty from the Cherokee Indians." By the fifth section of this act, after providing for the laying off into sections of

as much of the land as would sell for 50 cents per acre, it is declared:

"That the residue of said lands shall be reserved for the future disposition of the Legislature, and that no part or portion thereof shall be liable to be entered in the entry taker's books for the county of Haywood, or elsewhere, until provision be made by law for the disposal thereof; and entries heretofore made or grants obtained, or which hereafter may be made, otherwise than as provided by this act, be, and the same are hereby declared to be, utterly void and of none effect."

This section was continued in force by section 5 of the act of 1826. 2 Rev. St. 1837, pp. 201, 202. The act of 1819 was recognized by the act of 1828. 2 Rev. St., p. 204. The act of 1836 (2 Rev. St., p. 209) is a replica of the act of 1819, and the act of 1819 was brought forward as an existing and unrepealed law in 2 Rev. St. 1837, by express authority of section 10 of "An act concerning the Revised Statutes," ratified the 23d day of January, 1837. See 1 Rev. St. 1837, c. 1, § 10. By chapter 90, p. 194, Pub. Laws 1848-49 (section 7), it is provided:

"That all the bonds due the state for the sales of Cherokee lands, and all judgments rendered on such bonds, together with all the lands, sold and unsold, when the purchase money has not been paid, in the counties of Cherokee, Macon, and Haywood, are hereby pledged for the making of said road a turnpike road from Salisbury west to the line of the state of Georgia."

Here we find the Legislature of North Carolina, as late as the session of 1848-49, appropriating the proceeds from the sales of Cherokee lands, in the counties of Cherokee, Macon, and Haywood, to the construction of a turnpike road from Salisbury, N. C., west to the Georgia line, and, as will be observed, the act making the appropriation does not refer to funds derived from the granting of Cherokee lands, under the general entry and grant laws of the state, but to bonds due the state for the sale of Cherokee lands and judgments rendered on such bonds. Now, under the general entry and grant laws there could be no bonds to the state for the entry price, for that was established at 10 cents an acre, to be paid in cash; and, further, it will be seen that the special acts of the Legislature, authorizing the entry and grant of what were known as the "Cherokee Lands," classified them, and established a price for the first, second, third, and fourth classes. None of them were placed as low as 10 cents per acre, which, as before stated, was the price for land under the general law of entry and grant. It is thus clearly shown to the mind of the court that the Cherokee lands, up to the time of the passage of the act of 1848-49, were being disposed of under what were known as the "Cherokee Land Laws," and not under the general entry laws of the state. Then follows chapter 23, p. 62, § 3, Pub. Laws 1850-51, which defines what evidence shall be sufficient to authorize the Secretary of State to issue a grant for any tract of land lying in Haywood, Macon, or Cherokee county:

"The receipts of the agent of the state for the collection of Cherokee bonds, * * * together with the proper certificate of sale, transfer, deed, or warrant and certificate of survey, shall be sufficient evidence on which the Secretary of State may issue a grant to the purchaser or enterer of said tract of land."

The act of 1852, after providing for an entry taker for Cherokee county, and fixing the price of the lands in that county, and prescribing the methods by which private individuals might obtain grants for them, declares:

"That all the vacant lands in the county of Macon and Haywood may be entered under the provisions of this act, at the present rates, and all lands in said county heretofore entered and not paid for may be paid for as herein provided for the lands lying in Cherokee county," etc.

This manifestly means that all lands that had been entered under the Cherokee land laws, prior to the passage of the act, might be paid for as provided for the lands lying in Cherokee county. Pub. Laws 1852, c. 169, p. 616. This act was ratified December 27, 1852, and it will be noted that no mention is made in it of the lands lying in Jackson county, although that county was created by an act ratified the 29th day of January, 1851.

Lastly comes the act of 1855 (chapter 22, p. 46, Pub. Laws 1854-55), ratified the 15th day of February, 1855. This act is "supplemental to and amendatory of" the act of 1852 above cited. There is enough in this act of 1855 to show what construction the General Assembly put upon all previous legislation in relation to the Cherokee lands. By section 9 the provisions of the act of 1852 are extended to the county of Jackson.

The plaintiff's counsel relies upon the general law of the state in relation to entries and grants. He asserts that his entry was made and his grant obtained upon the authority and power conferred by chapter 42, 1 Rev. St. 1837. He insists that by section 1 of that chapter the vacant and unsurveyed lands lying to the westward of the line run by Meigs & Freeman in the year 1802 were subject to entry. The language of that section is:

"It shall not be lawful for any entry taker to receive an entry for lands lying to the westward of the line run by Meigs and Freeman in the year 1802, * * * except the vacant and unsurveyed lands that have been acquired by treaty from the Cherokee Indians in the years 1817 and 1819."

Now, if it be granted that this provision authorized the entry taker to receive entries of such "vacant and unsurveyed lands," it by no means follows that such entries should be proceeded upon as entries of the public domain. Such entries would serve only to give the enterer a right to be preferred to any subsequent enterer in obtaining a grant by complying with the laws especially applicable to the Cherokee lands. *Hall v. Hollifield*, 76 N. C. 476, 477. It is not said that such vacant and unsurveyed lands shall be put upon the same footing as the public lands of the state. By the "Act concerning entries and grants," passed in 1855 (Pub. Laws 1854-55, p. 44, c. 18, § 31) it is declared:

"Nothing contained in this chapter shall apply to the lands commonly known as and called 'Cherokee Lands,' but the said lands are to be disposed of and regulated according to the laws in relation thereto."

Here the Legislature distinctly recognized the existence of special laws relating, not to some particular part of the said lands, but to all the lands "commonly known as, and called, 'Cherokee Lands,'" and that these special laws made provision for the disposal of said

lands by a method different from that for the disposal of the public lands of the state. There seems, therefore, to be no question that there were special laws for these lands, providing a method for their disposal differing from the general entry and grant act, and these laws would prevail, even against a provision of the general law by which a method for their disposal was provided. See *State v. Stoll*, 17 Wall. 425, 21 L. Ed. 650; *U. S. v. Nix*, 189 U. S. 205, 23 Sup. Ct. 495, 47 L. Ed. 775, citing with approval *Magone v. King*, 51 Fed. 525, 2 C. C. A. 363, and *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1012.

Where authority to issue a grant is special, in order to validate action under the authority, it must be shown that the prescribed state of facts existed. The acts of assembly relating to the sales of Cherokee lands, prior to 1852, confer special authority and jurisdiction to give effect thereto, and a grant issued by virtue of these acts, in order to be effective, must be strictly in compliance with the provisions of said acts. *Harshaw v. Taylor*, 48 N. C. 513. This case is cited and approved in *Gilchrist v. Middleton*, 107 N. C., foot of page 679. It will be observed that the principle here settled is not merely that where the officer has no authority his act is void, but the act is void where the officer "exceeds" his authority. Where a deed is executed in face of a statutory prohibition, it is void, and may be attacked on a trial for possession. *Averitt v. Elliott*, 109 N. C. 562, 13 S. E. 785. If land is not subject to entry, the entry and the grant based upon it are both void. *Stanmire v. Powell*, 35 N. C. 312. This case has been followed down to *Holley v. Smith*, 130 N. C. 85, 86, 40 S. E. 847.

It will be seen from the cases of *Kimsey v. Munday*, 112 N. C. 816, 17 S. E. 583, and *Wyman v. Taylor*, 124 N. C. 426-428, 32 S. E. 740, as well as the case of *Harshaw v. Taylor*, 48 N. C. 513, 514, that the Cherokee lands were never regarded as subject to entry as the public lands of the state, prior to 1854-55, and even then it was provided that they were not to be entered as the public lands, but only "according to the laws in relation thereto." Chapter 18, p. 44, § 31, Pub. Laws 1854-55. The same provision was made in Rev. Code 1856, c. 42, § 31, and this was not changed until the present Code was adopted, in 1883. 2 Code, c. 11, § 2478. And in the case of *Brown v. Brown*, 103 N. C. 217, 8 S. E. 113, involving the very point under discussion, it is said:

"These enactments make manifest the settled purpose of the Legislature not to allow any lands while they continued in force, within the boundary prescribed of the lands set apart to and for the Cherokee Indians, to be subject to entry and grant. The terms employed to express such purpose are strong, unequivocal, and mandatory. Such entries and grants are expressly forbidden, and if such entries were made or grants issued, they were declared to be utterly void. * * * Indeed, such purpose appears in all subsequent legislation in the state in respect to the Cherokee Indians and Cherokee lands, a fruitful subject of legislation."

This case was reheard (*Brown v. Brown*, 103 N. C. 221, 9 S. E. 706), but it will be seen that the opinion from which the above excerpt is taken was only changed in respect of the land lying east

of the Meigs & Freeman line, and because of the act of 1794 (Potter's Revisal, c. 422; Haywood's Manual, p. 188), which provided that:

"All the lands in this state, lying to the eastward of the line of the ceded territory, shall be deemed and considered as coming within the meaning and provision of the said act," etc.

This same case was before the Supreme Court again (106 N. C. 451-460, 11 S. E. 647, 650), and the opinions of the court above referred to were distinctly reaffirmed. As already said, it was everywhere recognized, both by the legislative and judicial departments of the state government, that the Cherokee lands formed a special land fund, to which general legislation relating to the public lands of the state had no application, but that there was a body of special positive law by which the disposal of the Cherokee lands was to be controlled, and without a compliance with which entries and grants were not merely irregular, but utterly void, so "utterly void" that the courts appear to have declared them so whenever and wherever and in whatever kind of action they were offered as evidence of title or otherwise relied on. The legislative acts and the decisions of the Supreme Court construing the same not only recognized and gave effect to this body of special and positive law, but they also held that this law was complete and wanting in nothing that was essential to full and complete disposal of any part of said lands, without the aid of any provision of any statute of a general nature relating to the public lands of the state. The courts, too, were uniform in holding that any one claiming title to any of the Cherokee lands had the burden of showing to the court that the requirements of the special law had been complied with in all particulars, in order to support his title. On the rehearing in *Brown v. Brown*, 103 N. C. 221, 9 S. E. 706, the court came reluctantly to the conclusion that the act of 1794 (1 Potter's Revisal, c. 422), amendatory of the act of 1784 (1 Potter's Revisal, c. 202), had the effect to open to entry and grant "all lands lying to the eastward of the line of ceded territory," which line the court construed to be the dividing line between this state and the state of Tennessee. Page 223 of the 103d volume of reports, to foot of page 224, 9 S. E. 706, 707.

The act of 1784 empowered surveyors to include many entries in one survey, and the act of 1794 extended this authority to "all the lands in the state lying to the eastward of the line of the ceded territory." The "ceded territory" is held by the court to be the territory ceded by this state to the United States. In this way the court felt justified in sustaining the validity of the Allison grant, dated November 29, 1796, for 450,240 acres of land. This land lay east of the Meigs & Freeman line. *Brown v. Brown*, 103 N. C., foot of page 213, 8 S. E. 111. On the rehearing (103 N. C. 224, 225, 9 S. E. 706, 707), the court shows that the act of 1783 (1 Potter's Revisal, c. 185) was re-enacted by the act of 1809 (1 Potter's Revisal, c. 774) so far as lands lying west of the Meigs & Freeman line "within the bounds of this state" were concerned. But the

court, when the Brown Case was before it again (106 N. C., at page 457, 11 S. E. 647) said:

"We think it settled in this case (103 N. C. 221, 9 S. E. 706) that the Allison grant was valid to convey the state's title to the lands embraced therein, lying east, and not west, of the Meigs & Freeman line."

This, though not just what the court had previously held, was undoubtedly correct, for the act of 1783 was brought forward in 2 Rev. St. p. 188, as an unrepealed statute, and it also appears in the present Code as sections 2346-2348. In the investigation of this case, aided as the court has been by the able and thorough argument of counsel, we have not been able to find any decision that even intimates that any of the special laws in relation to the Cherokee lands have been repealed. In *Brown v. Brown*, 106 N. C., at page 454, 11 S. E. 647, it is said that whether the old act of 1783 was repealed by implication by chapter 42, § 1, of the Revised Statutes, need not be considered. It was not and could not be contended that said act had ever been expressly repealed, and if that act had been repealed by implication by chapter 42, § 1, Rev. St., there would still remain all the other legislation in relation to the Cherokee lands untouched by any general law. But repeal by implication is never favored, and it is never allowed if it be possible to avoid it. The cases in North Carolina on this subject are: *State v. Woodside*, 31 N. C. (9 Ired. Law) 496; *Simonton v. Lanier*, 71 N. C. 504; *State v. Cunningham*, 72 N. C. 477; *State v. Rivers*, 90 N. C. 739; *State v. Sutton*, 100 N. C. 474, 6 S. E. 687. It is certain there is no affirmative character in the part of chapter 42, § 1, Rev. St., relied upon as a repeal of the whole policy of the law in relation to the Cherokee lands. That part is a mere exception. That section forbids the entry of Cherokee lands generally. The statutes in reference to the Cherokee lands are public and local, and form a kind of public and local Code. It has already been shown how the exception in section 1 of chapter 42 may be given effect under this local Code. *State v. Chambers*, 93 N. C. 600.

Courts take judicial notice of public local statutes. *State v. Cooper*, 101 N. C. 688, 8 S. E. 134. The case of *Jarrett v. Kingzey*, 48 N. C. 488, is a direct authority to the effect that one entering part of the Cherokee lands was bound to comply with the special laws in relation thereto. We think that a consistent and proper construction of the exception in chapter 42, § 1, Rev. St., is that it was not intended to repeal any previous law, but was put in only to prevent repealing laws already in existence for the disposal of such lands. The Cherokee land laws did not prevent the entry of those lands, only in so far as the general law of the state in relation to the entry and grant of the public lands of the state was concerned. It was consistent with the special laws that any person allowed to acquire such land might take such action as would give him priority of claim to such portion as he desired to obtain a grant for. But, whatever might have been the law prior to the act of 1848-49, pledging the Cherokee lands to the building of the western turnpike road, it is plain that after that act a grant of any portion of those lands could be obtained only through a compliance with the method pro-

vided by the special laws in relation to the Cherokee lands. On the question of repeal by implication, all the authorities in the various states of the Union will be found collected in 26 Am. & Eng. Ency. of Law (2d Ed.) p. 720 et seq. For decisions of the Supreme Court of the United States, see Indexed Digest, vol. 2, p. 1497.

But there is another view of this first objection that we regard as fatal to the plaintiff's contention. Chapter 42, § 1, Rev. St., does expressly forbid the entry of lands lying westward of the Meigs & Freeman line. This is the positive, affirmative part of the statute. Is it possible to conclude that the Legislature regarded this as a substitute for the "Cherokee Land Laws," or that it amounted to a revisal and re-enactment of those laws, as contemplated by section 2 of chapter 1 of the Revised Statutes, to say nothing of the positive declaration of section 8 of chapter 1 of the Revised Statutes that "no act of a private or local nature" was to be considered as included among the repealed statutes, and to say nothing of section 10 of chapter 1 of the Revised Statutes, giving the commissioners power to bring forward unrepealed laws in a second volume of the Revised Statutes? 2 Rev. St. p. 188 et seq. But, suppose the words "except the vacant and unsurveyed lands" were intended to open this class of the Cherokee lands to entry, under chapter 42 Rev. St. In this event we have a special law in a general law, and before an entry taker would be authorized to receive the entry he would have to see that the same was of the "vacant and unsurveyed" class of lands, and when he issued his warrant to the surveyor of his county he would have to direct him to survey lands of the "vacant and unsurveyed" class, and before the Governor and Secretary of State would be authorized to issue the grant it would be necessary that the entry taker's warrant and the survey should show on their face that the lands were of the "vacant and unsurveyed" class, and before this grant would be received as evidence in any court, after it was admitted that the land was a part of the Cherokee lands acquired by the treaties of 1817 and 1819, and lay to the westward of the Meigs & Freeman line, the party offering and relying upon its validity would have to show, not by evidence aliunde, but by the grant itself, that the land was of that class of Cherokee lands made subject to entry by virtue of the exception in chapter 42, § 1, Rev. St.

The plaintiff, in the case at bar, admits that his entry was made under the authority of chapter 42, § 1, Rev. St., the general law in relation to entries and grants, and that the lands lay to the westward of the Meigs & Freeman line, and were of the lands commonly known as and called "Cherokee Lands." The entry of these lands is expressly forbidden by this general law, "except the vacant and unsurveyed." The plaintiff did not offer to show that the lands embraced by his grant were of the "vacant and unsurveyed" class. Take the case of the statute of limitations. It excepts infants and married women; but, if a disability is relied upon, its existence must be shown by the party claiming the benefit of it. *Miller v. Bumgardner*, 109 N. C. 416, 13 S. E. 935. Again, the authority of the entry taker in respect of the Cherokee lands was special, and

confined to the "vacant and unsurveyed," and his authority must be shown by the party asserting it. *Harshaw v. Taylor*, 48 N. C. 513. In *Ross v. Duval*, 13 Pet. (U. S.), near foot of page 61, 10 L. Ed. 51, it is said:

"The rule is well settled that, to avoid the statute, a party must show himself to be within its exception."

Now, as to the second objection to the grants offered as evidence by the plaintiff; the grounds being that said grants, with the papers attached thereto as part thereof, show that the land was entered by the grantee on the 26th day of July, 1852, in the book of the entry taker of Macon county, as land lying and being in said county, whereas on said date of said entry said land did not lie in said county, but in the county of Jackson, which last-named county was created by an act of the General Assembly of North Carolina, ratified the 29th day of January, 1851, and it was not then lawful to enter said land in said county of Macon. An entry taker is a creature of the statute, and his duties and authority are prescribed and limited by the statute. At the date in question, July 26, 1852, the law was that "the justices of the peace of the county may, when they deem it necessary, elect one * * * person to receive entries of claims for lands within such county." 1 Rev. St. 1837, c. 42, § 4. By chapter 68, p. 119, Pub. Laws 1848-49, an entry taker was required "to keep his office at the courthouse of his county, or within one mile thereof, under penalty of one hundred dollars and the forfeiture of his office." So it appears that it was only when the justices deemed it necessary they were authorized to appoint an entry taker. Surely the Legislature had the power to omit to provide for an entry taker's office and an entry taker for a new county as long as it deemed it unnecessary to make such provision. Now, as an entry taker possessed only such authority as the statute gave him, and as no such authority was given the entry taker of Macon county to receive entries of land lying in Jackson county, it follows that the plaintiff's entry, if it was of lands lying in Jackson county, was void. We have found no authority for the issuance of a warrant of survey by the entry taker of Macon county to the surveyor of Jackson county. The case of *Harris v. Norman*, 96 N. C. 59, 2 S. E. 72, and the cases there cited, are all that are necessary to cite upon this second objection to the grant.

From the grant and the paper attached and made a part of it, we must conclude that the entry was received and entered upon the entry taker's book of Macon county, by the entry taker of that county. As that officer had no authority to receive and record an entry or claim for lands not lying in his own county, it may well be presumed that the land mentioned in the entry was described as lying and being in Macon county; but that such was the description of the land is made clear by what is recited in the surveyor's certificate attached to the grant, viz.:

"By virtue of a warrant from the entry taker's office of Macon county to the surveyor of Jackson county, transmitted No. 6,757, entered the 26th day of July, 1852, I have surveyed six hundred and forty acres of land in the county of Jackson, in which said land now lies."

Why should the surveyor say "now lies," except to show that "then," when the entry was made, it was at least supposed to lie in Macon county? This certificate of the surveyor is referred to in the body of the grant:

"Entered the 26th day of July, 1852, as by the plat heretofore annexed doth appear."

It is insisted by plaintiff's counsel that the act of 1851 (Pub. Laws 1850-51, p. 99, c. 39) is broad enough to include the entry taker of Macon county. The act is entitled "An act providing for the administration of public justice in the county of Jackson." The first section provides:

"That the superior courts of law and equity and courts of pleas and quarter sessions for the counties of Haywood and Macon, respectively, shall have the same jurisdiction in all matters pertaining to the administration of public justice, within the county of Jackson, as said county heretofore had and exercised therein."

Now, certainly, the entry taker was not any one of the courts mentioned, nor was he in any way connected with any of said courts, and he was not affected by the first section. The second section declared that:

"The justices of the peace, constables, and other public officers, heretofore appointed and living within the territory of Jackson, shall have and exercise the same powers and privileges and be subject to the same penalties and amenable to the same tribunals as heretofore."

By the third section of this act the sheriffs of Macon and Haywood counties were empowered to act in their official capacities in the county of Jackson. From these several provisions the counsel for plaintiff argues that it was the purpose of the Legislature to give the county officers of Macon and Haywood complete authority in the new county of Jackson until such time as the government of the last-named county should be fully organized. This position is conceded to be true as to the Macon and Haywood officers named in the act, for the Legislature in express terms conferred upon them the authority.

A strong argument against the plaintiff's contention is that when, by the second section of the act, the Legislature conferred authority upon justices of the peace, constables, and other public officers to perform official functions in the new county, the power was confined to such of these officers as were living within the territory of Jackson. It has not been shown, nor even suggested, that the entry taker of Macon county was living within the territory taken from that county in the formation of Jackson. The court is thus confronted by a statute empowering certain officers by name and others as a class to perform official duty in the county of Jackson. Neither those named nor those living in the territory of Jackson county include the entry taker. The court is powerless to supply this omission, for its authority extends only to the construction of the act as written, and it cannot assume to add new features to the act or to enlarge the scope of its operation. It is true that the entries, warrants, surveys, and grants are official acts, and a presumption arises, in favor of their due execution, that everything

was rightly and duly performed. But this presumption is fully rebutted by the face of the instruments themselves and the facts shown in connection therewith.

The plaintiff having admitted that his recovery depended wholly upon the validity of the grants offered in evidence, the court, being of opinion that the entries on which the grants were issued, together with the grants themselves, are void, so instructed the jury, and directed a verdict for defendants.

**BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v.
EMPIRE STATE-IDAHO MINING & DEVELOPING CO.**

(Circuit Court, D. Idaho. January 17, 1903.)

1. MINES AND MINING—LOCATIONS—AMENDMENT.

Locations may be amended, without the loss of original rights, except those inconsistent with the amendment; but new rights cannot be added which are inconsistent with the acquired rights of others.

2. SAME—EXTENSION OF LOCATION.

Held, in accordance with the rulings of the appellate courts, that a junior locator may, for the purpose of acquiring extralateral rights, extend his surface location over prior locations when their owners do not object.

3. SAME—MONUMENTS—CONCLUSIVENESS.

A monument established by the locators of two different claims as the point through which the dividing line between them shall run is not binding upon subsequent purchasers, unless so made of record as to give notice to such purchasers.

4. SAME.

The ledge may be followed between the perpendicular planes of its end lines, regardless of the fact that this may be more upon the course than upon the dip of the ledge.

5. SAME—MINERAL-BEARING LEDGE.

When the mineral-bearing ledge consists of a mineralized zone or belt, without distinct walls, rather than a well-defined ledge, the practical mode of determining its legal width is by the lines beyond which ore is not found, or beyond which such indications of it do not exist, which would encourage the miner to continue his explorations with the expectation of compensation.

6. SAME—FOLLOWING LEDGE.

The owner of a ledge may follow it continuously and indefinitely, except where intersected or crossed by the ledge or underground rights of a prior locator, and beyond such intervening right the junior owner may resume and follow his ledge.

(Syllabus by the Court.)

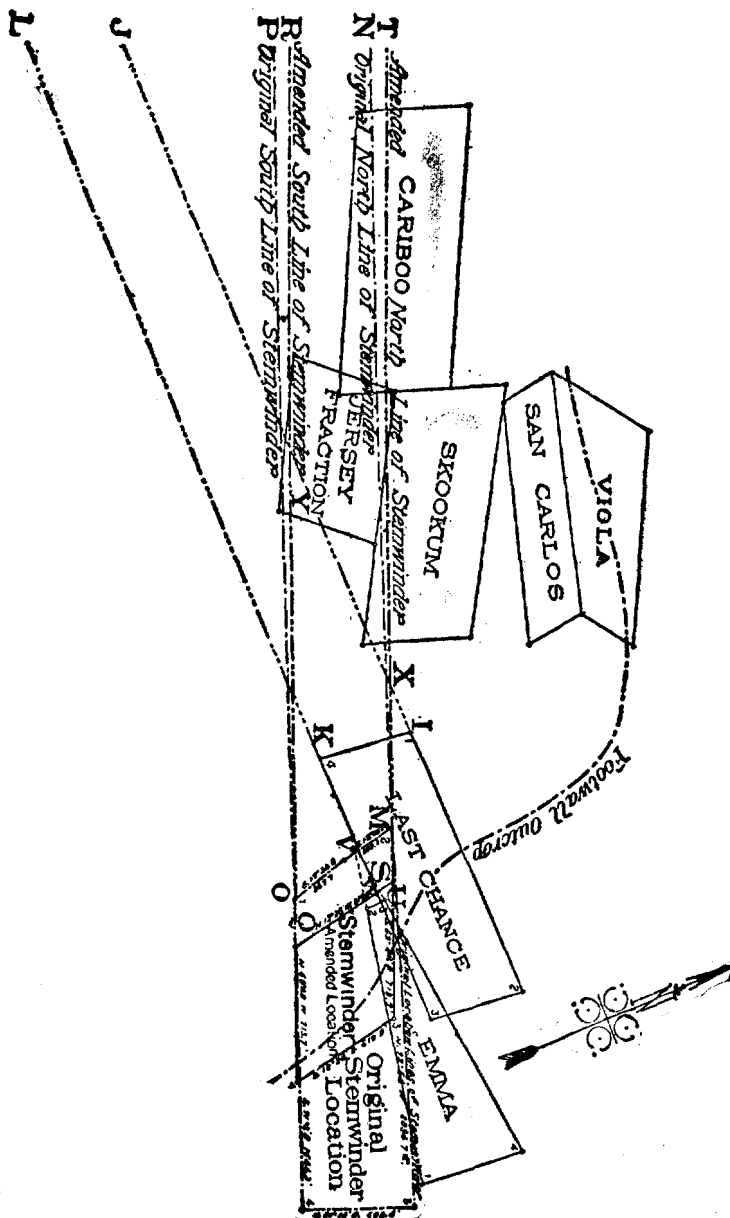
See 106 Fed. 471; 108 Fed. 189; 109 Fed. 538, 48 C. C. A. 665; 121 Fed. 973, 58 C. C. A. 525; (C. C. A.) 131 Fed. 591.

Curtis H. Lindley and McBride & Folsom, for complainant.

W. B. Heyburn, for defendant.

BEATTY, District Judge. Complainant, as owner of the Stemwinder Mining Claim, in bringing this action to quiet its title to an underground portion of the ledge thereof, admitting the priority of the Emma and Last Chance mining claims, makes no claim to any part of their surface area, nor to any portion of the ledge lying between the extend-

ed planes passing through their legal end lines; but it claims that underground portion of the ledge lying between the prolonged planes of the Stemwinder end lines and westerly of the prolonged plane passing through the north end line of the Last Chance, being that space represented upon the following plat (showing approximately the relation of the premises) by the lines X T, X Y, and Y R:



The said mining claims were located on September 17, 1885, but by judicial determinations the Emma and Last Chance, owned by the Last Chance Mining Company, have priority of rights. The location of the Stemwinder was amended on May 23, 1887. The Viola, the Skookum, and the San Carlos claims, owned by defendant, were located, respectively, on February 20, April 5, and April 23, 1886. Most of the questions now submitted are involved in an appeal pending in the Circuit Court of Appeals from an order of this court in this case granting a restraining order pendente lite. It is desirable to wait the conclusion of that court; but, as it has been suggested by one of the counsel that action may be delayed until the case on its merits reaches there, it is concluded not to delay.

It has long been held that a mining location may be amended without the forfeiture of any rights acquired by the original location, except such as are inconsistent with the amendment, but new rights cannot be added which are inconsistent with those acquired by other locations made between the dates of the original and the amended location. The amended Stemwinder notice fully states the reasons therefor, and specifically reserves all prior acquired rights. While the new lines are placed almost within the old, they are so laid that in their prolongation westward they leave out on one side and take in on the other small portions of the ledge not included between the original lines. The amended location is valid against any of defendant's locations made after the date of the amended notice, May 23, 1887; but, as to those made between the dates of the original and the amended location, it is void as to any portion of the ledge claimed by the amended location which was not included in the original, in so far as it conflicts with any of defendant's locations involved in this action.

The defendant contends that the south line of the Emma, prolonged westward, should bound the extralateral rights of the Stemwinder. It was so held by this court (108 Fed. 194), which was reversed by the appellate court (109 Fed. 538, 48 C. C. A. 665). I now think that this court should have held, as it then suggested, that the north boundary line of the Stemwinder should be one drawn parallel to its south line at the place where the ledge crosses the Emma line. This would have been consistent with the "overlap" doctrine and some other rulings, and would have given the Stemwinder the same length of ledge underground that it has of the apex, which in my opinion is the undoubted contemplation of the law. But the complainant is not content with this, and demands that its extralateral rights be limited only by its end lines as laid. If it is correct, then the locator of an unclaimed apex of even 10 feet may overlap other valid locations for 1,490 feet, and thereby claim extralateral rights for the distance of 1,500 feet of all the fractional underground portions of the ledge not included in prior extralateral rights. If this is the law, it must lead to great confusion of rights. It is said that the Supreme Court has in effect so held. I am unable to so read its decisions. I think that the argument in the Del Monte Case, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, is to the contrary, for on page 85, 171 U. S., page 907, 18 Sup. Ct., 43 L. Ed. 72, it says:

"Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary to now decide that matter."

So far as my attention has been directed, that court has not decided this question, at least not as to the vein upon which the discovery and location is made. The question of doubt with me is concerning the decision of the Court of Appeals in 109 Fed., 48 C. C. A., where on page 542, 109 Fed., and page 670, 48 C. C. A., it is said that:

"Across that ledge and on unappropriated public land the locator of the Stewindler laid his southerly end line, and along the course of the ledge and on unappropriated public land he laid his westerly side line. Across the ledge, partly on unappropriated public land and partly on the prior Emma location, he laid his northerly end line, parallel with his southerly end line, and along the course of the ledge, partly on the Emma and partly on unappropriated public land, he laid his easterly side line, almost, if not quite, parallel with his westerly side line. As, in the absence of any objection on the part of the owner of the Emma, the locator of the Stewindler had the legal right to cross the prior location, his lines, as against the government and all subsequent locators, would therefore seem to have been perfectly laid. Under such circumstances, we are unable to see why, as against the government and all subsequent locators, the location should not carry precisely the same rights, surface and extralateral, that it would carry if none of the lines had been laid upon or over a prior location, which, under the statute governing extralateral rights, would give to the locator of the Stewindler, as against the government and all subsequent locators, the right to follow the dip of the vein in its departure from the westerly side line of the claim indefinitely between vertical planes drawn through the parallel end lines extended indefinitely in their own direction."

The court describes the same end lines claimed by complainant in this action, and says that its extralateral rights extend indefinitely between the planes of those lines. While that was in another case, with its differing facts, it yet seems to me that the doctrine announced sustains complainant's claim. If so, the plain duty of this court is to follow it. There is, however, one question of uncertainty involved in the suggestion of the appellate courts that a junior location cannot be laid over a senior, against the objection of the owner. What must be the nature of the objection or resistance seems nowhere to be clearly defined. In the Del Monte Case (page 83, 171 U. S., page 906, 18 Sup. Ct., 43 L. Ed. 72) it is said that:

"A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon his premises."

It then refers to the fact that these lands are uninclosed, and the limits of possessory rights are vague and uncertain, and the validity of apparent locations is unsettled and doubtful, and seems to point to the conclusion that if a junior locator overlaps another claim in the absence of its owner, or from uncertainty of boundaries, or without the exercise of force, or without distinct objections from such owner, he will be protected in his extralateral rights based upon such a location. The evidence is that the owner of the Last Chance and Emma claims has in the past few years so vigorously objected to the overlapping of those claims by the Stewindler as to remove any stakes or markings of such claims found within their limits; but complainant's rights are not controlled by recent objections. Only the acts of the parties at the time

the Stemwinder location was made are to be considered. The evidence fails to show that, when the Stemwinder was located, objections were made to marking its boundaries across the other claims. On the contrary, the objections made seem to have been those of the locators of the Stemwinder to the placing of the stakes of the other claims upon their ground.

The placing of a monument upon the south line of the Emma by the locators of the claims as the line of separation between them is also urged as an additional reason why that line should limit complainant's rights. There is no doubt that those locators did agree upon this monument and erected it, and, if this were an action between them, it would be an important factor in determining their rights; but the question is whether their acts bind subsequent purchasers. They only fixed the monument. They did not establish a line. They did not re-mark their boundaries. They did not make of record the evidence of what they did, which seems to have been only an oral contract and the building of the monument. It may be suggested that, if such a contract can be enforced now, it must be between the owners of these several claims. The defendant has no interest in either. It is therefore now held that complainant is not bound by such monument, that it may base its rights upon the original marking of the Stemwinder and such of those rights as are reserved by the amended location, and that its extralateral rights in this case are, as I understand, defined by the Circuit Court of Appeals in the case above referred to.

Whether the evidence sustains defendant's contention that complainant, in following the ledge between the planes of its end lines, does so more upon its strike than upon its dip, I have not determined. There is nothing in the mining act that can possibly justify the conclusion that this extralateral right must be limited to 45 degrees, or to any other particular variation, from the true dip. All that this court can do is to follow the rule, as it understands it, adopted by the Supreme Court. That court holds without any qualification that the extralateral right is bounded by the prolonged planes of the legal end lines. I do not desire to add to what I have said in other cases in justification of my adoption of this rule.

The defendant also maintains that the apex of this ledge is so wide that it extends far to the westward of the west line of the Stemwinder. Upon this subject there is much, and some very interesting, testimony by experienced and scientific mining men; but no one has been able to set definite limits to the ledge, and that it has no distinct hanging wall cannot be doubted. Its one distinct and persistent feature is its foot wall. It was the axis of action. Upon it the superincumbent mass of hanging country had its oscillating and grinding motion, resulting in the creation of that heavy selvage or gouge now found upon it, and in so shaking and breaking up that hanging country as to change the relation of its component parts, thus creating large masses of brecciated rock, fissures, and cavities, through which the circulating mineral elements deposited their ores. It would be expected

that those conditions would decrease as we advance from the line of fissure and action, until reaching a point where there had been no disturbance of the rocks. We would expect the evidence of mineralization to extend far beyond the ore deposits, and as far as the country had been disturbed, displaced, or brecciated; but we cannot conclude that the legal hanging wall extends to the limits of these influences. It is a fact that, in many ledges having a distinct hanging and foot wall, the country beyond either is more or less mineralized, and at times even small deposits of ore are found beyond the lines of the walls. Yet no miner would say that such mineralized country rock constitutes a part of the ledge. It appears that in this ledge the foot-wall country has very little mineralization, or even mineral stains. The reason is evident. The heavy gouge prevented the escape in that direction of the mineral elements, and, the rocks having preserved their original compact formation, there were no cavities through which the mineral elements could circulate. To hold that the ledge extends to the extreme limits of all evidence of mineralization is not a reasonable or practical proposition in such a formation as this. If not there, where, then? Not beyond the ore deposit line, or where such strong indications of it are found that the miner would work or explore with the expectation of compensation. It cannot be doubted from the evidence that far beyond the line where any miner, acquainted with this formation, would work for ore, there is much evidence of mineralized rock, quite similar to the material recognized as clearly within the ledge. So far as can thus be concluded from all the evidence of ore developments at and within a reasonable distance below the surface in the Stemwinder, I doubt that the apex proper in that claim exceeds 250 to 300 feet in width. Suppose, however, that it does extend beyond the west line of the claim, the only effect would be, under the holding of the Court of Appeals in the King Case, 114 Fed. 417, 52 C. C. A. 219, that, if defendant owns that surface, it would own so much of the apex as lies within it. What its underground rights would be is a problem I am not called upon to now solve.

The position by defendant that the extralateral rights of the Stemwinder cannot be resumed beyond that of the Last Chance cannot be conceded. The law now works a great hardship upon the junior locator in permitting a senior to hold all the underground conflict between their extralateral rights, even when the older claims may be so irregularly located as to follow the ledge downward upon an oblique angle to its dip, and the junior so regularly located as to go down upon the true dip. Certainly this additional burden will not be added to a junior title without some explicit warrant in the law for it. I know of none. If we must have these interlacing extralateral rights, I know of no better or more equitable rule than that each owner of a ledge shall pursue it underground indefinitely and continuously, except such portion thereof as shall be crossed by the ledge of a prior claimant.

My conclusions upon most all of the vital questions in this case are reached by intending to follow the adjudications of the ap-

pellate courts, and while they are sufficiently evident from the foregoing, yet, to the elimination of doubt, it is now repeated that complainant is entitled to a decree quieting its claim and title to so much of the apex of the ledge as lies within the surface of its Stemwinder claim, not in conflict with the Emma and Last Chance claims, and to its underground and extralateral rights of that portion of the ledge lying between the perpendicular planes, prolonged westerly, passing through its end lines as now claimed by it, and westerly of the perpendicular plane, prolonged westerly, passing through the north line of the Last Chance mining claim; but there is excepted therefrom such portion of the extralateral right of any claim owned by defendant and involved in this litigation, located prior to May 23, 1887, as lies between the extended planes of the original and relocated Stemwinder lines, and that the restraining order be made permanent.

A decree in pursuance of the foregoing may embrace, not only the above specific order, but all issues involved which come within the views above expressed. Either party has 30 days from notice hereof to take such further proceedings as may be desired.

DAVIS et al. v. ALPHA PORTLAND CEMENT CO.

(Circuit Court, E. D. Pennsylvania. January 23, 1905.)

No. 46.

1. SALES—DELIVERY TO VENDEE—REQUISITES.

In the absence of a contrary agreement, the vendor is not bound to send or carry the goods to the vendee, but fulfills his obligations by leaving or placing them at the latter's disposal, so that he may remove them without lawful obstruction.

2. SAME—CONSTRUCTION OF CONTRACT—"F. O. B."

While the use of the phrase "f. o. b.," or an equivalent expression, in a contract of sale, prima facie imposes on the purchaser the duty of furnishing the cars or vessel upon which the goods are to be transported from the place of delivery, yet the whole agreement, when taken with its attending circumstances, or the construction of the contract by the parties, may shift the obligation of furnishing the cars or vessel upon the seller.

3. SAME—CONSTRUCTION BY PARTIES.

A contract of sale, providing for a number of successive deliveries, called for cement f. o. b. at a certain point. The sentence in which this provision appeared related to the price of the cement. The seller, in acting under this contract, always obtained the cars itself, and, in correspondence with the buyers concerning its failure to ship promptly, never alluded to the duty of furnishing the cars as resting upon the buyers. The buyers never obtained the cars, and both parties evidently regarded the duty of obtaining them as resting on the seller. *Held* that, in view of the construction placed upon the contract by the parties, it was the seller's duty to furnish cars for the shipment of the cement.

4. DAMAGES—LIQUIDATED DAMAGES—CONSTRUCTION OF CONTRACT.

A contract for the sale of cement provided that, if the seller failed to deliver a specified number of barrels, it should pay the buyers 15 cents per barrel as liquidated damages for each and every barrel short of the required number, and further provided that the seller would make all

shipments within 10 days after the receipt of orders. Held that, although the latter provision followed the stipulation for liquidated damages, that stipulation covered both the failure to deliver within 10 days from order, and the total failure to deliver.

5. SAME—LIQUIDATION OF UNCERTAIN DAMAGES.

It was competent for parties making a contract for a large quantity of cement, to be delivered at different times during an entire year, to stipulate for the payment of liquidated damages in case of the failure of the seller to ship the required amount of cement, where the experience of past years had shown that the price of cement fluctuated greatly, so that the damages which would actually result from a failure to deliver the cement at any time were uncertain.

J. Warren Coulston and John G. Johnson, for plaintiffs.

H. Gordon McCouch, Wm. A. Glasgow, Jr., and Alex. Simpson, Jr., for defendant.

J. B. McPHERSON, District Judge. This suit is brought to recover damages for the defendant's admitted failure to deliver cement in accordance with the contract contained in the following letters:

"December 21, 1901.

"Messrs. James A. Davis & Co., Boston, Mass.—Dear Sirs: Below we beg to confirm our verbal understanding had with your Mr. James A. Davis and Mr. Henry N. Fisher and our Mr. Gerstell in New York city on the 9th and 10th insts. viz.:

"In consideration of our agreeing to give you the exclusive sale of our Alpha Portland Cement in the New England States during the year 1902, you agree to purchase from us, 200,000 barrels of such cement at the following special prices, viz.:

"Alpha Portland Cement, 87½c. per bbl. in cotton;

"Alpha Portland Cement, \$1.10 per bbl. in wood;

"All in car load lots f. o. b. Alpha, N. J. Terms 2% off cash in ten (10) days.

"We agree to deliver to you the above mentioned quantity of cement at the prices named, same to be ordered out monthly about as follows:

| | | | |
|-----------|--------------|------------|--------------|
| January, | 8,000 bbls. | July, | 20,000 bbls. |
| February, | 10,000 bbls. | August, | 20,000 bbls. |
| March, | 10,000 bbls. | September, | 25,000 bbls. |
| April, | 15,000 bbls. | October, | 25,000 bbls. |
| May, | 15,000 bbls. | November, | 20,000 bbls. |
| June, | 15,000 bbls. | December, | 15,000 bbls. |

"It is further understood and agreed that in the event we should fail to deliver the 200,000 barrels of cement during the year 1902, barring strikes, fires and accidents or causes beyond our control, we will pay you 15c. per barrel as liquidated damages for each and every barrel short of the 200,000 barrels; and we agree to make all shipments to you within ten (10) days after receipt of orders, providing you do not call for shipment of more than 1000 barrels in wood and 3000 barrels in cotton per day.

"In the event you do not order from us the 200,000 barrels during the year 1902, it is understood and agreed that you will pay us 15c. per barrel as liquidated damages for each and every barrel short of the 200,000 barrels.

"It is further understood that in the event you do not order from us this year (1901) the quantity of cement mentioned in our agreement with you under date of December 31st, 1900, the difference between what you order and the quantity agreed upon to be taken out, viz.: 200,000 barrels, is to be taken out in addition to the 200,000 barrels mentioned above, which quantity is to be ordered out prior to the 200,000 barrels, and is to be billed to you at the following prices, viz.:

"Alpha Portland Cement 90c. per bbl. in cotton f. o. b. Alpha N. J.

"Alpha Portland Cement, \$1.15 per bbl. in wood f. o. b. Alpha N. J.

"Terms 2% off for cash in ten (10) days.

"If the above is in accordance with our verbal understanding your signature under 'Acceptance' will constitute a contract between us, and on the return of this letter with your signature we will forward you your bond for \$10,000 which was placed with us for the fulfillment of the agreement entered into, December 31st, 1900.

"Yours truly,

Alpha Portland Cement Co.

"By A. F. Gerstell, V. P.

"Acceptance.

"James A. Davis & Co."

"December 23, 1901.

"Alpha Portland Cement Co., Alpha N. J.—Gentlemen: Please find enclosed contract for 1902 duly executed as requested by you. The only stipulation is regarding the monthly quantities as mentioned by you in the contract, which is of course elastic or in accordance with the demands of our customers. We will try to the best of our ability to be reasonable in this respect, and will you kindly pin this letter to the contract in order that there may be no misunderstanding in the future regarding this part of the contract.

"Kindly return to us at once our bond which was placed with you for the fulfillment of agreement for 1901 and oblige,

"Yours very truly,

James A. Davis & Co."

"December 28, 1901.

"Mess. James A. Davis & Co., Boston, Mass.—Dear Sirs: Your favor of the 23rd inst. returning contract for 1902 duly executed is received, and we thank you for the same. I have instructed Mr. Brown to return you your bond.

"Yours truly,

A. F. Gerstell, V. P."

At the trial the court reserved the question whether there was any evidence to go to the jury in support of the plaintiffs' claim, and the parties agreed upon the following special verdict:

"The jury finds a verdict for the plaintiffs for the sum of \$88,150.14, with leave to the court to reduce the verdict to \$19,243.52, if the court shall be of the opinion that, under the contract, plaintiffs should only be allowed to recover 15 cents per barrel as liquidated damages."

The questions for decision under the pending motions are, first, whether the plaintiffs are entitled to recover at all; and, second, if they are so entitled, for how much should the judgment be entered?

Upon the first question, the defendant's position is that, as the contract calls for cement "f. o. b. Alpha, N. J.," this provision required the plaintiffs to furnish the cars at that point, and their conceded failure so to do is fatal to the claim. Upon the undisputed evidence in the case, I am unable to agree with this conclusion. It is, no doubt, true, as a general proposition, that, to use the language of Benjamin on Sales (7th Am. Ed.) § 679:

"In the absence of a contrary agreement, the vendor is not bound to send or carry the goods to the vendee. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, so that the latter may remove them without lawful obstruction. And if the delivery by the vendor is to take place upon the doing of certain acts by the purchaser, the vendor is not in default for nondelivery, until notice from the purchaser of the performance of the acts on which the delivery is to take place. Thus, if the vendor agrees to deliver on board of the purchaser's ship as soon as the latter is ready to receive the goods, the purchaser must name the ship, and give notice of his readiness to receive the goods on board, before he can complain of nondelivery."

It is also true that in a number of cases—some of them will be referred to in a moment—the courts have decided that the phrase

"f. o. b.," or an equivalent expression, imposes upon the purchaser the duty of furnishing the cars or the vessel upon which the goods are to be transported from the place of delivery. In *Kunkle v. Mitchell*, 56 Pa. 100, the seller agreed to "deliver on the cars at Indiana, 75,000 feet of lumber at 85 cents per hundred feet," and concerning this clause the court say:

"This is the controlling clause as to the place of delivery. The cars would be either the cars of the plaintiff [purchaser], or those of the railroad company, and in either case they were to be provided by the plaintiff, and not by the defendant. The cars, therefore, being to be provided by the plaintiff, the duty was imposed upon him to show he was at least ready with the cars, or willing to provide them, and to have notified the defendant of such readiness and willingness."

In *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32, the respective contracts contained the words "place of delivery, free on board, continental ports," "place of delivery f. o. b. Rotterdam," and "f. o. b. continental ports"; and the court, approving *Kunkle v. Mitchell*, declared it to be "a well-established principle of the law that, in a contract for sale and delivery of goods 'free on board' vessel, the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made, for, until he knows that, the seller could not put the goods on board."

These two cases were followed by *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836, where the contract provided that "the price to be paid to party of the second part by party of the first part [purchaser] shall be for all good, clean, marketable coal, free on board railroad cars at tipple, as follows, that is to say, in hoppers and gondolas for run of mine coal 68 cents per ton of 2,240 lbs." This was construed to mean that the tipple was the place of delivery at which the purchasers agreed to receive and pay for the coal, and that "they were bound to furnish the cars for it, and the appellee was required to be ready and willing to deliver it there. As he was so prepared, and the latter neglected and refused to receive it, they became liable in damages for the nonperformance of their contract."

In *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 101 Ala. 446, 14 South. 672, followed by *Capehart v. Furman Co.*, 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60, the meaning of "f. o. b." was said to be "a matter of common knowledge, and hence of judicial cognizance. * * * They import that the purchaser shall be free from all expense which may have attended the shipment and transportation to the point named. Had the provision related to the initial point of the transportation, the buyer would have been entitled to the shipment at that place free from all expense incident to loading the cars—all expense, indeed, incurred in the premises up to and including the loading of the cars. Then it would have been upon the buyer to pay the freight—the cost of transportation—to the final destination of the consignment. The provision here having relation to the point of final delivery, it can mean nothing else than that the seller is to pay all costs and charges up to that point, and that the buyer is entitled to receive the consignment free of all such costs and expenses."

In *Chicago Lumber Co. v. Comstock*, 71 Fed. 477, 18 C. C. A. 207, the language was, "Price for the above is \$10.75 per thousand feet loaded on the cars;" and the court declared that the seller's duty was fulfilled when he had dressed the lumber which was the subject of the contract, and had loaded it upon cars furnished to him for that purpose. "It was the duty of the lumber company, under the contract, to see that cars were furnished."

But while this is the *prima facie* effect of the phrase, standing alone, the whole agreement, with its attendant circumstances, may disclose that a different meaning should be given, or the parties may give to the words whatever other effect they please. They may expressly provide that "f. o. b.," instead of meaning that the purchaser should furnish the cars or the vessel, should shift this obligation upon the seller, and they may substitute the one meaning for the other quite as effectively by their conduct as by their written or spoken words. In *Coal Co. v. Schneider*, 163 Ill. 393, 45 N. E. 126, a contract to mine and sell coal was declared by the Supreme Court of Illinois to be "silent in regard to the party who shall furnish the cars," although it contained the words "f. o. b. at said mine." But as the evidence at the trial showed that the purchaser had agreed to furnish them, and had actually carried out the agreement, this was declared to be a definite construction of the contract by the parties, that determined its meaning. The court said:

"From these facts it is apparent that the construction placed on the contract both by appellees and appellant was that appellant was required by the contract to furnish the cars. In the construction of a contract, it is always allowable to look to the interpretation the contracting parties place upon it, either contemporaneously or in its performance, for aid in ascertaining its meaning."

It was because of this construction of the contract by the parties themselves that the court afterwards declared it to be the duty of the purchaser to furnish the cars. In *Neimeyer Lumber Co. v. Burlington Railroad Co.*, 54 Neb. 326, 74 N. W. 671, 40 L. R. A. 534, the words "Prices f. o. b. Omaha, Nebraska," were construed, in the light of all the evidence, to mean, not that the goods sold were to be delivered at Omaha, but that they would cost the purchaser the sum named when they reached Omaha, and the place of delivery was decided to be the point of shipment in the state of Arkansas. In *Baltimore & Lehigh Railway Co. v. Steel Rail Supply Co.*, 123 Fed. 655, 59 C. C. A. 419, the contract called for delivery "f. o. b. Pennsylvania Railroad cars, Baltimore & Lehigh Junction." But as the evidence showed that the seller had undertaken to obtain the cars, this was held by the court below to be a practical interpretation of the contract by the parties themselves, and this ruling was not disapproved by the Circuit Court of Appeals.

In the present case a similar interpretation seems to me to have been put upon the agreement under consideration. The defendant was making frequent shipments in fulfillment of the plaintiffs' orders, but always obtained the cars itself, never asking the plaintiffs to furnish them, and, although in frequent correspondence concern-

ing its failure to ship promptly, never alluding to any such duty as if it rested upon the plaintiffs. No attempt was ever made by the plaintiffs to obtain cars, and it was testified at the trial that they did not regard it as any part of their business. The following extract from the testimony of James A. Davis, one of the plaintiffs, shows clearly that both parties regarded it as the defendant's duty to furnish the cars:

"Q. The next difficulty or question which arose related to the car supply, did it not?

"A. I think it did; yes, sir.

"Q. And so far as that matter was concerned, you first wrote to the defendant that you knew that there was difficulty in that regard, did you not?

"A. I heard that there was. I did not know it.

"Q. Did you not say you knew it?

"A. Maybe I said so in my letter. Possibly I did.

"Q. We do not want any doubt about that. This is a letter written by you, is it not? (Letter shown witness.)

"A. Yes, sir.

"Q. I read you the language embodied in it: 'We know perfectly well what a lot of trouble you have been having with the railroad company.' That is in there, is it not?

"A. Yes, sir.

"Q. Later on, however, in certain letters, you seem to question the fact of the difficulty in that regard, did you not?

"A. Yes, sir.

"Q. And you said in some of the letters later on that you knew that was not true, did you not?

"A. I think I did; yes, sir.

"Q. Did you know of your own personal knowledge, or from what somebody else told you?

"A. I guess, from what somebody else told me.

"Q. Then you did not make any attempt yourself, by inquiry of the railroad people, to get cars and send them to Alpha for the shipping of that cement, did you?

"A. To send them to Alpha?

"Q. Yes."

"A. No, sir.

"Q. And though other people had said to you, as you say, that cars could be had, and though you were complaining because cement had not been sent to you on the ground that cars could not be had, you made no attempt personally, nor, so far as you know, did your partner make any attempt, to get cars sent to Alpha to load with cement to bring to you or send to your orders?

"A. That was no part of our business.

"Q. I do not want your reason. I want the fact.

"A. We did not.

"Q. You did not do anything of that kind, did you?

"A. We never did."

It is impossible to read the testimony—especially the letters that were offered in evidence—without being convinced that the defendant never entertained any idea that the plaintiffs were under the slightest obligation to furnish cars. And this reading of the agreement is in harmony with its natural construction. The sentence in which the words "f. o. b. Alpha, N. J.," appear, was concerned with the prices of the cement, and was intended to inform the plaintiffs that for the specified sums the defendant would load the cement on cars at Alpha without charge for the work of loading, so that the plaintiffs might know precisely for how much they must sell in order to make a profit. If it had been supposed that any

obligation to furnish cars rested upon the plaintiffs, it is most remarkable that such obligation is never once referred to during the constant correspondence and dispute concerning the defendant's failure to fill the plaintiffs' orders promptly, and that, while the plaintiffs never made any effort to obtain cars, the defendant assumed and discharged this somewhat difficult duty from the very first.

In my opinion, therefore, the verdict should be for the plaintiffs, and the remaining question is, in what amount? The relevant paragraphs of the contract are as follows:

"It is further understood and agreed that in the event we should fail to deliver the 200,000 barrels of cement during the year 1902, barring strikes, fires, and accidents or causes beyond our control, we will pay you 15c. per barrel as liquidated damages for each and every barrel short of the 200,000 barrels; and we agree to make all shipments to you within ten (10) days after receipt of orders, providing you do not call for shipment of more than 1000 barrels in wood and 3000 barrels in cotton per day.

"In the event you do not order from us the 200,000 barrels during the year 1902, it is understood and agreed that you will pay us 15c. per barrel as liquidated damages for each and every barrel short of the 200,000 barrels."

As it seems to me, this language is clear and unambiguous, and fixes the defendant's liability for failure to deliver at 15 cents per barrel. The plaintiffs argue that there are two distinct agreements in the first of these paragraphs—one, an agreement to pay 15 cents per barrel for failure to deliver; and the other, an agreement to make shipments within 10 days, which says nothing about damages for failure to fulfill this particular undertaking, and leaves them to be measured by some other standard. I cannot assent to this proposition. The whole sentence is to be read together, and, thus read, I think it provides for liquidated damages whether the defendant's failure to deliver was within 10 days or afterwards. The fact that the provision concerning prompt delivery comes later in the sentence than the provision for liquidated damages does not seem to me to be important. The parties were dealing with the subject of an ultimate failure to deliver, and it is evident that ultimate failure to deliver must include all preceding failures to deliver promptly. There is no claim to recover any special damage caused by the defendant's failure to deliver within 10 days. The claim is for the difference between the contract price and the market price at the time of such failure, and this would lead to the somewhat remarkable result that if the defendant actually delivered, but was a day or two behind the time, it would often have to pay more than if it refused to deliver at all. Of course, if the market declined below the contract price, the plaintiffs would not be complaining of failure to deliver; and it is clear, therefore, that the provision was mainly put in to meet the contingency of a rising market, when the defendant might be tempted to sell to others at the higher price. The second paragraph provides for the contingency of a falling market, when the plaintiffs might be reluctant to order with certain loss before them. I do not understand that the validity of these provisions is disputed. It is their scope about which the parties differ. If they are supposed to be invalid, I shall content myself

with adding that the contract on this point seems to find abundant support in *Sun Printing Co. v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, in which the Supreme Court has distinctly declared that it is the duty of the court always to enforce the contract when the damages are uncertain, and have been liquidated by an agreement. That they were uncertain is made clear, I think, by the following extract from the brief of plaintiffs' counsel:

"Plaintiff Davis testified (pages 20-2):

"Q. You said yesterday you had been engaged in handling Portland cement about twelve years, I think, was it not?

"A. Yes, sir.

* * * * *

"Q. Were you during those years engaged in handling it upon contracts which ran through a year or thereabouts?

"A. Yes, sir.

* * * * *

"Q. Was there much variance in the price of cement during those years?

"A. Yes, sir; quite considerable.

"Q. Sometimes the price would be above, and sometimes below, the contract price?

"A. Yes, sir.

* * * * *

"Q. Notwithstanding the fact that there was an annual contract at a fixed price, the defendant in this case reduced the price to you during that year, did they?

"A. Of 1901?

"Q. Yes.

"A. I think they did; yes, sir.

"Q. And allowed you to have the cement at a price less than that for which you had contracted? That is right, is it not?

"A. Yes, sir."

"Page 31:

"Q. Who did lose the money? Mr. Simpson says you know that the Alpha Company lost the money.

"A. What money?

"Q. The money on that reduction.

"A. The Alpha Cement Company; yes, sir. That is right."

"The situation at the time of making the contract, then, was this: The parties were dealing in a commodity which fluctuated considerably in price; they were making a contract for a very large quantity of cement to be delivered through an entire year, when the variance might be, and in previous years had been, very great; and they were making it in the light of the fact that an allowance had to be made to plaintiffs if the price fell considerably below the contract price. The evidence fails to disclose any other facts affecting the situation. What, then, more natural than that the parties would desire to be saved from very serious loss in case history repeated itself, and the price rose or fell considerably?"

But it was argued further that, whatever the original contract may have been, it was modified by certain letters in September and October, and that this new contract contained no provision for liquidated damages upon failure to deliver. I shall not extend this opinion by quoting the letters written at that time. I have read them all with care, and, to my mind, they did not modify the contract in any respect. A good deal of confusion about orders and shipments had arisen, as was perhaps unavoidable in the fulfillment of such a contract; and it was finally agreed, as the shortest way out of the difficulty, to cancel all existing orders and take a

fresh start. Nothing else happened, so far as I can see, and there was no thought on either side that this resulted in making a new contract. The case of *Grand Tower Mining Co. v. Phillips*, 90 U. S. 471, 23 L. Ed. 71, is not in point. A contract to furnish 15,000 tons of coal each month, which gave the buyer the option to punish a failure to deliver by exacting as liquidated damages 25 cents for each ton not delivered, or to carry the deficiency over to the succeeding month, and require its delivery then, in addition to the proper quota of the second month, was there construed; and it was held that, when the deficiency was carried over, the clause for liquidated damages ceased to apply, and, on a second failure to deliver, the seller should be punished by the infliction of the usual damages. As Mr. Justice Bradley said, the election to carry the deficiency over "was a substitute for the liquidated damages of 25 cents per ton. With regard to that particular amount of coal, the rule for liquidated damages was at an end. The agreement did not carry it forward to the following month. It imposed upon the defendant the obligation, if the plaintiff so elected, to furnish the coal itself, instead of paying the liquidated sum. If not so, what was the option worth? It amounted to nothing more than the right of giving to the defendant another month to furnish the coal. Surely they would have had that right without stipulating for it in this solemn way." The present contract contains no such option, and I am unable, therefore, to see the relevancy of the decision.

The defendant's motion for judgment in its favor notwithstanding the verdict is refused, and it is now ordered that the clerk enter judgment upon the verdict for the sum of \$19,243.52. To this order an exception is sealed to the plaintiffs, and also to the defendants.

McDONALD & JOHNSON et al. v. SOUTHERN EXPRESS CO.

(Circuit Court, D. South Carolina. December 30, 1904.)

1. FISH—STATE REGULATIONS—STATUTES—CONSTITUTIONALITY.

Act S. C. Feb. 16, 1904 (24 St. at Large, p. 385), prohibiting the shipment or transportation of "any shad fish beyond the limits of" the state, and declaring that any common carrier shipping or receiving for transportation any shad fish to points beyond the state shall be guilty of a misdemeanor and fined, is unconstitutional and void, as prohibiting the transportation of shad fish caught beyond the limits of the state, which the state has no power to regulate.

2. SAME—CONSTRUCTION—PARTIAL CONSTITUTIONALITY.

Since the Legislature, in passing Act S. C. Feb. 16, 1904 (24 St. at Large, p. 385), prohibiting the transportation of "any shad fish" beyond the limits of the state, distinctly refused to limit the act to shad fish caught within the limits of the state, it could not be construed by the courts to be so limited, and, as limited, held constitutional.

J. P. K. Bryan, for complainants.

Mordecai & Gadsden and U. X. Gunter, Jr., Atty. Gen. S. C., for defendant.

BRAWLEY, District Judge. An act of the General Assembly of South Carolina approved February 16, 1904 (24 St. at Large, p. 385),

declares, in section 1, "that on and after the 20th day of February, 1904, it shall be unlawful to ship or transport any shad fish beyond the limits of this state"; and in section 2, that "any person * * * who violates the provisions of section 1 of this act shall upon conviction be deemed guilty of a misdemeanor and subject to a fine not exceeding \$100.00 or to imprisonment not exceeding 30 days"; and in section 3, that "any common carrier receiving any shad fish for transportation or shipment to any points beyond the limits of this state, shall, upon conviction be deemed guilty of a misdemeanor, and shall for each offence be fined not exceeding \$100.00." Immediately after the passage of this act the defendant company, a corporation engaged in the business of transportation as an interstate common carrier, and theretofore carrying shad fish to places outside the limits of the state, gave notice that it would not, after February 20, 1904, receive for shipment or transport to points beyond the limits of the state any shad fish, whereupon complainants, six or seven in number, filed their bill of complaint, alleging, among other things, that they were dealers and shippers of shad fish caught within and without the limits of the state of South Carolina to places situated outside the limits of said state; that said shad fish was a recognized article of interstate commerce; that they had expended large sums of money in the equipment of their business, and had entered into contracts for daily shipments during the shad season; that the Congress of the United States had, by several statutes, provided for the propagation of shad fishes, and had expended large sums of money, and deposited many millions of shad fishes or shad fry in the coast waters of the United States for the benefit of the citizens of the United States, and that the act above mentioned was in contravention of article 1, § 8, of the Constitution of the United States. An interlocutory injunction was granted, and it was referred to the master to take testimony, and the case is now before me upon his report, and upon a motion for a permanent injunction; counsel for complainants appearing in behalf of said motion, and the Attorney General of the state in opposition.

The master reports that he held a reference October 7, 1904, at which were present the solicitor for the complainants, the solicitor for the defendant, Southern Express Company, associated with whom as counsel was the Attorney General of the state of South Carolina, and that the complainants and their witnesses being present and ready to give their testimony in the cause, it was agreed by the counsel for the complainants and the counsel for the defendant that the facts as alleged in the bill of complaint were admitted as true; counsel for the defendant stating that the issue was one of law, arising upon the face of the pleading. The facts as alleged being admitted, it was further agreed that during the pendency of the act set forth in the bill of complaint in the Legislature of the state of South Carolina an amendment was offered striking out the words "any shad fish," in section 1 of the act, and inserting in lieu thereof the words "any shad fish caught in the waters of the state of South Carolina," but the said amendment was rejected. It was stated by the counsel for the complainants in the argument before me, and not controverted, that he was prepared to prove by his witnesses that the greater part of the shad fish shipped

by complainants was caught beyond the limits of the state of South Carolina.

In *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, the Supreme Court of the United States considers the nature of the property in game, and the authority which the state had a right to lawfully exercise in relation thereto, and, after reviewing the authorities from the time of Solon, holds that, from the earliest traditions, the right to reduce animals *feræ naturæ* to possession has been subject to the control of the lawgiving power. The principle upon which this decision rests is that such animals belong to the collective body of people of the state, and are held by the state in trust for the people, and the person who takes the game can only acquire a qualified property in it; that such game not being the subject of private ownership, except in so far as the people may elect to make it so, the state may, if it sees fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good; that such common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The dissenting opinions of Justices Field and Harlan, while not questioning the right of the state, by its legislation, to provide for the protection of wild game, hold that such game, when beyond the reach or control of man, is not the property of the state, or of any one, in a proper sense, and that when man, by his labor or skill, brings any such animals under his control and subject to his use, he acquires, to that extent, his right of property in them; that, having thus, by labor or skill, added to the uses of man an article promoting his comfort, which without that labor would have been lost to him, he has an absolute right to it, and the state cannot interfere with his disposition of it; that such game thus reduced to his possession becomes an article of commerce; and that it does not lie within the province of any state to confine the excellencies of any articles of food within its borders to its own fortunate inhabitants, to the exclusion of others. Two other Justices took no part in the decision, but the opinion of the court settles the law that a state has the power to prohibit the exportation of game killed within the limits of the state. The statute of Connecticut which was under the review of the court forbade the transportation of "any such birds killed within this state," and the opinion of the Supreme Court uses the same words of limitation. The case under review related to woodcock and other birds, but there is no doubt that fish come within the general classification of game. Blackstone and Kent class them with animals *feræ naturæ*, and in this state it was so decided in *State v. Higgins*, 51 S. C. 53, 28 S. E. 15, 38 L. R. A. 561.

Whether the shad fish, owing to its peculiar nature, and to the circumstance that its presence within the waters of the state is due largely to the methods of propagation, and to the expenditure of moneys by the general government for the benefit of all the people of the United States, should be differentiated from this classification, is an interesting question raised by the pleadings, and may be considered hereafter. Assuming that it is to be classed with other game as animals *feræ naturæ*, the property in which rests in the state, and that, under

the principle settled by *Geer v. Connecticut*, the state has the right to prohibit the exportation beyond its limits of any such fish caught within its borders, does such right exist as to any fish caught without its borders and brought within it? The source of title in such fish is not the state. There is no ownership by the state, or by the people in their collective capacity, in game or fish taken or killed outside the borders of the state, for it is not a food supply which belongs in common to all the people of the state, and which can only become the subject of ownership in a qualified way, as declared in that case. Therefore it seems to me clear that shad fish caught without the borders of the state are not subject to the limitations and restrictions that the state may impose on the ownership of fish caught within its borders.

In the Case of *Davenport (C. C.)* 102 Fed. 540, the petitioner, who kept a restaurant in the city of Spokane, in the state of Washington, was arrested and imprisoned for having in his possession and offering for sale quail which he had purchased in the state of Missouri. The statute upon which the prosecution was founded declared it to be a misdemeanor to offer for sale quail or other game therein described. The petitioner was discharged in habeas corpus proceedings, the court saying:

"I fully assent to the doctrine of these decisions holding that it is competent for state Legislatures to enact laws for the protection of game; and I do not question the decision of the Supreme Court of the United States in *Geer v. Connecticut*, holding that the Legislature of the state has the constitutional power to entirely prohibit the killing of game within the state for the purpose of conveying the same beyond the limits of the state, for it is true, and it is an elementary principle, that the wild game within the state belongs to the people in their collective, sovereign capacity. Game is not the subject of private ownership, except in so far as the people may elect to make it so, and they may, if they see fit, absolutely prohibit the taking of it for traffic or commerce in it; but the power of the Legislature in this regard only applies to game within the state, which is the property of the people of the state, and no such power to interfere with the private affairs of individuals can affect the right of a citizen to sell or dispose of, as he pleases, game which has become a subject of private ownership by a lawful purchase in another state. This decision of the Supreme Court does not directly or indirectly support the proposition that the Legislature of one state has the constitutional power to prohibit traffic in game imported from another state."

In *People v. A. Booth & Company*, 86 N. Y. Supp. 272, decided November, 1903, in the Supreme Court of New York, an action was brought to recover penalties under the fish and game laws of New York for having possession of, selling, and transporting brook trout out of season, imported from Canada and stored in cold storage, and cases in the state of New York are reviewed. Among them is the case of *People v. Buffalo Fish Company*, 164 N. Y. 100, 58 N. E. 36, 52 L. R. A. 803, 79 Am. St. Rep. 622, where the court says:

"The question, and the only question, is whether a state statute can be lawfully enacted to prohibit a citizen of this state from buying fish in Canada, importing it into this state, and exposing it for sale here. There is no question at all about the competency of the state, in the exercise of the police power, to enact game laws. The question is whether such laws can be so framed as to prohibit or restrict by penal provisions the importation of an article of food in universal use. That the purchase of fish for food in a foreign country, and its importation here for sale as such is a branch of

foreign commerce, is too clear for discussion. * * * That the statute operates as a restriction upon the defendant's business as an importer and dealer in fish, no one can doubt. That a statute so operating is in conflict with the exclusive power of Congress to regulate foreign commerce, is not questioned, and yet the contention is made with great earnestness that this statute is perfectly valid. The reasoning upon which this conclusion is based, if I understand it, is that the state has the power to pass game laws, which no one denies; that the object of this statute was to protect game in this state, and not to interfere in any way whatever with foreign commerce, and, since the purpose that the Legislature had in view was lawful and laudable, the statute is good, although in fact it does prohibit or restrict the importation of fresh fish as an article of food. If the Legislature did not intend to restrict foreign commerce, as asserted, then it is obvious that the statute should be read and interpreted according to that intention, in which event it would have no application to the facts of this case; but, strangely enough, it is given a meaning which imputes to the lawmakers just the contrary, since it is said that the possession of imported fish is, in terms, inhibited. The good intentions of a Legislature will not save a state statute from condemnation when it in fact conflicts with the supreme law of the land. If it restricts the application of commerce, as it certainly does, then it is void, no matter what name may have been given to it, or what good purpose it was intended to promote."

The court held in the Booth Case that, if it was necessary to protect trout streams, they should be more effectively policed, or the use of the implements for their invasion regulated, and that provisions of that law were not a reasonable exercise of police power, but deprived a citizen of his property in fish as an article of commerce, and says:

"But there is a broader reason for the invalidity of this law, and one nearer home. It is not only void under the commerce laws of the United States Constitution, but is in conflict with the state Constitution, as depriving the owner of his property and liberty. Much confusion and uncertainty is found in the Session Laws and the decisions in relation to game and game fishes, which comes, in a great part, from not considering the quality of the title which the possessor has in such property."

There are two kinds or qualities of such title, depending upon the place of capture and possession, and, citing *Geer v. Connecticut* and other cases holding that, game being the property of the whole people, the law might impose such terms and conditions as it chose, not only as to its capture, but as to the disposition and use of the same, and that, such privileges being granted by legislation, the conditions upon which it was granted followed the game, the court also says:

"But when game is obtained outside the state, and brought into it as private property, the owner does not get his right to it from the state. He holds it independent of the state, the same as he owns his house, his cattle, or securities. He is the absolute, unqualified owner of property, protected by the Constitution, and just as sacred from encroachment from the state as from others."

In considering similar legislation in the state of Pennsylvania, the court says in *Commonwealth v. Wilkinson*, 139 Pa. 298, 21 Atl. 14:

"The manifest object of this act was the preservation of game within this commonwealth. We cannot assume that it was intended to preserve game elsewhere, and it would be a forced construction to hold that it was intended to exclude from our markets quail and other game killed in other states,

where by the laws of those states the killing of it was lawful. * * * The law was not intended to have any extraterritorial effect, and if it was, it would be nugatory."

The same doctrine is announced in *Maryland (Dickhaut v. State, 85 Md. 451, 37 Atl. 21, 36 L. R. A. 765, 60 Am. St. Rep. 332)*, in *Massachusetts (Commonwealth v. Hall, 128 Mass. 410, 35 Am. Rep. 387)*, in *Kansas (State v. Saunders, 19 Kan. 127, 27 Am. Rep. 98)*, and in other states.

There are decisions to the contrary in a number of states, the most notable of which is *Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129*, where the Supreme Court of California held that, in the exercise of the police power of the state, it may prohibit the taking of wild game, and any traffic or commerce in it, if deemed necessary for its protection or preservation of the public good, and, to this end, may make it criminal for any person to sell or offer for sale any of such game, whether killed within the state or without the state. These cases rest upon the principle stated by Lord Chief Justice Coleridge in *Whitehead v. Smithers, 2 C. P. D. 553*, where, under an English statute making it unlawful to have in possession plover during the close season, it was held that a party who imported the dead birds from Holland, and sold them in the British market, came within the prohibition of the statute, and the court said:

"It is said that it would be a strong thing for the Legislature of the United Kingdom to interfere with the rights of foreigners to kill foreign birds, but it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretense of their being imported from abroad."

It is hardly necessary to say that, the power of the British Parliament relating to questions of this kind being supreme, this case furnishes no rule of guidance in construing a statute of a state whose power in respect to all matters of interstate and foreign commerce is limited by the federal Constitution. The argument in favor of the validity of this statute is precisely that which was controlling in the English case just referred to; that is, that it would be impossible for the police officers of the state to determine whether the shad come from within or from without the state, and that it would be easier to enforce local protective and inspection laws if they were made applicable as well to fish caught without the state as to those caught within its borders. As a mere rule of convenience, this argument has weight, but the Supreme Court of the United States has definitely pronounced unconstitutional such local laws as are in restraint of interstate commerce. Thus, in the *Oleomargarine Case*, the state of Pennsylvania having passed an act making it a misdemeanor for any person to sell or have in his possession, with intent to sell, any imitation or adulterated butter or cheese, which the Supreme Court of that state sustained, in *Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49*, it was held by the Supreme Court of the United States that, inasmuch as oleomar-

garine was a recognized and proper subject of commerce, it could not be totally excluded from any particular state simply because the state may choose to decide that, for the purpose of preventing an impure and adulterated article, it will not permit the introduction of a pure and unadulterated article within its borders upon any terms whatever. The argument in favor of the statute was that it was enacted in good faith for the protection of the health of the citizens and for the prevention of deception, and that while it might be admitted that there was actually pure oleomargarine, not dangerous to the public health, its purity could not be ascertained by any superficial examination, and that, any certain and effective supervision of its manufacture being impossible, therefore all oleomargarine should be excluded; but the court held that it was beyond the power of the state to interfere with interstate commerce, and it could not, for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which was pure and wholesome. This case is on the line of many others where statutes passed under the cover of the exercise of police powers were held unconstitutional, as being a burden upon interstate or foreign commerce. *Henderson v. Wickham*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550; *Railroad Company v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

It being so clear upon principle and upon the most approved authorities that the state has no power to prohibit the exportation of game brought into the state from another state, or outside its borders, it was suggested by the learned Attorney General at the hearing that the act be so construed as to confine its operation to shad caught within the limits of the state. Such interpretation would limit the words of the act, and be manifestly against the intent of the Legislature which enacted it, for it appears from the agreed statement of facts than an amendment was proposed, while the act was on its passage, striking out the words "any shad fish," in section 1, and inserting in lieu thereof the words "any shad fish caught in the waters of the state of South Carolina," but the said amendment was rejected, and the court cannot do now by construction what the Legislature refused to do by enactment.

In the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, the court had under consideration certain criminal prosecutions for violations of what is known as the "trade-mark legislation." The Congress had passed an act of the broadest character to punish the counterfeiting of trade-marks, which was claimed to be valid as a regulation of commerce. Property in trade-marks had long been recognized and protected by the common law and by the statutes of the several states, and it was held in this case that if the power of Congress could in any case be extended to trade-marks, as a regulation of commerce, it must be limited to their use in "commerce with foreign nations, and among the several states and with the Indian tribes," and that this legislation was not, in its terms or essential character, a regulation that is limited, but, in its language, embraced, and was intended to embrace, all commerce, including that between citizens of the same state. It was held that such legislation

was void for want of constitutional authority; and, in reply to the suggestion that Congress had power to regulate trade-marks used in commerce with foreign nations and among the several states, the legislation should be held valid in that class of cases, if no further, the court says:

"While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part, where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

This precise point was decided in *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563, where the Chief Justice says:

"We are not able to reject the part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In view of the fact that the Legislature of South Carolina refused to limit the operation of this act by rejecting the amendment above referred to, some of the concluding words in the case cited are apposite:

"If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is partial in its operation, and which would complicate the rights which parties would hold in some instances under the act of Congress, and in others under state law."

Having reached the conclusion that it is the duty of this court to declare the statute invalid, under the commerce clause of the Constitution (article 1, § 8, cl. 3), as an interference with interstate commerce, it is unnecessary to consider the question raised by the complaint, and upon which an interesting argument has been presented. The complaint charges, in paragraph 6, subd. "c," that the complainants are engaged in catching and dealing in, and shipping to points outside of the state of South Carolina, the shad fish deposited and propagated by the United States as food fishes, and in the master's report it appears that this allegation is admitted to be true. It is well known that the rivers of this state had been well-nigh depleted of shad, and the Congress of the United States has undertaken by its legislation to provide for the propagation of food fishes. In sections 4395, 4396, 4397, and 4398 of the Revised Statutes [U. S. Comp. St. 1901, pp. 3001, 3002], a fish commission was appointed; and by the act of February 14, 1903, c. 552, § 4, 32 Stat. 826 [U. S. Comp. St. Supp. 1903, p. 43], this commission was put in the Department of Commerce, and by its fixed

policy and annual appropriations the United States government has undertaken to replenish the coastal waters with food fishes. By section 4398 the commissioner is authorized to take from the waters of the sea coast, where the tide ebbs and flows, such fish as may be needful and proper for the conduct of his duties, "any law, custom or usage of any state to the contrary notwithstanding"; and it appears from the reports of the fish commission that over thirty millions of shad fry have been deposited in the rivers of this state. It seems to be now pretty well agreed among those learned in the subject that the young shad hatched out in any particular river remain within a moderate distance of the mouth of that stream until the period occurs for their inland migration. It was formerly believed that shad during the winter moved towards the equator, and, wintering in the warmer waters of the South, started northward in a vast school at the beginning of the year, advancing along the coast in almost military array, sending a detachment up each successive stream, which, by a singular method of selection, sought the river in which they first saw the light; and the argument is that shad artificially propagated in rivers and in coast waters of the United states by the money of the people of the United States belong to all the people of the United States, and therefore a state has no power to impose any restriction upon such property which the United States, in furtherance of its policy of furnishing to the people food fishes, has not imposed. The argument is ingenious, and the question interesting, but the exigencies of this case do not require me to decide it, and I express no opinion upon that point.

Let a decree be prepared in accordance with this opinion.

UNITED STATES v. COBBAN.

(Circuit Court, D. Montana. January 9, 1905.)

No. 527.

1. SUBORNATION OF PERJURY—INDICTMENT—TIME—PLACE.

Where an indictment charged that defendant corruptly suborned and procured M. to appear before R., receiver of the United States land office within the district where certain timber land applied for was situated, and to make and subscribe before him a certain oath to a certain statement in writing, and the statement included in the indictment appeared to have been made at the land office in M., Mont., June 26, 1899, and the receiver's certificate appended to the statement was subscribed and sworn to before him June 26, 1899, the indictment was not demurrable for failure to state the time or place of the commission of the offense.

2. SAME—KNOWLEDGE.

Where an indictment for subornation of perjury alleged that M., the person alleged to have been suborned, falsely, feloniously, and willfully swore to matters set forth in an application to purchase public lands, and alleged that he did not make the application in good faith, but on speculation, under a contract with defendant respecting title, and that defendant knew that M. had made a contract by which the title he might acquire should inure to defendant's benefit, and that he did not believe to be true the matters he procured M. to swear to, but knew them to be false and untrue, it sufficiently charged that M. knew the statements made by him were false, and that defendant knew that M. had knowledge of the falsity thereof.

3. SAME—CAPACITY OF OFFICER.

Where an indictment for subornation of perjury with reference to a sworn application to purchase public lands alleged that the person suborned appeared before R., who was then and there a receiver of the United States land office within the district where the land was situated, which appeared by the statement, which was a part of the indictment, to be M., Mont., the indictment sufficiently alleged the office held by R.

Fred A. Maynard, Special Asst. U. S. Atty.
Marshall & Stiff and T. J. Walsh, for defendant.

HUNT, District Judge. Defendant is charged with subornation of perjury, under the following indictment:

"United States of America, District of Montana—ss.: In the District Court of the United States within and for the District of Montana, of the April Term, in the Year of our Lord One Thousand Nine Hundred and One.

"The Grand Jurors of the United States of America, duly empanelled, sworn and charged to inquire within and for the District of Montana, and true presentments make of all crimes and misdemeanors committed against the laws of the United States within said District, upon their oaths do find charge and present:

"That one Robert M. Cobban, late of the District of Montana, unlawfully did feloniously, wilfully, and corruptly, suborn, instigate and procure one Arnold Mickels to appear in person before one William Q. Ranft, who was then and there the Receiver of the United States Land Office within the district where the land is situated, and make and subscribe before him, the said William Q. Ranft, Receiver, as aforesaid, a certain oath to a certain statement in writing, and in and by said oath and affidavit falsely, feloniously, corruptly and wilfully depose and swear, among other things, in substance and effect as follows:

"'Land Office at Missoula, Montana.

"'(Date) June 26, 1899.

"'I Arnold Mickels of (town or City) Woodworth, County of Deer Lodge, State of Montana, desiring to avail myself of the provisions of the act of Congress of June 3rd, 1878, entitled "An Act for the sale of Timber Lands in the States of California, Oregon, Nevada, and in Washington Territory," as extended to all the Public Land States by Act of August 4, 1892, for the purchase of the NW. 4/ of Section 8 Township 14 N. of Range 16 W, in the district of lands subject to sale at Missoula Land Office, Montana, do solemnly swear that I am a native citizen, or to become a citizen of the United States of the age of 38 years, and by occupation a rancher; that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other application under said acts; that I do not apply to purchase the lands above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself, and that my post-office address is Woodworth, Deer Lodge Co., Montana, Arnold Mickels.

"'Arnold Mickels.

"'I Hereby Certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by ———), and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this 26, day of June, 1899.

William Q. Ranft.'

"And thereupon the said Arnold Mickels in consequence and by means of the said willful and corrupt subornation, instigation, and procurement of the said Robert M. Cobban, then and there, appeared in person before the said Receiver aforesaid, and made and subscribed before him an oath and affidavit in writing to the said statement required by said Act of Congress, and, then and there, by and before the said Receiver aforesaid, was duly sworn and took his, the said Arnold Mickels' oath of and concerning the truth of the matters contained in his said oath and statement; he, the said William Q. Ranft, then and there, being such Receiver as aforesaid, and having due and competent authority to administer the said oath to the said Arnold Mickels, in that behalf, and the matter in which he was so sworn and took his oath being then and there a proceeding in which a law of the United States authorizes an oath to be administered;

"And it, then and there, at and upon the making and subscribing of said statement and taking his oath and affidavit to the same became and was a material question whether the said Arnold Mickels did desire to avail himself of the provisions of said Act of Congress in the purchase of the land above described for the purpose of, in good faith, appropriating to his own exclusive use and benefit or on speculation; and whether he had directly or indirectly made any agreement or contract, or in any way or manner, with any person or persons whatsoever, by which the title he should acquire from the Government of the United States would inure, in whole or in part, to the benefit of any person other than himself.

"And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Arnold Mickels, being so sworn as aforesaid, then and there, in and by his said oath and affidavit in writing, upon his oath so taken as aforesaid, before the said William Q. Ranft, he being the said Receiver, and having such due and competent authority as aforesaid, falsely, feloniously, wilfully and corruptly and contrary to his oath so taken, did depose and swear among other things, in substance and to the effect that he the said Arnold Mickels did apply to purchase the land above described and set forth in said affidavit, not on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he, the said Arnold Mickels, had not directly and indirectly made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title he might acquire from the Government of the United States might inure in whole or in part to the benefit of any person except himself;

"Whereas in truth and in fact the said Arnold Mickels at the time he was so sworn and took his said oath, did not make said application for the purchase of said land in good faith to appropriate it to his own exclusive use and benefit, but on speculation; and whereas, in truth and in fact, the said Arnold Mickels, had before and after the time he was so sworn and took his oath as aforesaid, made and entered into a certain agreement and contract with one Robert M. Cobban, by which the title he might acquire from the Government of the United States should wholly inure to the benefit of the said Robert M. Cobban; and whereas; in truth and in fact, the said Robert M. Cobban, at the time he so suborned, instigated and procured the said Arnold Mickels to make oath and affidavit and to depose and swear falsely as aforesaid, then and there, well knew that the Arnold Mickels did not apply to purchase the land above described for the purpose of in good faith, appropriating it to his own exclusive use and benefit, but for speculation; and he, the said Robert M. Cobban, then and there, well knew that the said Arnold Mickels had made and entered into a certain contract and agreement by which the title he might acquire from the Government of the United States should wholly inure to the benefit of him, the said Robert M. Cobban; and whereas in truth and in fact the said Robert M. Cobban did not then believe to be true the said matters which he so suborned, instigated and procured the said Arnold Mickels falsely and feloniously to depose and swear to, as herein above specified, but did know them to be false and untrue; and so the Grand Jurors aforesaid upon their oaths aforesaid, do say that the said Robert M. Cobban, in manner and form aforesaid, wilfully, feloniously, and corruptly did suborn, instigate, and procure the said Arnold Mickels to commit wilful, felonious and corrupt perjury; contrary to the form of the

statute in such case made and provided, and against the peace and dignity of the United States of America.

William B. Rodgers,
"United States Attorney."

The defendant demurs, the first ground being that the indictment does not state the time or place of the commission of the offense. The indictment charges that the defendant did willfully, feloniously, and corruptly suborn, instigate, and procure one Arnold Mickels to appear in person before one William Q. Ranft, who was then and there receiver of the United States land office within the district where the land is situated, and to make and subscribe before him, the said receiver, a certain oath to a certain statement in writing. The statement is included in the indictment, and appears to have been made at the land office in Missoula, Mont., June 26, 1899. To the statement is appended the certificate of the receiver, wherein he states that the affidavit of Mickels was subscribed and sworn to before him June 26, 1899. The only reasonable construction to be placed upon the allegation is that the offense was committed June 26, 1899, at Missoula, Mont.

The next point is that it is not averred that Mickels knew the statements he made were false, nor that Cobban knew that Mickels knew they were false. But an examination of the indictment shows that Cobban willfully and corruptly procured Mickels to appear before the receiver and there to make oath feloniously, corruptly, and willfully, to certain things set forth in the indictment. It is also averred that Mickels, in consequence and by means of the willful subornation of Cobban, appeared in person before the receiver, and did make oath to the statement as to the truth of the matters therein contained, and then and there, at and upon the making and subscribing of said statements and affidavit, it became a material question whether Mickels did desire to avail himself of the law of Congress in the purchase of the land described, for the purpose of in good faith appropriating it to his own exclusive use or on speculation, and whether he had directly or indirectly made any agreement or contract with any person or persons by which the title which he should acquire from the United States would inure, in whole or in part, to the benefit of any person other than himself. It is then charged that Mickels, on these questions of fact, willfully and corruptly swore falsely, and the specific things so sworn to are set forth. Then follow the allegations regarding the statements made under oath by Mickels, and averring the truth and fact to be that he had made a contract with one Cobban by which the title he might procure would inure to the benefit of said Cobban, and whereas, in truth, the said Cobban, at the time he so suborned and procured said Mickels to make the oath and affidavit and to swear falsely as stated, then and there well knew that the said Mickels did not apply to purchase the land in good faith, but on speculation, and he, the said Cobban, then and there well knew that the said Mickels had made a certain agreement by which the title he might procure should inure to the benefit of him (Cobban), and whereas, in truth, the said Cobban did not then believe to be true the said matters which he so suborned and procured the said

Mickels falsely to swear to, and did know them to be false and untrue.

The direct allegations that Mickels falsely, feloniously, and willfully deposed and swore to matters and things set forth, and that he did not make his application in good faith, but on speculation, and under a contract with Cobban respecting title, are sufficient averments of a knowledge on his part that the statements he made were false, while the direct averment that Cobban knew that Mickels had made and entered into a certain contract, by which the title he might acquire should inure to his benefit, and that he did not believe to be true the matters which he procured Mickels falsely to swear to, but did know them to be false and untrue, sufficiently charges Cobban with a knowledge of the fact that Mickels knew that the statements he had made were false. *Commonwealth v. Devine*, 155 Mass. 226, 29 N. E. 515; *Babcock v. U. S.* (C. C.) 34 Fed. 876; *U. S. v. Fero* (D. C.) 18 Fed. 901.

It is also contended that the office that Ranft held is not named. The point is not well taken, as it is distinctly alleged that Mickels appeared before William Q. Ranft, who was then and there a receiver of the United States land office within the district where the land is situated, which appears by the statement to be Missoula, Mont. I believe this is a sufficiently certain allegation.

The demurrer is overruled, and the defendant is ordered to plead.

HAFF v. PILLING et al.

(Circuit Court, E. D. Pennsylvania. January 20, 1905.)

No. 12.

1. SALES—FAILURE TO DELIVER—MEASURE OF DAMAGES.

Where a contract for the sale of coal, to be delivered in monthly quantities, provided that each month's delivery should be treated and considered as a separate and independent contract, the measure of the buyer's damages for the seller's failure to deliver the coal was the difference between the price he contracted to pay the seller, and the price which he was compelled to pay in the open market on the last day of each month for the amount of coal which the seller failed to deliver according to contract during the month.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1178.

2. SAME—EVIDENCE—MERITS OF CLAIM.

Evidence that the buyer was compelled to pay a higher price for coal in the open market than the price fixed by the contract of sale, whereas he was selling the coal to his customers at the figures at which he had originally contracted to sell it, while irrelevant on the issue of the seller's liability for the breach of his contract, goes to show that the buyer is not insisting upon his legal rights without merit.

3. SAME—DEFENSES.

The fact that the sellers of coal had themselves contracted for the purchase of sufficient coal to supply their customers had no bearing on the question of the sellers' liability for a breach of a contract for the delivery of coal to one of their customers, except as evidence that they had used every precaution to be prepared to deliver the coal in com-

pliance with the terms of their agreement, and were prevented from so doing solely by a shortage of cars.

4. SAME—SHORTAGE OF CARS.

The fact that sellers took the precaution to contract for sufficient coal before they sold it to their customers did not excuse them from the effort to secure cars to ship the coal in, or to procure coal for delivery, if, as a matter of fact, they could have, with reasonable expenditure of money, purchased coal in the open market, or secured the cars to ship the coal for which they had contracted.

H. B. Gill and Read & Pettit, for plaintiff.

Henry P. Brown and John G. Johnson, for defendants.

HOLLAND, District Judge. This is a motion for a new trial, for the reasons (1) the verdict was against the evidence; and (2) against the weight of the evidence.

Mr. Haff brought suit for the recovery of damages for the breach of contract into which he had entered with defendants for the delivery of coal. The dispute arose out of the following facts:

On August 20, 1902, Haff made a contract with the defendants for the delivery of 10,500 gross tons of "Sonman Shaft Bituminous Steam Coal," f. o. b. cars at piers Pennsylvania Railroad Company, South Amboy, N. J., in about equal monthly quantities between September 1, 1902, and April 1, 1903, which would be 1,500 tons per month for seven months, at \$2.95 per ton. The contract contained the usual strike clause, and further it was stipulated as follows:

"It is understood and agreed that if there should be a shortage of cars, shipments will be divided from time to time in fair proportion on all orders. Each month's delivery to be treated and considered as a separate and independent contract."

The defendants, during the above-mentioned seven months, delivered, in accordance with their contract, to the plaintiff, at South Amboy, N. J., 2,232 tons of Sonman Shaft and 2,117 tons of other kinds of coal, making a total of 4,347 tons; the difference between this and the amount agreed to be delivered under the contract, to wit, 10,500 tons, being 6,153 tons. This amount the plaintiff was compelled to purchase in the open market during that time to fill contracts made by him, for which he was compelled to pay a much higher price.

If the plaintiff be entitled to recover for the failure of the defendants to comply with their contract to deliver this coal, the measure of his damage is the difference between the price he was to pay the defendants, and the price for which he was compelled to purchase in the open market at the last day of each month, for the amount of coal which the defendants failed to deliver according to contract during the preceding month, as the contract provides that each month's delivery is to be treated and considered as an independent contract. So that at the end of the month, if there was a failure on the part of the defendants to deliver the entire 1,500 tons, and the plaintiff was compelled to purchase any part thereof in the market at a higher price, he would be entitled to recover, if at all, for the difference. From the evidence, we learn that the plaintiff was required to purchase coal in the open market at an advance price for the purpose of supplying the 6,153 tons.

According to the plaintiff's evidence, the amount the defendants were short on delivery, and the months, the tons short, excess of market price, and total amount of excess paid, are as follows:

| Month. | Tons Short. | Excess of Market Price. | Damages. |
|-----------------|--------------|----------------------------|--------------------|
| September | 586 | \$5 55 | \$ 3,252 80 |
| October | 758 | 2 05 | 1,553 90 |
| November | 946 | 2 05 | 1,939 30 |
| December | 835 | 3 05 | 2,546 75 |
| January | 1,166 | 4 05 | 4,722 30 |
| February | 1,106 | 55 | 608 30 |
| March | 756 | 15 | 113 40 |
| | <u>6,153</u> | | <u>\$14,736 75</u> |

He, however, only claims damage in his statement to the amount of \$12,943.66.

The defendants, in their affidavit of defense, allege that the reason for their failure to deliver the total amount of the coal contracted for was because of "an interruption of transportation, which resulted from a shortage of cars, and other causes entirely beyond their control." They further claim a delivery to the plaintiff, under the contract, of 4,347 tons, for which the plaintiff owed them \$12,718.80, and advance charges on the coal for plaintiff's account \$376.41, making a total of \$13,095.21, and, having received from the plaintiff on account the sum of \$12,503.38, claimed a balance due of \$591.83.

The plaintiff had entered into contracts for the delivery of coal to his customers during the seven months involved in the contract in suit, and to one customer alone (the sugar refining company) he had obligated himself to deliver an amount of coal during the period in excess of that which he had contracted to purchase from the defendant, and in this contract he protected himself against strike contingencies.

The defendants, prior to August 20, 1902 (the date upon which they made the contract with the plaintiff for Sonman Shaft coal), entered into a contract with the Keystone Coal & Coke Company, on August 19, 1902, for 45,000 tons of Sonman Shaft coal, 6,000 tons of which were to be delivered monthly from September 1, 1902, to April 1, 1903, to the defendants; and on August 16, 1902, three days before, the Keystone Coal & Coke Company contracted for 45,000 tons of Sonman Shaft coal, to be shipped and delivered at the rate of 6,000 tons per month up to April 1, 1903; so that the defendants had contracts for sufficient coal to supply all their customers with whom they had contracted, as they allege, had they not been prevented from the performance thereof by reason of the shortage of cars. In support of their defense, they call officers of the Pennsylvania Railroad, and establish the fact that Sonman Shaft Coal Company was rated at 35 cars per day, and that they were unable to, and did not, furnish more than 7 per day, as there was a strike in the anthracite coal region, which largely increased the demand for soft coal, and the railroad company was un-

able to supply sufficient transportation to meet the increased demand. The defendants also showed they had sent a man specially employed by them to the mines, for the purpose of watching the number of cars received, in order that they might get their share of the coal shipped from Sonman Shaft; and they further testified that they called upon the railroad officials to ascertain whether or not more cars could not be had, but they were unsuccessful in obtaining them. There were shipped, however, to the defendants, Sonman Shaft coal to the amount of 10,864 tons, of which 9,383 tons reached South Amboy in cars in which it could be delivered there, and the defendants were not responsible for the failure of a delivery there of the remainder of this coal.

At the time this contract with the plaintiff was running, the defendants claim they had obligated themselves, during the same period, to deliver 14,000 tons of Sonman Shaft coal to Parrish, Phillips & Co., and 7,000 tons to Benedict, Downs & Co., and that, in accordance with their contract, that, in case of a shortage of cars, shipments would be divided from time to time in fair proportions on all orders, they were, in law, required to apportion the 9,383 tons to these customers, of the coal available for supplying contracts, in proportion to the amounts contracted for to these three parties, which defendants claim they actually did. The contracts, however, with Parrish, Phillips & Co. and Benedict, Downs & Co., showed upon their face that they were contracts for the delivery of Nonpareil coal; and the defendants offered evidence to show that, while the contracts called for Nonpareil, they were obliged to deliver Sonman Shaft. No witness, however, of either the firm of Parrish, Phillips & Co. or Benedict, Downs & Co., was called for the purpose of corroborating the claim of the defendants; and the plaintiff insisted that the written contract was to prevail, and that neither of these parties had any right to share in the 9,383 tons of Sonman Shaft coal which the defendants shipped to South Amboy, N. J.

It was established that there was much more Sonman Shaft coal mined and shipped than had been received by the defendants at South Amboy, and it was contended by the plaintiff that the defendants could have secured cars and purchased this Sonman Shaft coal in the open market to comply with the conditions of the contract, if they had made an effort and paid some advance therefor. Of the 9,383 tons of available Sonman Shaft coal, 2,230 tons were delivered to the plaintiff, 2,191 tons to Parrish, Phillips & Co., and 1,308 tons to Benedict, Downs & Co., leaving a balance of 3,654 tons, which the defendants claim they applied on other running contracts to replace other coal which they had taken to furnish on their contracts with the plaintiff, Parrish, Phillips & Co., and Benedict, Downs & Co.; but these other contracts, to which this balance of Sonman Shaft coal was diverted, were only running, verbal contracts of customers.

Under these circumstances, the plaintiff claimed that he was entitled to recover, and testified that he had actually been damaged to that extent, for the reason that he was compelled to pay a higher price for coal in the open market, when he was selling it for the figures for which he originally contracted; and, while we think this has nothing to do with the liability of the defendants, yet it shows at least that the plaintiff is not standing upon a legal right, without merit. Nor do we think

that the contracts with the Keystone Coal & Coke Company and their contract with the Sonman Shaft Coal Company have any bearing upon the question of the defendants' liability on their contract, other than as evidence for the defendants in establishing their defense that shortage of cars was the cause of their failure to comply with the contract, and that they had used every precaution to be so situated as to be able to deliver the coal in compliance with the terms of their agreement, and that it was the subsequent unusual demand for cars, bringing about a shortage in the transportation of the coal, which was the cause of their failure to supply the coal. It does not follow, however, that, because they took the precaution to make these contracts for this coal before they sold it, they would be excused from further effort to secure cars or to procure coal for delivery, when and if, as a matter of fact, they could have, by reasonable expenditure of money, purchased Sonman Shaft coal in the open market, or secured the cars to ship the coal for which they had contracted.

The principal question submitted to the jury was whether the defendants' failure to comply with their contract in the delivery of coal was caused by shortage of cars, which the defendants were unable to overcome, and it involved a number of subordinate questions, all of which were submitted to the jury, and their finding was against the defendants' contention. The evidence was not such as to enable the court to say, as a matter of law, that they should find either of these questions in favor of the defendants. They were fairly submitted to the jury, whose province it was to determine whether the plaintiff or defendants were in the right. They found, after allowing the amount claimed by the defendants as a set-off, a verdict in favor of the plaintiff in the sum of \$12,090.37. There was nothing to show that there was any effort on the part of the defendants to comply with their contract, other than the fact that they made the contracts with other concerns to supply the coal for which they contracted with the plaintiff, and went several times to see the railroad company about cars, and had a man at the mines to keep tab on the cars shipped from there on their contract with the plaintiff. They made no effort to purchase coal in the open market, and made no effort whatever in any other direction to secure cars in addition to those that were apportioned by the railroad company to the Sonman Shaft mines. On the other hand, there was some evidence to show that additional cars could be had by paying some additional price.

And as to the question of the defendants' liability to other parties to whom they delivered Sonman Shaft and other coal, the evidence was such that the jury could fairly find that there was no liability to others for this coal on the part of the defendants. Upon the whole evidence, it was a question for the jury, and there has been nothing to convince the court that their finding should be disturbed.

Motion for a new trial is overruled.

UNITED STATES v. JEFFERSON.

(Circuit Court, W. D. Kentucky. January 4, 1905.)

1. LOTTERIES—PRIZE PACKAGES—COUPONS.

Defendant, to induce the sale of a cereal called "Mother's Oats," placed in each package a coupon on which one of the letters which spelled the word "Mother's" was printed, and offered premiums to persons holding coupons which would spell the word "Mother's"; the letter "O" being placed on only 1 coupon in 500. *Held*, that such scheme was a lottery, within Act Cong. March 2, 1895, c. 191, 28 Stat. 963 [3 U. S. Comp. St. 1901, p. 3178], providing that any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or representing a ticket, chance, share, or interest in, or dependent upon the event of, a lottery, etc., or other similar enterprises offering prizes dependent upon lot or chance, shall be guilty, etc.

[Ed. Note.—What constitutes a lottery, see note to *MacDonald v. United States*, 12 C. C. A. 346.]

R. D. Hill, U. S. Atty.

Augustus E. Willson and W. M. Smith, for defendant.

EVANS, District Judge. The indictment in this case, to which the defendant has demurred, is founded on the first section of the act of March 2, 1895, c. 191, 28 Stat. 963 [3 U. S. Comp. St. 1901, p. 3178], which, so far as it may apply to the questions now raised, is in this language:

"That any person who shall cause to be * * * carried from one state to another in the United States any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concern, or other similar enterprise offering prizes dependent upon lot or chance, * * * shall be," etc.

The indictment shows that a commodity called "Mother's Oats" was sold in 10-cent packages, each of which contained a coupon which elaborately set forth a scheme for awarding premiums, and on the face of which was printed in red ink one or the other of the letters which spell the word "Mother's." The important premiums offered under the scheme are given only to those persons who hold coupons, the large red letters on the face of which can be so combined as to compose the word we have mentioned. The letter "O" is placed on only one coupon in 500, and obviously there is little chance to win one of the prizes; but there is a chance, though small, and each persistent purchaser of the packages and coupons buys it. Some of these packages, with the coupons inclosed, are charged to have been shipped by the defendant from Illinois to Kentucky, and that transaction is the occasion of this indictment; the government insisting that the coupons described come within the true intent and meaning of the act of Congress, and the defendant to the contrary.

Although the counsel for the defendant have urged otherwise, I think we may, at the outset, lay aside as immaterial all questions as to the mere sale of Mother's Oats in packages containing the coupons, and all questions as to the price and value thereof. Sales of such commodities in packages containing the coupons may be altogether lawful

in the state where they occur. They may be lawful in any state, for their legality may depend upon local laws. Congress has not undertaken to deal with that phase of the question. It has only undertaken to prohibit the carrying from one state to another of any such paper, certificate, or instrument as is described in the act, and the question we are to decide is whether the coupons come within that legislation. Upon reading the indictment, and the coupon therein set forth, it appears that what is proposed to be done is to give certain prizes, called "premiums," upon certain contingencies. Those contingencies are wholly dependent upon chance, which I take to be the very essence of a lottery. Except by the operation of mere chance, no allotment of premiums to particular persons can eventuate. The important premiums (or prizes) offered are ten in number, and the ascertainment of the person entitled, under the scheme, to one of those premiums, is wholly dependent upon chance; and the number of chances depends, of course, upon the number of packages purchased. Obtaining a premium (or prize) under the scheme is made to turn upon the finding upon the coupons held by any one person large red letters which can be combined into the word "Mother's." Unless that can be done, no person will be entitled to one of the ten important premiums offered. The assignment of a premium (or prize) to any given person must be the result of the operation in his favor of the chances that bring about that combination of letters. Does the obtaining of such a premium depend upon the event of a "lottery" or "chance," within the meaning of those words in the statute? In *Horner v. United States*, 147 U. S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237, the Supreme Court entered into an elaborate discussion of the meaning of the word "lottery," and, as I view the opinion in that case, I must hold that obtaining a premium under and through the scheme described in the indictment in this case must be the result of a lottery. At all events, it is dependent upon chance. Certainly there was a "paper," "certificate," or "instrument" purporting to represent a "chance" in the scheme of giving, and determining who should get, the premiums or prizes; "premiums" and "prizes" being, I think, equivalent words, within the meaning of the act. It seems to me that we must not construe the statute as embracing only such a lottery as the Louisiana Lottery was, where there was a wheel and other paraphernalia for drawing out numbers, because I do not think Congress had reference to any particular mechanism for giving effect to the operation of lot or chance. I think it had a more general purpose, in the language used, than that, and that a more unrestricted meaning should be given to the words of the statute; and, without undertaking to lay down any general principles or to give any precise definitions, it will suffice to hold that the facts charged in the indictment present a case within the general meaning and intent of the act. I think, if the facts stated in the indictment are true, the accused must be found to have caused a common carrier to carry from one state to another a paper, certificate, or instrument purporting to "represent" a "chance" in what may properly be called a lottery or other similar enterprise. This the act makes a public offense.

The demurrer must be overruled.

SECURITY TRUST CO. OF CAMDEN, N. J., v. UNION TRUST CO. et al.

(Circuit Court, E. D. Pennsylvania. December 30, 1904.)

No. 22.

1. FEDERAL AND STATE COURTS—CONFLICTING JURISDICTION.

Where a state court had assumed jurisdiction of a suit for the foreclosure of a railroad mortgage, had appointed a receiver, and entered a decree directing a sale, and had power to grant complainants relief with reference to certain rolling stock on which they claimed a lien, etc., a federal court would not thereafter assume jurisdiction of complainants' bill to declare and enforce such lien.

2. SAME—STATUTES—INJUNCTION.

Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting the issuance of an injunction by United States courts to stay proceedings in any state court, except in bankruptcy cases, prohibits the issuance of an injunction or restraining order against proceedings in a state court from the commencement of the suit until the judgment or decree is satisfied.

[Ed. Note.—Federal courts restraining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 18 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

In Equity.

James W. M. Newlin, for complainant.

Wm. S. Hammond and D. L. Krebs, for respondents.

HOLLAND, District Judge. This is a bill in equity filed in this district to restrain the Union Trust Company, trustee, one of the defendants, from selling certain property under a decree of the court of common pleas of Clearfield county. Defendants demur to the bill upon the ground that the court of common pleas of Clearfield county, Pa., sitting in equity, long prior to the commencement of the complainant's suit in this bill, took complete jurisdiction of the subject-matter set forth in the bill of complaint, and that the complainant has a complete remedy at law. The facts necessary to an understanding of this case, so far as can be gathered from the bill filed, are as follows: The Altoona & Philipsburg Connecting Railroad Company executed a mortgage on June 1, 1893, upon its property and leased lines to the Union Trust Company, trustee. A judgment nisi was entered thereon April 24, 1904, for the sum of \$366,675, and a decree made to sell the said property, together with the rolling stock, unless the same was paid by the defendants therein on or before June 1, 1904. Frank McCulley was appointed receiver of the Altoona & Philipsburg Connecting Railroad Company and the Pittsburg, Johnstown, Ebensburg & Eastern Railroad Company by the said court of common pleas of Clearfield county, and obtained a rule in said court on parties interested to show cause why the said railways and rolling stock claimed by the complainant in this bill should not be placed in his possession, which rule was returnable Thursday, May 12, 1904. This rolling stock used by the Altoona & Philipsburg Connecting Railroad Company and the Pittsburg, Johnstown, Ebensburg & Eastern Railroad Company is claimed by the complainant, as trustee for certain car-trust certificates created under certain agreements, by which these railroad companies leased this

rolling stock subject to the rights of the complainant, trustee for the trust certificates. The relief prayed for in this bill is that the defendants, or any of them, be enjoined from further proceeding under the bill in equity in the court of common pleas of Clearfield county until this court shall make a suitable decree identifying the complainant's rolling stock upon the lines of these railways and protect the complainant from sale of this rolling stock; (b) requiring the companies to furnish a complete inventory of the rolling stock; (c) to determine the lease now existing for said rolling stock, and to require the defendants to answer generally; and such other relief as the court may deem proper.

Upon the demurrer being filed the complainant moved to amend so as to alter its bill, and, instead of alleging that the decree of the court of common pleas of Clearfield county directs the sale of its rolling stock, it now asserts, in its amended bill, that the decree of the Clearfield county court does not direct the sale of the rolling stock, but that the defendant the Union Trust Company, notwithstanding this fact, has threatened to sell this rolling stock under said decree. The defendants oppose this amendment. The result, however, will not be different even if the amendment be allowed. The Clearfield county court has assumed jurisdiction of this whole subject-matter, and has ample power to grant complainant the relief sought in its bill. It is a matter arising out of the foreclosure proceedings in Clearfield county, and, as that court has obtained jurisdiction or possession of the cause, it should retain it throughout to the exclusion of all other courts. The case of *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145, is directly in point. See, also, *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390, and *Freeman v. Howe*, 65 U. S. 450, 16 L. Ed. 749. Section 720 of the Revised Statutes [page 581, U. S. Comp. St. 1901] prohibits the issuing of an injunction by any United States court to stay proceedings in any court of a state, except in bankruptcy cases. Under this section it has been held that, where a federal court and a state court have jurisdiction, the tribunal whose jurisdiction first attached holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399. This section applies to prevent the issuing of an injunction not only to a state court, but it prohibits a restraining order against parties to the suit in a state court. *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Wagner v. Drake* (D. C.) 31 Fed. 851; *Peck v. Jenness*, 48 U. S. 625, 12 L. Ed. 841; *Diggs v. Wolcott*, 8 U. S. 179, 2 L. Ed. 587. The prohibition extends not only to the proceedings in a state court up to and including the final judgment, but to the entire proceedings from the commencement of the suit until the execution issued on the judgment or decree is satisfied. *Wayman v. Southard*, 23 U. S. 1, 6 L. Ed. 253; *Leathe v. Thomas*, 97 Fed. 136, 38 C. C. A. 75; *Fenwick Hall Co. v. Town of Old Saybrook* (C. C.) 66 Fed. 389.

The bill, as originally filed, alleges the threatened sale of the claimed property under a decree of the Clearfield county court, and asks this court to interfere to restrain the parties from carrying out the order of that court. The decisions above cited make it clear that this court cannot interfere; and we do not think the complainant would be in any

better position if its bill be amended, because it alleges in the amendment that, while the decree of the Clearfield county court does not direct the sale of the rolling stock, yet, notwithstanding, the trustee threatens to sell it under this decree, and prays that it be restrained. It is very plain that this trustee is acting under the order or decree of the Clearfield county court, and according to the allegations in the amended bill it interprets that decree as authorizing it to sell complainant's rolling stock. Complainant's understanding of the decree is different, and it comes to this court for the purpose of having a construction put upon the decree of the Clearfield county court contrary to that placed upon it by the officer of that court, and then requests this court to issue an order restraining the defendants from carrying out the Clearfield county decree as they interpret it. This court has no authority to make such a decree. The proper forum for the complainant to obtain the relief sought for is in the court of common pleas of Clearfield county.

Demurrer sustained.

NORTHERN LUMBER CO. v. O'BRIEN et al.

(Circuit Court, D. Minnesota. January 24, 1905.)

1. RAILROAD LANDS—WITHDRAWAL FROM ENTRY—CONFLICTING CLAIMS.

Where certain railroad lands were withdrawn from pre-emption or homestead entry on the filing of the general route of a proposed railroad to which lands had been granted by Congress, such withdrawal of lands, which also came within the place limits of a subsequent grant to another railroad, excepted the lands from the subsequent grant, though, when the first railroad was afterwards built, its line was so changed that the lands did not come within its grant.

See 124 Fed. 819.

James B. Kerr, for complainant.

J. N. Searles, for defendants.

LOCHREN, District Judge (orally). On May 5, 1864, Congress enacted a statute granting to the Lake Superior & Mississippi Railroad Company certain lands in aid of the construction of a railroad from St. Paul to some point on Lake Superior, state of Minnesota, the grant being of the odd-numbered sections within specified limits, reserving lands which had been disposed of or which were covered by pre-emption or homestead entry, or in any other manner appropriated or reserved, and providing for indemnity in lieu of any such lands from odd sections within certain other specified limits. On the 7th day of May, 1864, two days later, the Lake Superior & Mississippi Railroad Company filed a map of its general route in the Land Department, and thereupon the Commissioner of the General Land Office issued an order withdrawing lands in odd sections from pre-emption or homestead entries within the supposed limits of this grant, and this order included the lands in question. On July 2, 1864, the land grant to the Northern Pacific Railroad Company was enacted, and the lands in question also came within the place limits of the grant to that road, according to the line of definite location which was afterwards adopt-

ed by the Northern Pacific Company and filed with the Secretary of the Interior.

The only question in the case is whether these lands having been withdrawn by executive authority prior to the passage of the act granting the lands to the Northern Pacific Railroad Company, this took them out of that grant; as when the line of definite location of the Lake Superior & Mississippi Railroad was afterwards determined upon, adopted, and filed these lands did not come within the limits of lands granted to that company. According to the usage of the Land Department for a long time, it had been customary to withdraw the lands along the lines of railroads which would come within the definition of lands which were granted to aid their construction from public sales and from entry by homesteaders or pre-emptors for the purpose of reserving them for such grants; and that had been done in this case with reference to the supposed line of the Lake Superior & Mississippi Railroad before the grant to the Northern Pacific Company. The question is whether this reservation of them by executive authority excepted them or took them out of the subsequent grant to the Northern Pacific Railroad Company. It seems to me that under the authority of the case of *Wolcott v. The Des Moines Company*, 5 Wall. 681, 18 L. Ed. 689, it did have that effect, although, when the Lake Superior & Mississippi Railroad was afterwards built, the line had been changed so that the lands did not come within its grant, but fell entirely outside of it. Under the authority of that case, at the time of the passage of the act making the grant to the Northern Pacific Railroad Company the lands were, by executive authority, in the supposed carrying out of the act of Congress making the prior land grant, reserved and withdrawn, and did not then stand in the category which would be understood by the general term "public lands," but came within the exception of lands that had been reserved. I am inclined to think that this conclusion is determinative of this case, and that a decree must be entered dismissing the bill.

Ordered accordingly.

THE SHENANDOAH.

'District Court. N. D. California. December 20, 1904.)

No. 13,360.

1. SEAMEN—INJURY IN SERVICE—LIABILITY OF VESSEL.

Evidence considered, and held insufficient to show that the injury of a seaman was due to the negligence of the officers of the vessel, or to defective appliances, or that the master failed in his duty in not putting into a port to obtain medical treatment and care for the seaman after the injury, which, although in fact serious, was of such nature that its extent was not apparent, and could only have been discovered by a medical examination.

In Admiralty. Suit by seaman to recover for injuries and for failure of the master to afford him proper surgical treatment.

F. R. Wall, for libellant.

Andros & Hengstler, for respondent.

DE HAVEN, District Judge. I have fully considered the evidence in this case, and my conclusion therefrom is that the master and officers of the Shenandoah used reasonable care in overhauling her rigging before reaching Cape Horn, and in replacing old and defective ropes with others, which in the judgment of her officers were sufficiently sound and strong to make the vessel's rigging seaworthy. I am also of the opinion that the evidence does not show that the gasket upon which the libelant was engaged in hauling while furling the maintopsail parted, or that his falling from aloft was caused by the unsound condition of such gasket, as alleged in the libel. Nor do I think that after the libelant was injured the master failed in his duty to him in not putting into Port Stanley, or one of the other ports named in the libel, in order that he might receive surgical treatment. It is true the libelant's injury was in fact serious and painful. But this did not necessarily make it the duty of the master to deviate from his course, and make for some port where libelant might obtain the services of a surgeon. The master was only required to exercise a reasonable judgment as to the extent of libelant's injuries, and as to the necessity of placing him under the care of a physician at some near port. In the case of *The Iroquois*, 113 Fed. 964, the court, in discussing the extent of the master's obligation when a seaman is injured at sea in the discharge of his duties, said:

"Of course, if the vessel were so far at sea as to make it uncertain whether she could reach the nearest port in time to benefit the sufferer, or if the master had no reason to believe that the sickness or injury was serious, he would not be chargeable with negligence for proceeding on his course, giving to the seaman such care as his knowledge and the conveniences on board the vessel would permit. When there is no physician to consult, the master must necessarily determine, as best he may, whether the injury or sickness is such as to endanger life or limb; and he cannot be charged with negligence simply because he erred in judgment as to the necessity for putting into port, when the nature of the disease, or the extent of the injury was obscure, and its serious character would not have been apparent except to a physician or surgeon."

This language is particularly applicable to the present case. That libelant sustained a lesion in the region of his hip joint was not apparent, and could not have been discovered except by a surgeon; and the master is not to be charged with negligence in acting upon the belief that the extent of libelant's injury was only the severe bruising of his thigh, and the nervous shock incident to the fall.

The libel will be dismissed, the claimant to recover costs.

IN RE LESSARD.

(Circuit Court, D. New Hampshire. January 5, 1905.)

No. 521.

1. ARMY—MINORS—ENLISTMENT—DESERPTION—ARREST—HABEAS CORPUS.

Where a minor under the age of 18 years enlisted without the consent of his father, then living, and after his arrest for desertion, but before final hearing of a writ of habeas corpus by the father to obtain his discharge, formal charges of desertion and fraudulent enlistment, etc., were preferred against him by the military authorities, he could not be

discharged under such writ until he had satisfied the charges pending against him by the government.

F. P. Tilton, for petitioner.

C. J. Hamblett, U. S. Atty.

ALDRICH, District Judge. This is a habeas corpus proceeding upon petition of a father to secure the discharge of a minor son, who enlisted in the army without his consent. Before the petition for the writ, Lessard had been arrested as a deserter by the city marshal of Laconia by virtue of a proclamation issued by military authority, and under color of the act of Congress authorizing civil officers to arrest under such a proclamation. Upon citation to the city marshal to appear and show cause why the writ should not issue, and upon due hearing, the writ issued, and the minor son was brought before this court, and the petitioner and the government were heard. After the arrest, and after the issuance of the writ, but before judgment or final hearing in this court, and within a reasonable time, formal charges of desertion and fraudulent enlistment and receipt of pay and allowances were preferred against the minor by the military authorities.

The recent case of *United States v. Reaves* (decided in the Court of Appeals for the Fifth Circuit) 126 Fed. 127, 60 C. C. A. 675, seems to be exactly in point to the case under consideration. I cannot view the case *In re Carver* (C. C.) 103 Fed. 624, as at all decisive of the situation involved here, for the reason that there the case was not one of desertion, nor was it a case where the military authorities had acted by proclamation or arrest. Likewise the case of *Ex parte Houghton* (C. C.) 129 Fed. 239, differentiates itself from the case at bar, because there the arrest was made and the charges preferred subsequent to the petition for habeas corpus, and the decision was made to rest upon the ground that the jurisdiction of the Circuit Court—in other words, the civil tribunal—had first taken hold of the situation. The result is that I find no controlling authority in this circuit governing a case like the one before me. That being so, and the questions involved having reference to federal statutes, and being questions of a character to be governed by general law, I must accept the decision of the United States Circuit Court of Appeals in the Fifth Circuit, to which I have referred, as decisive of this case, in its present aspect, against the petitioner. By arrangement, the city marshal was permitted to lodge the respondent in safe-keeping with the commanding officer of Ft. Constitution, in New Castle, subject to the writ. It is therefore only necessary to discharge the writ of habeas corpus, which will leave the minor in custody of the military authorities. This should be done, however, as in the case in the Fifth Circuit, without prejudice to the petitioner's right to demand his son's discharge from the army, and enforce the same by appropriate remedy, when the son shall have answered or satisfied the charges now pending against him in that department of the government.

Writ discharged, without prejudice.

In re FELDSEK.

(District Court, E. D. Pennsylvania. January 14, 1905.)

No. 1,807.

1. BANKRUPTCY—PROPERTY OF BANKRUPT—RECOVERY—THIRD PERSON—LIABILITY—PROOF.

A trustee is not entitled to recover funds alleged to belong to a bankrupt from a third person unless the proof shows beyond a reasonable doubt that such person has the fund or property in his possession or control.

2. SAME—EVIDENCE—FINDINGS.

Evidence in a proceeding to require a third party to pay over to a trustee in bankruptcy certain moneys claimed to be in his possession, but belonging to the bankrupt, held to sustain a decision by the referee in favor of the trustee.

In Bankruptcy.

Henry N. Hessel, for trustee.

Julius C. Levi, for Samuel Feldser.

HOLLAND, District Judge. This is a certificate of review to the decision of the referee directing Samuel Feldser to pay over to J. Howard Reber, trustee in bankruptcy of the estate of Rosa Feldser, bankrupt, the sum of \$2,800. The referee, after taking 188 pages of testimony upon the rule of Samuel Feldser to show cause why he should not pay over \$3,500 to the trustee, filed an opinion in which he finds that Samuel Feldser has in his possession or control the sum of \$2,800, and directs him to pay the same over to the trustee. I have gone over the evidence and the opinion of the referee very carefully, and I am convinced that he is correct in his conclusions of law and fact, with the exception of the amount which he finds should be paid over. It is necessary that it should be, as stated by the referee, found beyond a reasonable doubt that the person against whom the order is made has the funds or property in his possession or control.

On the 30th day of November, 1903, Samuel Feldser received \$5,500 from Mr. Lessig, Jr., for the sale of the store, and immediately thereafter began paying off some of the creditors. To the Citizens' National Bank he paid \$1,500, and to the Tri-County Bank \$500. He further states that he paid to various persons in Pottstown different sums, ranging from \$15 to \$500, making a total of small amounts of \$1,200, and he gives the names and residences of these persons to whom these amounts were paid. The sums particularly specified as paid to these persons named do not total to the sum of \$1,200, but there are others that he claims were paid, whose names he failed to recollect; and the evidence in regard to the \$1,200 is very suspicious, it is true. But notwithstanding the fact of its being improbable, the names of the parties to whom the payments were made were in Pottstown, and the creditors could have ascertained whether or not he was telling the truth as to these payments; and, in the absence of any evidence from them to the con-

trary, the character of his testimony and the circumstances as to the payments having been made are not sufficient to convince me beyond a reasonable doubt that this money was not paid out by him. But as to the balance, to wit, \$2,250, which he claims he paid to his mother, I am convinced he still has it in his possession and control. The whole transaction, from the beginning, is of a character to indicate a fixed design to defraud creditors. The method of disposing of it to Lessig, and the story as to how it occurred, its transfer to the present owner, all indicate what was the object of the various transactions. But this can only throw light upon the question as to what Samuel Feldser was aiming to do by the transfer of the property, and would be no reason why an order should be made to require him to pay over money if he did not have it in his possession. His story of the sale and disbursement is so grotesque and improbable that no one can possibly believe it, and, taken together with other evidence and circumstances in the case, I have no doubt whatever but that he has now in his possession and control \$2,250.

The exceptions to the referee's order are therefore dismissed, and it is ordered and decreed by the court that Samuel Feldser be directed to pay over to J. Howard Reber, trustee in bankruptcy of the estate of Rosa Feldser, bankrupt, the sum of \$2,250 on or before February 15, 1905.

Ex parte LOOK.

(District Court, N. D. California. December 27, 1904.)

No. 13,396.

1. HABEAS CORPUS—CRIMINAL CONVICTED BY STATE COURT—APPEAL—ALLOWANCE.

A federal court will not allow an appeal from its decision refusing a writ of habeas corpus to release one convicted of murder by a state court, when on a previous writ of error the United States Supreme Court had decided that no rights secured to the accused by the federal Constitution and laws had been violated, and the only ground for the application was that defendant was never properly charged before a committing magistrate.

On Habeas Corpus.

The petitioner, Lee Look, was convicted in one of the superior courts of the state of California of the crime of murder, and thereupon sentenced to suffer the penalty of death. This judgment was affirmed by the Supreme Court of the state, and from this judgment a writ of error was taken to the Supreme Court of the United States. The writ of error was dismissed by that court, but for what reason does not appear, and thereupon the petitioner filed his petition in the District Court of the United States for the Northern District of California for a writ of habeas corpus, claiming that he had never been properly charged before the committing magistrate with the crime of murder, and that the information upon which he was tried was, for that reason, void, and his conviction thereon was in violation of the rights, privileges, and immunities granted him by section 1, art. 14, of the amendments of the Constitution of the United States.

A. H. Jarman, for petitioner.

DE HAVEN, District Judge. Petitioner herein has filed his petition for an order allowing an appeal from the order of this court denying his application for the issuance of a writ of habeas corpus. The case as presented is in principle the same as that of *In re Durrant* (C. C.) 84 Fed. 314-317, and, following the rule therein announced, the petition for an order allowing an appeal is denied.

In re HASKELL'S ESTATE.

(District Court, N. D. California. December 20, 1904.)

No. 433.

1. BANKRUPTCY—ASSIGNEES—APPOINTMENT—NECESSITY.

A bankrupt, against whom proceedings were instituted in December, 1868, was alleged to have sold certain land to petitioner's predecessors in interest prior to 1860, but petitioner alleged that the conveyance executed by the bankrupt omitted the land in controversy by mistake. *Held*, that a successor to the bankrupt's assignee, who died in 1893, would not be appointed solely to enable petitioner to quiet her title to the land.

J. S. Carr, for petitioner.

DE HAVEN, District Judge. This is an application for the appointment of an assignee of the estate of Daniel H. Haskell in place of Henry C. Hyde, who died in 1893. The bankruptcy proceeding was commenced in the month of December, 1868. The petitioner is an adverse claimant of certain real estate alleged to have been sold by the bankrupt, prior to the year 1860, to some one of petitioner's predecessors in interest, and omitted by mistake from the deed of conveyance executed by the bankrupt. The only reason set forth for the appointment of an assignee is to enable the petitioner to sue him, and thus to quiet the title to the land which she claims, and the record title to which stands in the name of the bankrupt. I do not think the court would be justified in appointing an assignee for any such purpose upon the petition of an adverse claimant.

The petition will be denied.

HALL et al. v. NORTH PACIFIC COAST R. CO.

(District Court, N. D. California. December 16, 1904.)

No. 13,186.

1. DEATH—EVIDENCE.

In an action for the alleged death of a passenger resulting from the sinking of a ferryboat in a collision, evidence reviewed, and *held* sufficient to sustain a finding that deceased was a passenger on the boat that sunk, and lost his life in the collision.

2. COLLISION—FERRYBOATS—MUTUAL FAULT.

Where two ferryboats approaching each other attempted to cross courses in a dense fog, when neither could see the other in time to avoid a collision, they were both at fault—the one for attempting the maneuver; and the other in assenting to it and putting her wheel hard astar-

board, causing her to swing one point nearer to the other boat, though she immediately stopped and reversed her engines.

3. SAME—LIMITATION OF LIABILITY.

Where, after collision, the corporation owning both boats filed a petition to limit its liability with reference to the boat lost only, and did not offer to surrender the colliding boat, an interlocutory decree that the owner of the boat lost was entitled to limit its liability to the appraised value of such boat with its freight pending was no bar to libellant's subsequent action against the owner for damages for the death of a passenger in such collision, in which it was held that both boats were at fault, though libellant had appeared and presented a claim for such damages in the limitation proceeding.

[Ed. Note.—Limitation of vessel owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

4. SAME—JUDGMENTS—SATISFACTION.

Where libellant appeared in a proceeding by the owner of certain ferryboats to limit liability as to one of them for a collision, and filed a claim for death of a passenger, the owner of the boats, on satisfying the decree in such proceeding, would be entitled to have the amount paid libellant thereunder deducted from the amount of damages awarded her in a subsequent suit for damages on the same cause of action.

5. SAME—DAMAGES.

Where deceased, at the time of his death in a collision at sea, was between 52 and 53 years of age, and had been living with his family, consisting of himself and seven children, damages to the extent of \$5,000 were recoverable therefor.

H. V. Morehouse, for libellant.

Wm. W. Deamer, for respondent.

DE HAVEN, District Judge. This is a libel in personam, brought by Patrick Cassidy, as guardian ad litem of Catherine Hall, an incompetent person, and also of her minor children, to recover from the defendant damages alleged to have been sustained by those for whom the action is prosecuted by reason of the drowning of one Alexander Hall as the result of a collision between the steam ferryboats San Rafael and Sausalito on November 30, 1901. The libel alleges that Hall was a passenger on the San Rafael at the time, that the defendant was the owner and engaged in operating both of the colliding steamers, and that the collision was caused by the negligence of the defendant in their navigation. The defendant, in its answer, denies that Hall was a passenger on the San Rafael, or that he was drowned as a result of the collision referred to in the libel; also denies that such collision was caused by the negligence of the defendant; and also pleads in abatement certain proceedings prosecuted in this court by the defendant for limitation of liability for the damages growing out of said collision.

1. The evidence bearing upon the question whether Alexander Hall was a passenger upon the San Rafael, and lost his life in the collision, is entirely circumstantial. He was about 52 years of age, and resided near Sacramento city, with his family, consisting of himself and seven children. His wife was in another part of the state under treatment for some mental disease. The evidence shows that he was a kind father, seldom away from his children, and never for more than a few days. He left his home on the day of the collision with the

avowed purpose of going to San Rafael, to visit his brother-in-law, and reached Oakland about 5 o'clock in the afternoon of that day, and was last seen on the ferryboat leaving Oakland at that hour for San Francisco. This boat reached San Francisco in time for him to have taken passage on the San Rafael on the fatal trip when she came into collision with the Sausalito and was sunk. He has never been heard of since. While it must be admitted that these facts, in the absence of direct proof that he was on the San Rafael when she left San Francisco on her last trip, do not make a very strong case in favor of the contention of the libellant that Hall was a passenger on the San Rafael, and was drowned, still it cannot be said as a matter of law that they are insufficient to prove the fact thus contended for. The most reasonable conclusion to be drawn from these facts is that he was a passenger on the San Rafael, and was drowned. There is nothing in the evidence to suggest any other cause for his continued absence from home and family.

2. The facts relating to the collision between the San Rafael and Sausalito, and which the libellant insists show negligence upon the part of the servants of the defendant in the navigation of both steamers, may be very briefly stated: The San Rafael left San Francisco for Sausalito about the hour of 6:15 on the evening of November 30, 1901, and the Sausalito left the town of Sausalito for San Francisco at about the same time. The night was dark, and the fog very thick. Just after passing Alcatraz Island, the master of the Sausalito heard the fog whistle of the San Rafael, from one-half to one point off his port bow, and shortly thereafter the San Rafael sounded two whistles, indicating that she was going to port. The Sausalito answered with two whistles, and the wheel of the Sausalito was immediately put hard astarboard, for the purpose of changing her course to port. The master of the Sausalito testified, in substance, that he knew the San Rafael was in error in giving the passing signal to port, and that, after answering the same, he at once gave orders to his engineer to stop and back his vessel, and at the same time gave three blasts of his whistle, to notify the other steamer that his engines were reversed. The engines of the San Rafael were also reversed about the same time, and within a very short time thereafter—not more than two minutes—the collision occurred, the bow of the Sausalito striking the San Rafael an angling blow on her starboard side, and injuring her to such an extent that she sank in 20 minutes, and became a total loss. The evidence also shows that just prior to the collision the Sausalito had swung to port one point. There was a strong ebb tide pressing against the side of the San Rafael at the time, and the defendant claims that the Sausalito was not under headway, and that the collision was caused by the drifting of the San Rafael upon the Sausalito. In the view I take of the case, it is not necessary to determine whether this claim is sustained by the evidence or not. My conclusion from all of the evidence is that the collision was caused by the mutual fault of the steamers in attempting to cross courses in a dense fog, when neither could see the other in time to avoid a collision. It is true the first error was committed by the San Rafael, but it was certainly an error upon the part of the Sausalito to assent to the San Rafael's pro-

posed change of course, and to starboard her wheel for the purpose of passing to port; and the evidence does not satisfy me that the effect of this error was rendered harmless by the subsequent action of the Sausalito in stopping and reversing her engines. She had swung to port one point, and her wheel was still hard astarboard at the time of the collision, and, in my opinion, in thus changing her course, she contributed to the cause of the collision.

3. The defendant filed in this court a petition to limit its liability, as owner of the steamer San Rafael, for all damages growing out of the collision mentioned in the libel. The libelant here appeared in the proceeding as guardian ad litem of the widow and children of Alexander Hall, and presented his claim for the same damages sought to be recovered by him in this action. An interlocutory decree has been entered in that proceeding, which decrees that the defendant "is entitled to limit its liability, as owner of the steamer San Rafael, for and on account of the matters and things in its said petition alleged, * * * and its liability, as owner of the steamer San Rafael, is limited to the appraised value of the said steamer San Rafael with its freight pending." It is claimed by the defendant that upon these facts the libelant is not entitled to recover in this action, and the same should abate. I cannot give my assent to this contention. The defendant in the proceeding referred to never sought to limit its liability, as owner of the Sausalito, for the damages resulting from the collision between the San Rafael and Sausalito, and it is apparent from the decree therein that the court did not intend to limit the liability of the defendant for any wrongful act of the Sausalito contributing to such collision. It may be conceded that the court ought in that proceeding to have required the defendant to also surrender the Sausalito, and thereupon have limited the liability of the defendant to the value of both steamers, and thus have disposed of all questions growing out of the collision in one action; but this was not done, and, not having been done, the right of the libelant to maintain this action is not affected by the decree limiting the defendant's liability as owner of the San Rafael. Of course, when the defendant satisfies the decree in that proceeding, it will be entitled to have the amount paid to the libelant thereunder deducted from the amount of damages awarded by the decree herein. In this way, the defendant will be allowed to satisfy both decrees by the payment of the actual amount of damages for which it is personally liable.

4. Upon the question of damages there is but little to be said. The deceased was 52 or 53 years of age at the time of his death. There is no evidence in relation to his average earnings, but the court will be warranted in presuming that he was able to support his family. Besides, the loss of the training and counsel of a discreet and kind father may be taken into consideration in fixing the damages sustained by his minor children by reason of his death. *Shearman & Redfield on Negligence*, § 771.

My conclusion is that the libelants are entitled to recover the sum of \$5,000 as damages, and costs, with interest from date until the decree is satisfied; the decree to be satisfied by the payment of the sum so awarded, less any amount which may be paid to the libelants upon

the decree rendered in their favor in the Matter of the Petition of the North Pacific Coast Railroad Company, 134 Fed. 749, for a limitation of its liability, filed in this court, and numbered 13,112.

Let a decree be entered in accordance with the foregoing opinion.

SESSIONS et al. v. SOUTHERN PAC. CO. et al.

(Circuit Court, N. D. California. December 27, 1904.)

1. FEDERAL COURTS—REMOVAL OF CAUSE—SEPARABLE CONTROVERSY—ACTION FOR DEATH.

Where, in an action for death of a passenger, plaintiff joined the railroad company, a nonresident corporation, with certain of its employes, operating the colliding trains which caused the accident, who were of the same citizenship as plaintiff, but the only negligence averred was that of the servants in control of the trains, the corporation's liability being based wholly on the fact that the acts of the servants were within the scope of their employments, and bound the company, the complaint did not charge a joint tort, and hence the corporation was entitled to remove the cause to the federal court.

[Ed. Note.—Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

On Motion to Remand Cause.

W. B. Rinehart and Welles Whitmore, for plaintiffs.

P. F. Dunne, for defendants.

HUNT, District Judge (orally). Plaintiff alleges that she is the widow of Charles A. Sessions, deceased, and that Nathan P. Sessions, also a plaintiff, is the son and only child of said Charles A. Sessions, deceased. Plaintiff alleges: That she was entirely dependent upon her husband for maintenance and support. That she and her son and the defendants McGuire and Cole are residents of the state of California. That the defendant Southern Pacific Company is a corporation organized and existing under the laws of the state of Kentucky, doing business in the state of California, and that on December 20, 1902, the defendant company was engaged in operating trains upon its railway lines between the city of Oakland, Cal., and the city of Fresno, in the same state. That on said December 20, 1902, at the time of the occurrences set out, and at the time of the death of said Charles A. Sessions, the defendants McGuire, Dolan, and Cole were employed by, and were employes and servants of, the defendant corporation, the defendant McGuire being a locomotive engineer, engaged in managing and running the locomotive engine attached to and being part of a certain passenger train of the defendant known as the "Stockton Flyer," and the defendants Dolan and Cole acting in the respective capacities of conductor and brakeman upon a certain train operated by the defendant corporation and known as the "Owl" train, and that the defendant Dolan was at said time in the management and control of the said passenger train known as the "Owl" train, and the defendant Cole was at the same time acting as passenger brakeman on the

said train. That upon December 20, 1902, the said Charles A. Sessions purchased a ticket entitling him to passage over the defendant's line from Oakland to Fresno by way of the town of Byron, and was taken as a regular passenger upon the "Owl" train, and that the defendant company carried the said Sessions on said day from Oakland to a point on said railway line near the town of Byron, where the said "Owl" train stopped, and the car in which said Sessions was riding as a passenger stopped; and while said car and the said "Owl" train stopped and were standing on the track of the said railway the said car and the said train were run into from the rear by another train of cars drawn by a locomotive engine, said train being known as the "Stockton Flyer," and which said locomotive engine and said train of cars known as the "Stockton Flyer" were being run at said time by said defendant, its agents, servants, and employes, including said McGuire, over and along said line of railway, at a high rate of speed. That the said "Owl" train was at said time owned, managed, and controlled by the said defendant Southern Pacific Company, its agents, servants, and employes, one of which was the said Dolan, and one of which was the said Cole. That the said train known as the "Stockton Flyer" collided with the car of the "Owl" train, in which the said Charles A. Sessions was riding, and then and there killed him; and that said collision and said wreck and the said death of the said Sessions were caused by, and were the direct result of, the carelessness and gross negligence of the said defendants. Plaintiffs ask damages in the sum of \$20,000.

The action was instituted in the superior court of the state of California in and for the county of Alameda, and thereafter the defendant Southern Pacific Company filed its petition for removal, alleging its incorporation under the laws of the state of Kentucky, and that the plaintiffs Ella A. Sessions and N. P. Sessions were and are residents and citizens of the state of California, and that there is in said suit a controversy wholly between citizens of different states. Defendant also sets forth in its petition for removal that in June, 1903, an action was instituted upon the same claim as herein set out against this defendant in the superior court of the state of California in and for the county of Contra Costa, to recover of this defendant, as the sole defendant therein, the sum of \$20,000, for the same damages alleged to have been sustained by the same plaintiffs, Ella A. and N. P. Sessions, on account of the death of the same Charles A. Sessions named in the complaint on file in this present suit, and that thereafter the said suit was removed to the Circuit Court of the United States, and that petitioner, when the action was removed, filed its answer in the Circuit Court of the United States, and that said suit was pending and undisposed of in the Circuit Court of the United States until the 26th day of September, 1904, on which date the plaintiffs in said action dismissed said suit from the said Circuit Court of the United States, and immediately after said dismissal, to wit, on the 29th day of September, 1904, plaintiffs brought this action in the superior court of the state to recover damages in the sum of \$20,000, alleged to have been sustained by the said plaintiffs on account of the death of the said Charles A. Sessions named in the plaintiffs' complaint, and joined

therein as defendants the said McGuire, Dolan, and Cole. Petitioner further sets forth that the action sought to be removed against the three codefendants joined therein presented no actionable cause for negligence against the petitioner's codefendants, McGuire, Dolan, and Cole, and that no cause of action was stated against them, or either of them, and that they were joined merely as a device to defeat, and for the sole purpose of defeating, the right of petitioner to removal to the Circuit Court of the United States. Petitioner set forth that the defendants at the time of the accident alleged in the complaint were employes at monthly wages, and that each of them was and is wholly unable to respond in damages in any appreciable amount to the plaintiffs, and that the cause of action set up and alleged presented a separable controversy. The necessary bond was furnished, and the cause was removed. The plaintiffs have now filed a motion to remand the cause to the superior court of the state.

An examination of the complaint fails to show the commission of a joint tort. The averments, taken together, are that the negligence was that of the servants who had control of defendant's train when the collision occurred. No other representative of the corporation is charged to have been present or to have been associated with them; hence the argument of joint negligence of the servants and principal is the legal view of the plaintiffs, predicated upon the belief that the acts of the servants in control, being acts of agents and servants in the scope of their employments, were the acts of the defendant company, and that, therefore, the principal and agent become jointly liable in a single action. The plaintiffs rely principally upon the case of *Railroad Company v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. The rule that, where concurrent negligence is charged, the controversy is not separable, as laid down in the *Dixon Case*, must be regarded in its relation to the construction put upon the pleadings and the record in that particular case, and, when so regarded, the decision of the court is limited to the determination that the Court of Appeals of Kentucky was correct in denying a petition to remove where a complaint expressly averred that the death of the plaintiff was caused by the joint and concurrent negligence of all the defendants. The chief justice argued that the unusual rate of speed of the train, as averred in the complaint in that case, may have been permitted by some rule of the company itself, and, if so, the negligence was concurrent; not, as I understand it, however, by derivative negligence, but by direct omission or neglect, which would make the company concurrently liable with the employes in an entire cause of action. But in the case under consideration there is no such allegation averring that the death of plaintiff was caused by the joint and concurrent negligence of all the defendants. The case is brought fairly within the principle of the *Warax Case* (C. C.) 72 Fed. 637, that "the liability of the master for the negligence of his servants in his absence, and without his concurrence or express direction, arises solely from the policy of the law which requires that he shall be held responsible for the acts of those he employs, done in and about his business, while the liability of the servant arises wholly from his personal act in doing the wrong." The Supreme Court upholds this principle, and, where its application may be made to

a state of facts such as plaintiffs plead herein, the cause of action cannot be joint. Believing that the servants are improperly joined as defendants with the railroad company, the company has a right to have the suit tried in this court.

The motion to remand is denied.

DONOVAN v. SALEM & P. NAV. CO.

(District Court, E. D. Pennsylvania. December 20, 1904.)

No. 56.

1. ADMIRALTY—SUIT IN FORMA PAUPERIS—SHOWING REQUIRED.

A showing to obtain leave to maintain a suit in admiralty in forma pauperis, although made in conformity to rules of the court long in force, must also conform to the requirements of Act July 20, 1892, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706]; but when process has issued without such showing, and a motion has been made to require security for costs, libelant may be permitted to supply the omission, as contemplated by section 2 of the act.

In Admiralty. On motion for order on libelant to enter security for costs.

Willard M. Harris, for libelant.

J. Warren Coulston and Adolph Scherve, for respondent.

J. B. McPHERSON, District Judge. On August 26, 1904, the libelant filed a libel in personam, averring that he was employed by the respondent to command a steamboat, that the tender of his services as such master was afterwards refused, and that he had suffered certain damage by this breach of contract. The libel also contained the averment "that the libelant, by reason of poverty, is unable to defray the expenses of litigation, and prays that process may issue and be served in forma pauperis." His proctor also certified "that in my opinion there is reasonable cause for suit." Process was accordingly issued in forma pauperis, and the suit has proceeded so far that the libelant has finished taking his testimony. The respondent now comes forward with a motion that the libelant be directed to deposit the estimated costs of the cause or give security therefor, the motion being based upon the papers on record, and upon the facts disclosed by the depositions; these depositions disproving (so it is said) the averment of poverty contained in the libel, and showing, moreover, that the libelant is not the only person interested in the result of the litigation.

There are some differences in scope between admiralty rules 4 and 5 of this district and the act of July 20, 1892, 27 Stat. 252, 2 Supp. Rev. St. 41 [U. S. Comp. St. 1901, p. 706], as will appear by comparing the statute and the rules. The latter are as follows:

"4. No process shall issue in a plenary proceeding until the estimated costs of the cause shall have been deposited or secured by the libelant, except in a case of seamen's wages, unless by the special order of the court.

"5. But if it shall appear that a party seeking redress is unable by reason of poverty to defray the expenses of litigation, a proctor will be assigned

him by the court, and on demand of such proctor, and his certificate that there is reasonable cause for suit, process shall issue and be served in forma pauperis."

These rules have been in force for many years in this district, and the libel now under consideration was evidently drawn with exclusive reference to them, and without regard to the statute, whose provisions, as I have already stated, are not identical. The act is in these words:

"Be it enacted, &c., that any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

"Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases.

"Provided, that the United States shall not be liable for any of the costs thus incurred."

So far as the act differs from the rules, the former must prevail, and the consequence is that the libelant did not bring himself within the protection of the statute. He did not aver that he is a citizen of the United States—what privilege of suing in forma pauperis an alien may have is a matter for future consideration—and he did not make affidavit that he is unable to give security for the costs, or that he believes he is entitled to the redress he seeks. These are statutory requirements that are not to be evaded, and they should appear, in all such cases, either by a separate affidavit or by appropriate averments in the libel, before process is issued. But the second section of the statute seems to contemplate that during the progress of the trial the respondent may see cause to demand fees or security for costs, although the suit may have been begun without deposit or bond, and it therefore provides that "the plaintiff may answer and avoid" such demand "by filing a like affidavit." Under this section, therefore, the libelant is entitled to an opportunity to answer the pending motion, and an appropriate order must be made for that purpose. The court will then be in a position to determine, from all the evidence in the case, whether the libel should be dismissed under the provisions of section 4—to which

Judge Holland referred in *Our Friend v. Majestic* (D. C.) 131 Fed. 395—or should go on without deposit or security to the final hearing. In this connection I may, perhaps, say that it may be worth while to inquire hereafter, as bearing upon the truthfulness of the libellant's averment that poverty prevents the entry of security (if such an averment shall be made), whether any other person has a possible interest in the recovery, and may, therefore, be properly required to come to the libellant's assistance in this respect. *Boyle v. Great Northern Railway* (C. C.) 63 Fed. 539.

The libellant is hereby granted leave to file a sworn answer to the pending motion within 10 days; proceedings to stay meanwhile.

CUNARD S. S. CO., Limited, v. STRANAHAN.

(Circuit Court, S. D. New York. November 16, 1904.)

1. ALIENS—PENALTY FOR BRINGING IN DISEASED IMMIGRANTS—CONSTRUCTION OF STATUTE.

Section 9 of Act March 3, 1903 (32 Stat. 1215 [U. S. Comp. St. Supp. 1903, p. 175]), making it unlawful for any person, transportation company, etc., to bring to the United States any alien afflicted with a loathsome or with a dangerous contagious disease, and providing that, if it shall appear to the satisfaction of the Secretary of Commerce and Labor that any alien so brought to the United States was afflicted with such a disease "at the time of foreign embarkation and that the existence of such disease might have been detected by means of a competent medical examination at such time," such person or transportation company shall pay a fine to the collector, to be enforced by withholding clearance papers from the vessel until its payment, is intended to apply only to a case where a diseased person is brought in by a vessel as a passenger or voluntarily, and when the vessel owner or transportation company has an opportunity to discover the existence of the disease by means of a medical examination before the alien is taken on board, and a vessel owner cannot be subjected to the penalty for bringing into port an alien who has stolen his passage, and whose presence on the vessel was not discovered before her sailing.

On Demurrer to Complaint.

Lord, Day & Lord, for complainant.

Henry L. Burnett, U. S. Atty., and Wm. Michael Byrne, Asst. U. S. Atty., for defendant.

WALLACE, Circuit Judge. I find that in giving my reasons, at the close of the argument, for overruling the demurrer to the complaint, I was under a misapprehension in assuming that the collector required the payment of the so-called "fines" without express authority; that is, that the statute did not provide any specific method of enforcing their payment. Upon this assumption I expressed the opinion that the penalty or fine could only be enforced by judicial proceedings, overlooking the clause authorizing the collector to refuse clearance papers to the vessel while the penalty remains unpaid. In view of this provision, I have no doubt that in a proper case the collector can enforce payment of the sum specified

by the method prescribed, and that it is of no consequence that the sum is termed a "fine." My opinion, however, remains unchanged that the conditions did not exist which authorized him to exact the penalty in the case of the four aliens who were not brought in by the vessel as passengers, but who were stowaways. I think the statute is intended only to apply to a case where a diseased person is brought in by the vessel as a passenger, or voluntarily, and when the vessel owner or transportation company has an opportunity to discover the existence of the disease by means of a medical examination at the time or before the alien is taken on board. Before the Secretary of Commerce and Labor can pass judgment upon the question whether the existence of the disease might have been detected by means of a competent medical examination, the conditions must exist which call for the exercise of his judgment, otherwise he has no jurisdiction to pass upon it. This jurisdiction can attach only when the vessel owner has brought the diseased alien into a port of this country. I think the word "bring" is used in the sense of "import." The statute refers to the disease as one that existed at the time of the "foreign embarkation" of the alien, and which could have been discovered at that time by a competent medical examination. This can be fairly read as meaning the time when the alien is taken on board the vessel in a foreign country to be imported into this country. The purpose is not to be imputed to Congress, in the absence of plain language, to penalize an act innocent of intentional wrong. It would be an unnecessary, and it seems to me an unwarranted, construction to read the statute as intended to subject the vessel owner to a penalty for bringing into the port an alien who has stolen his passage, and whose presence on the vessel may not have been discovered before her arrival. Such a person is not "imported" within the ordinary meaning of penal laws. *The Brig Wilson v. United States*, 1 Brock. 423, Fed. Cas. No. 17,846; *Schooner Mary and Cargo*, 1 Gall. 206, Fed. Cas. No. 9,183; *Schooner Boston and Cargo*, 1 Gall. 239, Fed. Cas. No. 1,670.

In re ANDERSON.

(District Court, D. Montana. January 16, 1905.)

No. 270.

1. **BANKRUPTCY—DISCHARGE—APPLICATION—FILING—TIME—EXTENSION.**

Where a bankrupt failed to file his application for a discharge within a year after adjudication, as provided by Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], and made no affidavit in support of an application for an extension of time, an affidavit by one member of a firm of attorneys who had represented him in the bankruptcy proceedings, alleging that two members of the firm were absent for a considerable period before expiration of the time within which the petition for a discharge should have been filed, etc., and that affiant, who was the only remaining member of the firm, had been unable to keep up with the firm's business, and that the filing of the petition was overlooked, was insufficient.

Huntoon, Worden & Smith, for bankrupt.

HUNT, District Judge. The bankrupt has filed a petition praying that he be allowed to file a petition for his discharge. The petition is dated December 7, 1904. Accompanying it is the affidavit of E. G. Worden, who states that he is a member of the law firm of Huntoon, Worden & Smith, of Lewistown, Fergus county, Mont., attorneys for Steve D. Anderson. Affiant states that Steve D. Anderson was duly adjudged a bankrupt on September 1, 1903, but that he failed to file his petition for discharge before one year after September 1st because one of the members of the law firm of Huntoon, Worden & Smith was absent for a period of three and one-half months immediately prior to the 27th of September, 1904, and in consequence was unable to attend to any part of the business of the said law firm; that another member of the said law firm was absent from the city of Lewistown, county of Fergus, upon urgent business, for a period of about seven weeks during the same time that the other member was so absent, and that it was practically impossible for the affiant, who was the other member of the firm, to keep up the work of said law firm during said absences; and that it became impossible for the two members to attend to the new business and to the accumulated business of the said law firm during the few weeks when one of the members was present to assist affiant in the business of the firm, while the other member was absent; and owing to these facts, and to the further fact that said matter had lain for about a year, the filing of the petition of the bankrupt for discharge was overlooked.

Section 14 of the bankrupt act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], provides that:

"After the expiration of one month, and within the next twelve months subsequent to being adjudged a bankrupt, any person may file an application for discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within, but not after, the expiration of the next six months."

The showing made by the affidavit is far from sufficient to justify a court in concluding therefrom that the bankrupt was unavoidably prevented from filing his petition within the time prescribed. The bankrupt himself makes no affidavit, and must therefore be bound by the excuses offered by his counsel. These being plainly insufficient, his petition for leave to file a petition for discharge is denied.

WERCKMEISTER v. AMERICAN LITHOGRAPHIC CO. et al.

(Circuit Court of Appeals, Second Circuit. November 3, 1904.)

No. 185.

1. COPYRIGHTS—PLEADINGS—EVIDENCE.

Where, in a suit to restrain infringement of a copyright on a painting, defendant pleaded a subsequent exhibition of the painting at the Royal Academy in London as a publication thereof, and complainant took issue on the plea, evidence of restrictions on the exhibition of paintings at such exhibition, in that the public, other than members of the Academy and exhibitors and their families, were not entitled to admission, except on payment of an entrance fee, and that no permission to copy works during the exhibition could be granted, was competent as tending to negative the alleged publication.

2. SAME—EXHIBITION—PUBLICATION.

Under Rev. St. §§ 4952, 4955, 4962 [U. S. Comp. St. 1901, pp. 3406, 3407, 3411], authorizing copyrights of paintings, etc., and requiring notice of such copyright to be published thereon, the exhibition of an original copyrighted painting at an academy, at which no person was entitled to copy the same, and to which the public, other than the members of the academy, were not admitted, except on payment of a fee, without a notice of copyright thereon, did not constitute such a publication as avoided the copyright.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 126 Fed. 244. See, also, 117 Fed. 360.

Antonia Knauth, for appellant.

W. A. Jenner, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The suit was brought to restrain infringement of a copyright claimed by complainant in a certain painting called "Chorus." Said painting showed a convivial group of gentlemen gathered about a punch bowl, holding pipes and filled glasses in their hands, and singing in chorus. It is a meritorious work of art by Sadler, a British subject. The bill alleges that on or about April 2, 1894, Sadler assigned his right and title in any copyright obtainable on said painting by an instrument in writing to complainant, a citizen of Germany; that on April 16, 1894, and before publication, complainant duly obtained a copyright in this country, and on or about June 1, 1894, began the publication of said painting here and in foreign countries, and, being the proprietor of the copyright therein, he "has printed and continues to print therefrom copies of said painting, and has duly given notice of your orator's copyright" by inscribing upon a visible portion of every copy of said painting the word "Copyright" and name of party and date of copyright; and that the defendant the American Lithographic Company has infringed upon complainant's rights by printing great numbers of cheap copies of said painting for the purpose of advertising certain goods of the defendant the American Tobacco Company. The plea alleges that said painting —

"Was publicly exhibited by the author and proprietor thereof at the exhibition of the Royal Academy of Arts, held in the city of London, England, from

the first Monday of May, in the year 1894, to the first Monday of August, in the same year, both days inclusive, and continuously during said period, and was during the whole of said period exhibited to the public and published, and that there was not at any time during the said exhibition, nor before, nor at any time since, any notice of the said copyright inscribed upon some visible portion of said painting, or on the substance on which the same was mounted, as required by the statute in such case made and provided, and that such exhibition and publication was with the knowledge, consent, and permission of the complainant and the said Sadler, the author and proprietor of said painting."

Complainant by replication took issue on the plea, and introduced testimony to prove, *inter alia*, certain restrictions upon the exhibition of paintings at the Royal Academy. This testimony showed that the public are not admitted to said exhibitions, except upon payment of an entrance fee, but that members of the Academy and exhibitors and their families are entitled to free admission, and that the following rule of the Academy is strictly enforced, namely:

"No permission to copy works during the term of the exhibition shall on any account be granted."

Sir Lawrence Alma Tadema, a member of the council of the Royal Academy, deposed that it was not the custom of artists who exhibited their pictures at the exhibitions of the Royal Academy to place any notices of copyright thereon or on the frame, and that he had never seen any such notices at said exhibitions, and that he knew from an experience of 30 years that neither visitors to the exhibition nor the public were allowed to make copies, or even notes, of the pictures thus exhibited, and that he understood that the Academy had no right to allow any copies to be made, but were expected to protect, and did protect, the rights of the exhibitor by the employment of persons to enforce said rule and otherwise.

Counsel for defendants contends that under the pleadings such testimony is immaterial and irrelevant. He invokes the familiar rule that no fact can be proved that is not pleaded, and contends that, the truth of the allegations of the plea having been put in issue without amendment of the bill before replication, no matter in avoidance of the plea is admissible. It is unnecessary to question the correctness of the general rule as thus stated. This principle has no application to the pleadings and proofs herein.

In the case of *Horn v. Detroit Dry Dock Company*, 150 U. S. 611, 14 Sup. Ct. 214, 37 L. Ed. 1199, cited by defendants, the proof established the truth of a plea of a receipt in full. Defendant admitted the correctness of the receipt, but sought to avoid its effect by evidence as to failure of consideration, mistake in its execution, and lack of mutuality. The court found that "the issue made by the replication was simply the existence of the receipt as set forth in the plea," and, that being established, the dismissal of the bill necessarily followed, as said matters were foreign to the issue presented by the pleadings. Here the plea alleged that the original painting was—

"Publicly exhibited by the author and proprietor thereof at the exhibition of the Royal Academy, * * * and published, * * * and that such exhibition was with the knowledge, consent, and permission of the complainant," etc.

The evidence introduced by complainant as to the conditions under which said painting was exhibited were not foreign to the issue. It was directly antagonistic to the allegation that the painting was published. The controlling question herein, in the view which we take of the law, is whether there was a publication of the painting. The defendants raised this issue by the plea, and thereby invited a presentation of the facts decisive of said question. The statutes provide as follows:

"Sec. 4962. That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book, or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to act of Congress, in the year ———, by A. B., in the office of the librarian of Congress, at Washington;' or, at his option, the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus 'Copyright, 18—, by A. B.'" [U. S. Comp. St. 1901, p. 3411.]

"Sec. 4952. The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same; and, in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; and authors or their assigns shall have the exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States." [U. S. Comp. St. 1901, p. 3406].

"Sec. 4955. Copyrights shall be assignable in law, by any instrument of writing, and such assignment shall be recorded in the office of the librarian of Congress within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice." [U. S. Comp. St. 1901, p. 3407.]

The copyright in said painting was assigned to complainant, copyright was duly taken out by him prior to the publication alleged in the plea, and since said copyright was obtained the complainant has duly marked every copy published by him as "Copyrighted."

Counsel for defendants contends that said exhibition at the Royal Academy of the original painting by the artist after complainant had obtained his copyright, without notice thereof upon said painting or its frame, constituted a publication, and therefore complainant was precluded from recovery by virtue of the provisions of the statute quoted above. Counsel further contends that the restriction on copying is immaterial, so long as the general public is admitted to view the painting. The questions thus presented have not been directly decided in the case of paintings, but it is believed that they may be determined by an examination of the history of the law of copyright, and by reference to the decisions of analogous questions arising in the case of books, lectures, and dramatic compositions.

A copyright is an incorporeal right to print and publish. *Trustees v. Greenough*, 105 U. S. 527, 530, 26 L. Ed. 1157. It is a property in notion, without corporeal, tangible substance. *Miller v. Taylor*, 4

Burr. 2303. This property is a different and independent right, detached from the corporeal property out of which it arises. *Stephens v. Cady*, 14 How. 528, 14 L. Ed. 528. Each of these is capable of existing and being owned and transferred independent of the other. *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155. The recognition of the doctrine of a distinctive literary property has existed from very early times. 2 *Lewis' Blackstone*, 407. The senate of the republic of Venice in 1469 granted to one John of Spira the exclusive privilege for five years of printing the letters of Cicero and Pliny. *Two Centuries Growth of American Law*, 422. Blackstone considers this exclusive right of property as grounded on labor and invention and reducible to the head of occupancy. 2 *Lewis' Blackstone*, 405. The protection of the result may be considered as due to original acquisition. The conceptions which it represents are as free as the birds of the air or the wild beasts of the forest, but they belong to him who first reduces them to captivity. The Greeks reasoned that the perfect statue already existed in the block of marble, and that it required only the genius of the sculptor to develop its proportions. Copyright protects the captor of the idea, the genius of the sculptor, by giving him the exclusive property in his acquisition or creation.

To pursue the foregoing analogies, the common-law protection continues only so long as the captives or creations are kept in confinement or controlled. The statute permits them to go free and releases the restraint, provided the owner has stamped them with his brand. In either case the property of the owner is protected against appropriation without his consent. The common law protected copyright before publication. The statute supersedes the common-law right, and subject to certain conditions extends its protection after publication. The author of a work of art has at common law a property therein until it is published with his consent. He may withhold or communicate it, and in communicating it he may impose such restrictions upon its use as he sees fit. *Drone on Copyright*, 103; *Parton v. Prang*, 3 Cliff. 548, Fed. Cas. No. 10,784. The right to make copies before publication and the right of first publication are common-law rights. The right to multiply copies after publication to the exclusion of others is the creature of statute. *Palmer v. De Witt*, 47 N. Y. 532-536, 7 Am. Rep. 480. Compliance with the statutory provision of publication deprives the owner of his common-law right. But, as the statute was enacted for his protection, the mode of publication or the question as to what amounts to publication must correspond to the nature of the right secured. *Drone on Copyright*, 287.

Publication of a subject of copyright is effected by its communication or dedication to the public. Such a publication is what is known as a "general publication." There may be also a "limited publication." The use of the word "publication" in these two senses is unfortunate and has led to much confusion. A limited publication of a subject of copyright is one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public. *Abernethy v. Hutchinson*, 3 L. J. Ch. 209; *Nichols v. Pitman*, 26 L. R. Ch. Div. 374; *Caird v. Sime*, 12 L. R. App. Cas. 326; *Tomkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *Palmer v. De Witt*, 47 N.

Y. 532, 7 Am. Rep. 480; *Turner v. Robinson*, 10 Ir. Ch. Rep. 121, 135; *Laura Keene v. Wheatley & Clarke*, 9 Am. Law Reg. 33-80, Fed. Cas. No. 7,644. "In cases of literary, scientific, and professional treatises in manuscript, it is obvious that the author must be deemed to possess the original ownership and be entitled to appropriate them to such uses as he shall please. Nor can he be justly deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use, and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication to which the receiver may choose to devote them." Story on Equity, § 943. The one is a dedication, the other is a mere license, to the public. From the one an abandonment of the incorporeal hereditament is implied; in the other is implied the reservation of its enjoyment. The test is whether there is or is not such a surrender as permits the absolute and unqualified enjoyment of the subject-matter by the public or the members thereof to whom it may be committed.

The nature of the property in question in large measure determines the extent of the public right. Thus, in case of a book, ordinarily the sole practical benefit to the author is in the right to multiply copies. The exhibition or private circulation of the original or of printed copies is not a publication, unless it amounts to a general offer to the public. The unrestricted offer of even a single copy to the public implies the surrender of the common-law right. *Wheaton & Donaldson v. Peters & Grigg*, 8 Pet. 591, 8 L. Ed. 1055. The author of dramatic compositions is entitled to the profit arising from public delivery or performance, to the sale of the manuscript, and to the printing and publishing of it. *Palmer v. De Witt*, *supra*; *Macklin v. Richardson*, Ambler, 694. On this capacity for public representation, as distinguished from the publication of other literary productions, the courts have founded the rule that such public exhibition is not a general publication. By admission to such exhibition the general public acquire no right to reproduce the composition, either by taking notes or by the exercise of the memory. The spectator is entitled to the enjoyment of the exhibition, but there is no implication of abandonment by the author of his title, or of surrender of the rights attached to his creation. The spectator, in paying for his ticket of admission, has not paid for any right to get possession of the play for subsequent representation. *Tomkins v. Halleck*, 133 Mass. 43, 43 Am. Rep. 480. The same rule applies to lectures orally delivered. *Bartlett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076; *Nichols v. Pitman*, *supra*. In such cases, even where the hearers were allowed to make copies for their personal use, such license was limited to such individuals for the purpose of their own information, and they could not publish for profit that which they had not obtained the right of selling. *Abernethy v. Hutchinson*, *supra*. This settled doctrine, then, rests upon these grounds: The right secured by statute is the exclusive one of multiplying copies after publication. In the case of dramatic compositions the right of public representation also is protected. The character of the exhibition or disclosure for

amusement or instruction is prohibitive of any suggestion of a general publication, and implies the limitation of the public right.

The result of an examination of the authorities seems to show that the following propositions are established: A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public. Prior to such publication, a person entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals or a limited, ascertained class, or he may expressly or by implication confine the enjoyment of such subject to some occasion or definite purpose. A publication under such restrictions is a limited publication, and no rights inconsistent with or adverse to such restrictions are surrendered. Restrictions imposed upon the use prior to publication protect the copyright. Such restrictions imposed after publication cannot affect the public rights acquired by reason of the fact of publication. The nature of the subject-matter, the character of the communication, circulation, or exhibition, and the nature of the rights secured, are chiefly determinative of the question of publication. Thus, the oral lecture to a class of students is not published even by permission to the individuals of such class to make copies for their own use, because this is in accord with the purposes of instruction and does not otherwise injuriously affect the right of the author. But the exhibition of a play to persons paying admission does not permit them to make copies for reproduction, because the character of the exhibition for amusement indicates the limitation of its purpose, and the reproduction thereof, by persons admitted only as spectators would be destructive of the other rights possessed by the author, including that of representation secured to him by statute.

It is not perceived how the legal status of a right of copyright in a painting or statue, so far as concerns their publication, can be distinguished from that of lectures or dramatic compositions. In fact, such distinctions as may be suggested only serve to strengthen the presumption of limited publication in favor of the work of art. There the author may wish to enjoy the profit from exhibition of the original and from the right to publish copies, but his chief object often is to secure the profit arising from the sale of the original work. The exhibition of a work of art for the purpose of securing a purchaser or an offer to sell does not adversely affect the right of copyright; and from the fact that the right protected by statute in a work of art is that of copying and not of exhibiting is derived the general rule that the mere exhibition thereof is not a general publication. *Drone on Copyright*, 287. There may be a sale of the subject of copyright separate and distinct from the sale of the copyright therein. *Stephens v. Cady*, 14 How. 528, 14 L. Ed. 528; *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155; *Werckmeister v. Springer Lithographing Co.* (C. C.) 63 Fed. 808. In a limited exhibition, as of a play, there is no dedication to the public, no presumption or recognition of a right to copy, and therefore no abandonment of said right. In the case at bar not only was there no presumption of a right to copy, but there was an express denial of

such right. Whether said exhibition would have amounted to a publication in the absence of any such prohibition is immaterial to the disposition of this case, and upon that question we express no opinion.

We have not been referred to a single authority which holds that such an exhibition as the one here in question is a general publication. The reasoning and conclusions reached in the cases bearing on this question strongly support the view that the right of copyright in works of art is not affected by a restricted exhibition. Thus in *Turner v. Robinson* it was held that an exhibition of a painting for the purpose of obtaining subscribers to an engraving thereof was not a publication. In this case defendant was enjoined from making copies of a painting where copying was prohibited by advertisement. 10 Ir. Ch. Rep. 121. To the same effect is the decision in *Prince Albert v. Strange*, 1 Mac. & G. 23, 2 DeG. & Sm. 652. And in *Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784, Mr. Justice Clifford held that:

"A painter also has at common law the same right before publication to prevent any person from copying it; * * * and his assignee has the same right before publication to prevent another from multiplying copies of it or reproducing the picture."

The cases cited by counsel for defendants in support of his argument that this exhibition was a publication have only a remote bearing upon the question involved herein. They relate, with one exception, to instances where there was a general publication of a book by its delivery, or an offer of delivery under a sale or lease to the general public; that is, to all persons who chose to accept it, accompanied by a personal contract between the owner and the purchaser or lessee imposing restrictions upon its use. Referring to such cases Chief Judge Parker says in *Jewelers' Mer. Agency v. Jewelers' Pub. Co.*, 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666, as follows:

"The leasing of a book for a year or a term of years to any and all persons who will accept it on the author's terms, even if those terms include an agreement not to disclose its contents, constitute a publication. If a book be put within the reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common-law copyright or right of first publication is gone."

Judge Parker further holds that publication is proved—

"By the fact that by the delivery, whatever the occasion for it, the public or an indefinite portion of it were assured of access to the book without further action on the part of the author."

He then refers to the cases "in which there was a private circulation for a restricted purpose," and says:

"The distinction is in the limit of the circulation. If limited to friends and acquaintances it would not be a publication; but if general, and not so limited, it would be. Coppinger on Copyright, p. 117."

He then distinguished the case before him on the ground that:

"In this case the circulation was not limited to friends and acquaintances, or even to a class. The limitation was upon the character of the use which a subscriber could make of it."

So in *Larrowe-Loisette v. O'Loughlin* (C. C.) 88 Fed. 896—

"the book was exposed for sale, so that the public without discrimination as to persons might have an opportunity to enjoy it."

In *Ladd v. Oxnard* (C. C.) 75 Fed. 705, Judge Putnam said:

"While the nature of the use of the complainants' book was sought to be limited, there was no limit placed by the complainants on the extent or number of persons to whom the book might be distributed under the conditions which they had provided."

And in *Rigney v. Dutton* (C. C.) 77 Fed. 176, Judge Lacombe holds that a cut was published by being printed in—

"a weekly newspaper which circulates freely among all who choose to pay the subscription, whether they are in the stationery trade or not."

It is to be observed that in *Jewelers' Mer. Agency v. Jewelers' Pub. Co.*, supra, three of the judges concurred in the result upon the special ground that the deposit of two copies of the book with the librarian of Congress constituted a publication thereof. And it may be claimed that the foregoing decisions, holding that publication is shown by a delivery of books to subscribers under conditions as to use, are contrary to the doctrine that the delivery of a lecture to a class under conditions as to use of copies is not a publication. But here there is in the first place the distinction pointed out by Mr. Justice McLean, in *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082, that there is no consent that the manuscript should be printed. "They [the students] have no right to a use which was not in the contemplation of the complainant or of themselves when the consent was first given."

Again, it is to be noted that in the one case the possession of the printed book, the subject of copyright, is surrendered, in the other there is no surrender of possession, and no one is admitted to listen to the lecture except upon a condition imposed prior to the communication. But the distinction between a public circulation of written copies and a restricted or private communication of their contents has existed from the earliest times and was for some purposes recognized before the use of printing. *Keene v. Clarke*, 9 Am. Law Reg. 33-64, Fed. Cas. No. 7,644. "The author's right of property in his unpublished work being undoubted, it has also been settled that he may communicate it to others under such limitations as will not interfere with the continuance of the right. 'He has,' as was said by Lord Broughton in *Jefferys v. Boosey*, 'the undisputed right to his manuscript. He may withhold or he may communicate it, and, communicating it, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfillment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation.' He cannot print and sell without publishing his work, but he may legitimately impose restrictions which will prevent its publication, whether the communication be made by giving copies for private perusal or by recitation before a select audience. In the latter case the retention of the author's right depends upon its being either a matter of contract or an implied condition, that the audience are admitted for the purpose of receiving instruction or amusement, and not in order that they may take a full note of what they hear, and publish it for their own profit, and for the information of the public at large." *Caird v. Sime*, 12 App. Cas. 326, 344.

In *Press Pub. Co. v. Monroe*, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353, this court had occasion to consider the common-law right of an

author to his unpublished work in a case where a newspaper surreptitiously obtained and, without the consent of the author, published a copy of her ode to be delivered at the World's Fair at Chicago. There the court recognized the doctrine of restricted publication, and protected the rights of the author, although copies of the ode had been previously distributed. Judge Lacombe, delivering the opinion of the court, said:

"The copies which were given to the members of the committee on ceremonies and to a so-called 'Literary Committee' were delivered to them solely to enable them to decide whether the poem was one suitable and worthy of their acceptance as the ode to be delivered at the opening exercises. Such a delivery of copies of a literary production is not a publication, and could not prejudice the owner's common-law rights. *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082; *Bartlett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076."

The decisions in *Larrowe-Loisette v. O'Loughlin* (C. C.) 88 Fed. 896, *Ladd v. Oxnard* (C. C.) 75 Fed. 703, and *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547, are in harmony with the views already expressed herein.

In *Werckmeister v. Pierce & Bushnell Mfg. Co.* (C. C.) 63 Fed. 445, Judge Putnam held that:

"A mere exhibition of a picture in a public gallery does not at common law forfeit the control of it by the artist or the owner, unless the rules of the gallery provided for making copies, of which there is no evidence in this case."

It is true that this decision was reversed by the Court of Appeals in the First Circuit by a divided court. But the opinion appears to be based on the assumption, in the absence of proof that copying was prohibited, that the painting was publicly exhibited and, therefore, published within the meaning of the copyright act.

The same distinctions are observed and the same rules applied in the cases where statutory copyright has been obtained. This branch of the subject is fully discussed in the opinion of this court in *Harrison v. Maynard, Merrill & Co.*, 61 Fed. 689, 10 C. C. A. 17. There the owner of the copyright, supposing that a fire had destroyed the commercial value of the sheets of his book stored in a bookbinder's cellar, permitted him to sell them, and the vendee resold them under an express agreement that they should be utilized as paper stock only. The court held that the copyright owner, who had transferred the title, could not by virtue of the copyright statute enjoin the purchaser from binding and selling such sheets in violation of said agreement. And the court refers to *Henry Bill Publishing Co. v. Smythe* (C. C.) 27 Fed. 914, as illustrating the distinction between the remedy in case of an unauthorized sale where the owner has retained the title, and an authorized conditional sale where the purchaser has violated the condition. There, the plaintiff published Blaine's *Twenty Years of Congress*, and sold it through book agents, by subscription only, to individual buyers. The defendant, knowing this fact, bought them from a book dealer, who had bought them from a book agent. The court enjoined the sale of these copies, and held that the statute protected the owner of the copyright in the exercise of his exclusive right to make such sales to individual subscribers through agents having no title. But the court

further said that, when the copyright owner actually sold the book to canvassers upon their agreement to sell by subscription only, he lost the protection of the copyright act. "Whenever he parts with that ownership, the ordinary incident of alienation attached to the particular copy parted with, in favor of the transferee."

In *Falk v. Gast Lithograph & Engraving Co.*, 54 Fed. 890, 4 C. C. A. 648, this court had occasion to consider the question of publication of photographs, which were works of art within the decision in *Burrow Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349, under the copyright statute. The proprietor of certain copyrighted photographs had sent out to retail dealers for their inspection an exhibition card containing copies, greatly reduced in size, of 100 of such copyrighted photographs, but without the statutory notice of copyright impressed thereon, from which the dealers were to order the particular cabinet photographs which they wished to purchase. This court held that said card was not a published edition of said photographs, and said:

"The statutes refer to a published edition, which is an edition offered to the public for sale or circulation. An exhibition of a card of miniature samples to the dealers alone, for the purpose of enabling them to give orders, is not a published edition, within the meaning of the statute."

It must be conceded that the author of a work of art does not lose his common-law copyright by exhibition in his studio for purposes of sale, and that the same rule would be applied to an association of artists exhibiting their work in a common gallery solely for this purpose. In the case at bar, both of the restrictions of class and purpose considered above were imposed upon those who were admitted to the Royal Academy. The limit of free admissions was to the members and their guests. The limitation to the public was upon the payment of an admission fee. The extent of the publication to such members of the public as chose to pay the fee was a permission to view the exhibition, but a prohibition to make any copies of the paintings therein. This prohibition clearly expressed the limitation implied in the private lectures or the dramatic performance, namely, a prohibition of any use inconsistent with the purpose for which the exhibition was given. Whatever doubt there might have been if the limitation had been merely to an indefinite class, or the limitation as to purpose had been merely implied from the character of the exhibition, there can be no doubt where the limitation as to purpose is not only thus implied, but is expressed in the rules of the Academy, and is universally and uniformly enforced as against every member of the public. We conclude, therefore, that such exhibition did not amount to a general publication.

In this discussion we have considered only the issues presented by the plea, and have not gone into the question of the right of assignment before copyright, which was advanced on the argument.

The decree of the Circuit Court sustaining the defendants' plea and dismissing the bill is reversed, with costs, and the cause is remanded to the Circuit Court, with instructions to enter an order overruling the plea, with leave to answer the bill.

NORTHERN SECURITIES CO. v. HARRIMAN et al.

(Circuit Court of Appeals, Third Circuit. January 3, 1905.)

No. 52.

1. APPEAL—ORDER GRANTING PRELIMINARY INJUNCTION—REVIEW.

Where the opinion of a Circuit Court in granting a preliminary injunction shows that the judge regarded as of controlling importance the fact that an order denying the injunction would not be reviewable by appeal, the rule that the appellate court will not interfere with the exercise of the discretionary power of the court of first instance unless there is strong reason for it does not apply, and the question of the right to the injunction will be determined on the merits.

2. CORPORATIONS—PURCHASE OF STOCKS—CONSTRUCTION OF CONTRACT.

A contract by which defendant, the Northern Securities Company, acquired from complainants certain shares of stock of the Northern Pacific Railway Company, *held*, under the evidence, to have been one of purchase and sale, by which defendant, on payment of the agreed price, became the absolute owner of the shares, free from any trust in favor of the complainants, and free to distribute the same pro rata among all its stockholders upon the entry of a decree declaring it to be an illegal combination, and prohibiting it from voting or receiving dividends on such stock.

3. SAME—MANNER OF DISTRIBUTING ASSETS.

Defendant corporation having been adjudged an illegal combination in restraint of interstate commerce, and enjoined from voting or receiving dividends on certain railroad stock which it owned, but permitted to transfer the same to its stockholders, a plan adopted by its directors and stockholders to distribute the same pro rata among all its stockholders was equitable, and its execution should not be enjoined.

4. APPEAL—ORDER GRANTING PRELIMINARY INJUNCTION—REVIEW.

It is a proper exercise of discretion for a court to grant a preliminary injunction where the bill and evidence present a *prima facie* case and raise important and doubtful questions of law and fact, and, unless the injunction is granted to preserve the status quo until the hearing, the suit would be ineffective; and an order for an injunction, granted on such grounds after the court has given due consideration to the balance of inconvenience and injury which may result to one party or the other, should not be reversed by an appellate court before the case has been finally heard and determined by the court below on full proofs. Per Gray, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Elihu Root and John G. Johnson, for appellant.

D. T. Watson and Wm. D. Guthrie, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal by the Northern Securities Company from a decree of the Circuit Court for the District of New Jersey awarding a preliminary injunction, by which that company was restrained from disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company. It appears from the opinion of the learned judge of the court below that in granting this injunction he was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justi-

fied in requiring that the status quo should be preserved, and the subject-matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved ought, in our judgment, to be determined upon the merits, and without further delay. *Western Union Telegraph Company v. Pennsylvania Railroad Company*, 123 Fed. 33-36, 59 C. C. A. 113. There have been cases, it is true, in which it has been held that, where the court of first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court, "unless there is some strong reason for it." *Massie v. Buck*, 128 Fed. 31, 62 C. C. A. 535. But to the circumstances of this case those rulings are inapposite. Attentive reading of the opinion of the learned judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie from a denial of the injunction as "of controlling importance," and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court; and we think that reason and justice demand that such an adjudication shall not be further postponed. The injunction complained of precludes the enjoyment of rights of ownership in property of great value. The facts upon which the propriety of upholding it depends are unquestionably disclosed in the record before us, and the principles by which the legality of the order awarding it must be tested are indubitable, and may be as readily applied now as at any time hereafter. The only substantial question is as to whether the decree below was accordant with law, and that question this court could not refuse to determine without, in effect, renouncing the appellate jurisdiction which Congress has expressly conferred upon it.

In November, 1901, the Northern Securities Company was incorporated under the laws of the state of New Jersey. Its total authorized capital stock was \$400,000,000, divided into 4,000,000 shares of the par value of \$100 each. The amount of the capital stock with which the corporation could commence business was fixed at \$30,000. Its duration was to be perpetual, and its objects were certified to be, *inter alia*, as follows:

"(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the state of New Jersey or of any other state, territory or country.

"(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

"(3) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

The Securities Company was promptly organized in pursuance of its certificate of incorporation, from which the foregoing clauses have been extracted, and very shortly thereafter the associate stockholders of the Great Northern Railway Company transferred to the Securities Company a controlling interest in the capital stock of the Great Northern Railway Company upon an agreed basis of exchange of \$180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and the associate stockholders of the Northern Pacific Railway Company assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of \$115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company. For the stock of these railway companies, whether transferred as above stated, or subsequently acquired upon the same basis, and also for about \$7,522,000 paid to it in cash, the Securities Company issued its stock certificates in the following form:

Authorized Capital Stock, \$400,000,000.
No. _____ Shares.

Northern Securities Company.

Incorporated and Registered Under the Laws of the State of New Jersey.

This Certifies that _____ is the registered holder of _____ Shares of the Capital stock of the Northern Securities Company of One hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this certificate to be signed by its President and Treasurer this _____ day of _____, A. D. 190-.

Treasurer. _____ President.
Countersigned this _____ day of _____, A. D. 190-.

Countersigned and Registered this _____ day of _____, A. D. 190-.
Transfer Agent.
Manhattan Trust Company,
Registrar of Transfers.

By _____ Secretary.
Shares, \$100 each.

In March, 1902, a bill was exhibited by the United States, in the Circuit Court for the District of Minnesota, against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont. The object of this bill was to restrain the violation of the act of Congress of July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and the suit which it originated was so proceeded with that in April, 1903, the said Circuit Court adjudged and decreed:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several states, such as an act of Congress approved July 2, 1890, entitled 'An act to

protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company now claimed to be held and owned by the defendant the Northern Securities Company was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states; that the Northern Securities Company, its officers, agents, servants, and employes, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. * * *

Upon March 14, 1904, this decree was affirmed by the Supreme Court of the United States (193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 579), and thereupon, viz., on March 22, 1904, the board of directors of the Securities Company adopted the following preambles and resolutions:

"Whereas, in the course of its business, this company has acquired and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company, and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, in a suit brought by the United States against this company, the said railway companies, and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company, held by this company; and

"Whereas, this company has issued, and there are now outstanding, 3,954,000 shares of its own capital stock; and

"Whereas, this company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay:

"Resolved, in consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railway companies held by it.

"Resolved, that the board of directors of this company hereby declares it advisable that article (4th) of this company's certificate of incorporation be amended, so as to read as follows:

"Fourth.—The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars (\$3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars (\$3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars (\$100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the

shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents (\$39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents (\$30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company. The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.'

"Resolved, that a meeting of the stockholders of this company for the purpose of taking action upon the said alteration of the certificate of incorporation of this company, and also upon such other business as may come before the meeting, be, and is hereby, called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and state of New Jersey, at 11 o'clock a. m. on April 21, A. D. 1904."

Notice of a meeting of the stockholders of the Securities Company was accordingly given, and such meeting was duly held upon April 21, 1904. At that meeting the stock of the company was reduced 99 per centum, and the proposed pro rata distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company to and amongst the shareholders of the Securities Company was assented to. This was followed by the institution of the present suit, wherein the complainants alleged "that the defendant Northern Securities Company threatens and intends to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway companies pro rata amongst its stockholders in disregard of the rights of your orators, and that, if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled, will be lost to your orators. * * *" The bill accordingly prayed for an injunction, and thereupon, and on affidavits and exhibits, the injunction now in question was awarded.

The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depository, or trustee," and that the "legal and equitable owners of said shares of stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in

form, and prima facie in substance, was one of purchase and sale, is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock * * * at an aggregate price of \$91,407,500, payable, as to \$82,491,871 thereof, in the fully paid-up and nonassessable shares of the capital stock of this company at par, and as to \$8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about \$7,522,000, was (as is stated in the bill) "used for the purchase of other property and for corporate purposes." The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock which it thereby pledged. It is claimed, however, that notwithstanding these facts the beneficial interest in the railway stock was not transferred to the Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common capital stock of the Northern Pacific Railway Company, "to organize a holding company, * * * and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies, and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company"; and that "in pursuance of said agreement said Northern Securities Company was organized, * * * and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depository, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by

the Oregon Short Line Company, and that "they further stated that, upon the organization of the proposed holding company," not that it would take as custodian or trustee, but that "they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depository. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made. The situation, then, is this: The Northern Securities Company is the owner of 1,537,594 shares of the stock of the Northern Pacific Railway Company, and 1,181,242 shares of the stock of the Great Northern Railway Company, which it has been restrained, at the suit of the United States, from voting or receiving dividends upon, and in view of this restraint all parties agree that it should not continue to hold them. It accordingly proposes to assign them pro rata to its shareholders, including not less than 2,500 persons, whose shares were unquestionably acquired by purchase, and who are not parties to this suit; and as such disposition of them would effect a ratable, and therefore equitable, division of them amongst all who are entitled to participate in a distribution of the corporate assets, we are of opinion that the injunction which prohibited it should no longer remain in force.

If the question before us had been involved and decided in the suit of the United States v. The Northern Securities Company, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we, of course, would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. The petition or bill of the United States did pray, *inter alia*, that the stockholders of the railroad companies who had exchanged their stock therein for stock of the Northern Securities Company should be required to surrender any stock of the Northern Securities Company so acquired and held by them, and to accept therefor the railway stock "in exchange for which the same was issued"; but the decree, in so far as it was mandatory, went no further than to prohibit the doing of "the specific things which, being done, would effect the result denounced by the act." 193 U. S. 356, 24 Sup. Ct. 465, 48 L. Ed. 679. This was all that was requisite, and it was accomplished by that part of the decree which has been already quoted; and the added clause, though apparently suggested

by the prayer of the bill to which we have referred, was obviously not intended to have any obligatory effect. It was permissive merely, and this so plainly appears from its terms that it is necessary only to direct attention to them. They are: "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignment of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies." This decree was affirmed in its entirety, and without modification, and thereafter the three principal complainants in the present case applied to the Circuit Court for the District of Minnesota for leave to intervene in the suit in which it had been made. The ground of that application was substantially the same as that upon which this bill is founded; but in denying it the court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to command stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The government was satisfied with the relief which it obtained, and expresses itself as fully satisfied therewith at the present time.

* * * It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be returned, or exclude other methods of disposing of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance, and make an order which we ex-

pressly, and on full consideration, declined to make when the decree was entered. This we must decline to do."

The facts which have been mentioned negative the contention that the question here in dispute was adjudicated in the government suit, and the further contention that it was at least authoritatively dealt with in the principal opinion rendered upon the appeal in that case is, we think, likewise fallacious. Some phrases in that opinion, if considered separately, and without reference to the precise subject which was under investigation, may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree.

"The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation, as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose." 193 U. S. 357, 24 Sup. Ct. 465, 48 L. Ed. 679.

We have been asked to infer from this statement in the opinion that the learned justice who made it intended to affirm that the property interests of the original holders of the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court; and the plain and natural meaning of the language used is that by that decree no property interests had been disturbed. As was said by the learned judges who made it:

"When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able, and likewise disposed, to make some disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject-matter of an independent suit between the parties immediately interested."

The present suit is an independent one, and, as its subject-matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative.

The conclusions reached upon the questions we have discussed render it unnecessary for us to express any opinion upon the other points argued by counsel. From what has been said it follows that the decree of the Circuit Court must be reversed, and therefore it is so ordered.

GRAY, Circuit Judge (dissenting). I am constrained to dissent from the judgment of the majority of the court. I do not think the learned judge of the court below exercised other than a sound judicial discretion in granting the motion for a special injunction, *pendente lite*. He has stated in his opinion that important and doubtful questions of law and fact had been raised by the pleadings and affidavits, and I cannot agree that these questions should have been so determined by him on a motion for a preliminary injunction, as to make necessary the dismissal of the bill. I say, to make necessary the dismissal of the bill, because it is apparent that, to have denied the injunction *pendente lite*, and thus to have permitted the distribution of the stocks of the Northern Pacific and Great Northern, in the custody and control of the defendant company, according to the plan proposed, would have practically frustrated the object of the suit, and have rendered unavailing a decree, as prayed for, in favor of complainants. Nothing but a clear conviction that complainant's bill was without equity, and should therefore be dismissed without further hearing, would have justified the court below in refusing the preliminary injunction. On the other hand, if the court were satisfied that a *prima facie* case had been presented by complainants, and that the balance of advantage or disadvantage to result to the parties respectively from the granting or withholding an injunction was such as to sanction such action, it was the exercise of a sound judicial discretion to grant the injunction and preserve the status quo, until there was opportunity, after full hearing, in the orderly progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact raised by the pleadings and evidence in the case. The responsibility for the exercise of this power and duty rested upon the court below.

Upon appeal from an order granting a preliminary injunction, a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court should not interfere with its discharge of the responsibility and duty imposed upon it. "The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action." That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammelled opportunity he sought, for a full hearing and deliberate investigation of what he has stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties, or a reviewing court, of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory

decree for a special injunction, given by the act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view, that it is our duty in the case at bar to do more than merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this, and I think we can conform to this general rule "without in effect renouncing the appellate jurisdiction conferred upon us by Congress."

As I am clearly of the opinion that the court below, in granting the special injunction, *pendente lite*, has given due consideration and effect to the balance of inconvenience and injury which may result to one party or the other, and that the *prima facie* case was sufficiently established at the hearing to entitle the complainants to the protection of such an injunction, I am in favor of affirming the interlocutory decree.

In re WATERLOO ORGAN CO.

(Circuit Court of Appeals, Second Circuit, December 20, 1904.)

No. 72.

1. CORPORATIONS—BANKRUPTCY—BONDS—ISSUANCE—ULTRA VIRES.

The president of a corporation, in redemption of his promise to a stockholder to purchase his stock on his becoming dissatisfied therewith, gave such stockholder his personal note for the price of the stock. The stockholder thereupon indorsed the note to the secretary of the corporation, who delivered to him therefor an order on the corporation's trustee for two of its bonds. The note was never collected by the corporation, nor entered among its bills receivable; and the bonds so issued were not entered as a part of the corporation's bonded indebtedness until over three years thereafter, when the amount was charged to profit and loss. *Held*, that such bonds were *ultra vires* and void under New York Stock Corporation Law 1892, p. 1835, c. 688, § 42, prohibiting any corporation from issuing bonds, except for money, labor, or property actually received for its use and lawful purposes, and were therefore not allowable against the corporation's estate in bankruptcy.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of New York, in Bankruptcy.

For opinion below, see 128 Fed. 517.

See 118 Fed. 904.

Petition by trustee of bankrupt to review order of the District Court affirming order of referee adjudging that one Francis Bacon was the owner and holder of two bonds, of \$500 each, issued by the Waterloo Organ Company, Bankrupt, and allowing his claim as a valid obligation against said company.

George E. Bartman, for petitioner.

J. N. Hammond, for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The Waterloo Organ Company was adjudicated an involuntary bankrupt in 1902. In 1894 it had made a second issue of bonds to the First National Bank of Waterloo, as trustee under a mortgage, and had deposited them with the trustee to be delivered by it upon the orders of the company as the bonds should be disposed of for corporate purposes. In 1891 Bacon, the president of said First National Bank, became a subscriber for 10 shares of the capital stock of said corporation, of the par value of \$100 each, and afterwards received shares by way of scrip dividends, so that in July, 1898, he was the owner of $16\frac{4}{5}$ shares. One Alexander C. Reed, who was practically the founder of the company, and its president, had promised Bacon that at any time when he was dissatisfied he would take his (Bacon's) stock off his hands. On July 16, 1898, Bacon told him he understood that stockholders had sold their stock for the purpose of getting out from under the stockholders' liability, and asked him to make good said promise; and on said day Reed bought said stock, and paid therefor by his note of even date payable to Bacon's order one day after date, for \$1,000; and Bacon indorsed the note to the order of the secretary of said organ company, and delivered it to him, and received in exchange therefor an order upon the cashier of said First National Bank, trustee, for two bonds of the corporation, for \$500 each, and, upon surrender thereof, received the bonds in question from the bank. Bacon was then president of said bank. On the same day he resigned his position as a director of the organ company. From that time until default by the company, the coupons upon said bonds were regularly collected by said Bacon, through the bank, in the ordinary course of business.

It appears that at the time of said transaction Reed was solvent. He was president of the organ company, and the owner of three-fourths of its stock. Said note was never collected, and was not entered among the bills receivable of the organ company, nor upon its annual inventory, prior to December, 1901; and the two bonds issued to Bacon were not entered upon the account of the bonded indebtedness of the organ company until that date, when the amount was charged to profit and loss. It is asserted, and not denied, that the copy of said order on the bank, and receipt for the bonds, were not entered in their regular place in the copy book of the organ company, but on the last page thereof. From this and other facts it is argued that the transaction between Bacon and Reed was a fraudulent scheme on the part of Bacon to get rid of his stock in exchange for the bonds. The testimony of Bacon is indefinite and contradictory.

The referee, who heard the witnesses, concluded that the facts as proved were insufficient to prove fraud, and especially that they failed to show any knowledge or information of fraud brought home to Francis Bacon, and that, if there was any fraud, it was a fraudulent scheme between the officers of the organ company to relieve Reed from the payment of his note. While we are not entirely satisfied as to the correctness of these conclusions, in view of the foregoing facts, we have not found it necessary to disturb said finding that fraud on the part of Bacon had not been proved.

Counsel for petitioners contends that these bonds are void because issued upon no consideration other than said note.

The statute of New York governing said corporation is as follows:

"No corporation shall issue either stock or bonds except for money, labor, or property actually received for the use and lawful purposes of such corporation. No such stock shall be issued for less than its par value. No such bonds shall be issued for less than the fair market value thereof." New York Stock Corporation Law 1892, p. 1835, c. 688, § 42.

It is insisted that this note was not "property actually received for the use and lawful purposes" of said corporation. It was not property in any practical sense. It was a mere piece of paper unless and until it was collected or otherwise availed of in securing some form of property. That it was not in fact received by the corporation for its use or lawful purposes, or with the intention thus to use it, may legitimately be inferred from the course of the president in failing to provide for its payment, and from the failure of the secretary of the company to enforce its collection or to inventory it among the assets of the company.

But even if it be assumed that this note was technically or potentially property, and that Bacon acted in good faith in the transaction, we think the issuance of the bonds for said note was in violation of the statute. The words "lawful purposes" are general in character, but would seem to mean such property as would be germane to or connected with the business purposes of the corporation, as defined in its charter or articles of incorporation. It must be assumed that the Legislature, by this carefully worded provision, intended to safeguard the rights of creditors and stockholders, and to insure that whatever indebtedness was incurred by the issuance of bonds should inure to the benefit of the corporation. It was certainly no part of the lawful purposes of this corporation to exchange its bonds for notes. If such an interpretation were permitted, it would nullify the whole purpose of the statutory provision. Inasmuch as no property was ever received by the company for its lawful use and purposes, and no benefit was obtained from the note given, it must be held that said issue was *ultra vires* and void.

We are not here concerned with the doctrine that the plea of *ultra vires* will not prevail in cases where the transaction is not forbidden by statute, where its effect will be to accomplish a legal wrong or to do injustice, and especially where the contract has been fully performed by one party, and the other party has received the full benefit of said performance. *Missouri Pacific R. Co. v. Sidell*, 35 U. S. App. 152, 67 Fed. 464, 14 C. C. A. 477; *Memphis & L. R. Co. v. Dow* (C. C.) 19 Fed. 393; *Eastern B. & L. Ass'n v. Williamson*, 189 U. S. 122, 129, 23 Sup. Ct. 527, 47 L. Ed. 735, and cases cited; *Vought v. Eastern B. & L. Ass'n*, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761. In this case, as we have seen, the issuance of the bonds for the note was forbidden by law, and no benefit accrued to the corporation.

In *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664, Chief Judge Andrews says:

"A corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute, and, in the application of this

principle, it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the Legislature, within its constitutional power, has declared shall not be performed."

In *Railway Companies v. Keokuk Bridge Co.*, 131 U. S. 371-389, 9 Sup. Ct. 770, 33 L. Ed. 157, Mr. Justice Gray, speaking for the court, says:

"It is proper to add that our judgment does not rest in any degree on the ground suggested in argument—that, the bridge contract and the lease having been executed, the Pittsburgh and Pennsylvania Companies, having received the benefits of them, are estopped to deny their validity, because, according to many recent opinions of this court, a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a quantum meruit, the value of what the defendant has actually received the benefit of. *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Parkersburg v. Brown*, 106 U. S. 487-503, 1 Sup. Ct. 442, 27 L. Ed. 238; *Chapman v. Douglas County*, 107 U. S. 348-360, 2 Sup. Ct. 62, 27 L. Ed. 378; *Salt Lake City v. Hollister*, 118 U. S. 256-263, 6 Sup. Ct. 1055, 30 L. Ed. 176; *Pennsylvania Railroad v. St. Louis, etc., Railroad*, 118 U. S. 290, 317, 318, 6 Sup. Ct. 1094, 30 L. Ed. 83."

And in the leading case on this subject (*Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 54, 55, 11 Sup. Ct. 478, 25 L. Ed. 55) Mr. Justice Gray, exhaustively reviewing the authorities on *ultra vires*, says:

"It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court."

This transaction, being one within the prohibition of the statute, is therefore void. "Contracts prohibited by statute, or declared illegal or void, or made in the exercise of a power expressly denied, are, of course, void, and the courts will not aid either party to them." *Washington Life Ins. Co. v. Classon*, 162 N. Y. 305, 310, 56 N. E. 755. *New York State Loan & Trust Co. v. Helmer*, 77 N. Y. 65; *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531; *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275.

We have not discussed here the question as to the obligation of a corporation, which has received money or property under a contract which was beyond its powers, to refund such money or property before it can set up the plea of *ultra vires*, because, as stated above, we hold that no money or property was received by this corporation in exchange for said bonds.

The order of the District Court affirming the order of the referee is reversed, with costs.

In re WATERLOO ORGAN CO.

(Circuit Court of Appeals, Second Circuit. December 20, 1904.)

No. 23.

1. CORPORATIONS—BANKRUPTCY—BONDS—ISSUANCE AS SECURITY—CLAIMS.

New York Corporation Law (Laws 1892, p. 1824, c. 688) § 2, authorizes corporations organized thereunder to borrow money necessary for their business, and to issue and dispose of their obligations to secure the same, etc.; and section 42, p. 1835, provides that no corporation shall issue bonds, except for money, labor, or property actually received for its use and lawful purposes, and that no bonds shall be issued for less than the fair market value thereof. *Held*, that where a corporation, being in need of money, pledged certain of its bonds to a bank as security for further credit, under an agreement that the corporation might sell any of the bonds at par, and, on delivery of the proceeds thereof to the bank, it would release and redeliver such bonds to the corporation, and the bank immediately thereafter extended its line of credit to the corporation, such bonds were properly issued, and constituted valid claims against the corporation's estate in bankruptcy.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of New York, in Bankruptcy.

See 118 Fed. 904; 128 Fed. 517.

Petition by trustee and creditors of the Waterloo Organ Company, bankrupt, to review an order affirming order of referee adjudging that the First National Bank of Waterloo is the owner and holder of 21 bonds, of \$500 each, issued by the bankrupt, and allowing the claim of said bank as a valid obligation of the bankrupt.

George E. Zartman, for petitioners.

J. N. Hammond, for respondent.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The Waterloo Organ Company, a full liability company, organized under the New York corporation law, was adjudicated an involuntary bankrupt on July 2, 1902.

"On or about September 21, 1900, pursuant to a resolution of the board of directors theretofore passed, the preamble to which was as follows:

"Whereas, this company desires to obtain additional advances, loans, discounts, credits and other pecuniary accommodations of and from the First National Bank of Waterloo, N. Y., and

"Whereas, the said bank requires security for all such loans and discounts, and for any other indebtedness or liability of this company to it,"

—The said company by an instrument signed by its president and secretary, executed under its corporate seal and duly acknowledged, transferred to the said First National Bank of Waterloo twenty-one of the mortgage bonds, of \$500 each, of said company, numbered sixty to eighty, both inclusive, as 'a general and continuing collateral security for the payment at maturity and according to the terms thereof of each and all of the notes, checks, drafts, bills of exchange and other obligations of every kind, made, drawn, signed, accepted or endorsed by said Waterloo Organ Company which the said bank now has or which it may at any time hereafter have, hold, purchase or obtain, including any and all claims either in law or in equity, held or acquired by said bank against said Waterloo Organ Company, to the end that the bonds so delivered may be held by the said bank as security and indemnity, for any

indebtedness or liability of any kind whether past, present or future, owing by the said Waterloo Organ Company to the said bank from time to time.'

"Said instrument further provided that the company should have the privilege to sell any of said bonds to other parties at par, to deliver the proceeds thereof to the bank to be applied upon the indebtedness of the company to the bank, and that thereupon the bank should release and redeliver to the company the bonds so sold and paid for."

At the time of said transfer the company was directly indebted to the bank upon its own notes in the sum of \$6,415.45, and contingently liable as indorser on business paper of its customers, which had been discounted by the bank, in the further sum of about \$33,000. Upon the delivery of the bonds the bank immediately increased its line of discounts to the company, and the indebtedness of the company to the bank was largely increased, and so continued down to the time of the adjudication, when the amount of paper on which the company was directly liable was about \$11,000, or a sum in excess of the par value of the bonds. The bank presented before the referee its 21 bonds, of \$500 each, for proof and allowance.

The sections of the corporation law of the state of New York (Laws 1892, pp. 1824, 1835, c. 688) pertinent to the issues herein are as follows:

"Sec. 2. That in addition to the powers conferred by the general corporation law every stock corporation shall have the power to borrow money and contract debts when necessary for the transaction of its business or for the exercise of its corporate rights, privileges and franchises, or for any other lawful purpose of its incorporation; and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations or of any debt contracted for said purposes."

"Sec. 42. No corporation shall issue either stock or bonds except for money, labor or property actually received for the use and lawful purposes of such corporation. No such stock shall be issued for less than its par value. No such bonds shall be issued for less than the fair market value thereof."

Counsel for the trustee objected on the ground that there was no valid consideration for the issue of the bonds, and that, as they were issued as collateral security without a present consideration, they were not issued for their fair market value, and therefore the issue was ultra vires and void.

The referee has discussed the questions raised herein, and the authorities bearing thereon, and held "that it was in the power of the corporation to pledge these bonds to the bank; that the bank is a lawful holder thereof, and, having proved them, they should be allowed in this proceeding"; and the court below has affirmed the order of the referee allowing the claim on said bonds. We concur in said decision.

The record fails to show any written agreement fixing the value at which the bonds were issued. It is agreed that their par value was their fair market value. In case of doubt as to the character of a transaction, or as to the proper construction and interpretation of a contract, and the determination of the respective rights and obligations of the parties thereto, such doubts may be resolved,

and the intention or understanding of the parties thereto may be determined, by a consideration of their relations, the objects they respectively had in view, their declarations at the time of the transaction, and their acts then and thereafter done.

It appears from the record that the company "desired to obtain additional advances, loans, discounts, credits, and other pecuniary accommodations," and that the First National Bank required security therefor, and for any other obligations of the company, and that the company thereupon issued its bonds to said bank under its power to mortgage its property to secure payment of debts contracted for corporate purposes. In view of the amount then due, and the immediate increase by the bank of the company's line of discount until the direct liability alone of the company exceeded the fair market value or par value of said bonds, we think it may fairly be inferred that the company was in need of further funds in order to carry on its corporate business; that the bank was unwilling to grant further credits except upon receipt of further security, and that the agreement between the parties was that said bonds should be issued at their fair market value, which was their par value, and that they were actually issued for property in the nature of advances, loans, discounts, credits, etc., received for the use and lawful purposes of said corporation; and that said issue, therefore, was valid. That said bonds were issued at par is further indicated by the provision in the instrument of transfer "that the company should have the privilege to sell any of said bonds to other parties at par, to deliver the proceeds thereof to the bank to be applied upon the indebtedness of the company to the bank, and that thereupon the bank should release and redeliver to the company the bonds so sold and paid for." Under this arrangement, the bank was bound to account for said bonds at their par value. This consideration is important in view of the strenuous argument of counsel for petitioner, supported by some decisions, that the company could not dispose of its bonds at less than the value provided for by state Constitution or statute, because the bonds, if resold to an innocent purchaser for value, might be enforced as a valid obligation for their full value against the maker of the bonds. In these circumstances, as the company has actually received a consideration equal to the full value of the bonds, and has enjoyed the benefits thereof, it should not be permitted to escape payment therefor by alleging the invalidity of said bonds.

The principle applicable to such a case is illustrated in *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, where Mr. Justice Gray says:

"The true ground of relief in such cases is clearly shown in a line of opinions, two of which were cited by Mr. Justice Miller in support of the proposition just quoted, in which municipal corporations, having received money or property under contracts so far beyond their powers as not to be capable of being enforced or sued on according to their terms, have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they had received."

To the same effect are *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238. There Mr. Justice Blatchford says:

"In such a case, the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."

In *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531, and *Pratt v. Eaton*, 79 N. Y. 449, the court held that a corporation seeking to avoid liability on a contract on the ground that it was prohibited from making the same was bound to restore the consideration received on the faith of such contract, and, where a mortgage was given to secure a loan, although the security received therefor was void because prohibited by law, yet, the loan being valid, the court annexed the pledge to the debt for the loan made, and held that the mortgage bonds might be enforced against the assets of the corporation.

In the case of *Francis Bacon* against this defendant, decided at this term (134 Fed. 341), we held (following the decisions of the federal courts) that the bonds were void, and the plea of *ultra vires* was a good defense. That decision, however, was based upon the finding that no property was received by the Organ Company in exchange for its bonds; that the note which was given was not property devoted to the use of said company; that it was not, in fact, received for the lawful use and purposes of said company; and that the company had not enjoyed any benefit from the receipt of said note.

The order is affirmed, with costs.

DES MOINES LIFE ASS'N v. CRIM.

(Circuit Court of Appeals, Fourth Circuit. November 29, 1904.)

No. 529.

1. APPEAL—REVIEW—HARMLESS ERROR.

Where the demurrer of a defendant to a replication setting up an estoppel, going to the right of the defendant to maintain the defense pleaded as to a part of the claim sued on, was overruled, and defendant thereupon rejoined, and went to trial on the issues made by the declaration and plea, a finding and judgment for plaintiff on such issues renders the ruling on the demurrer immaterial, and it will not be reviewed in the appellate court.

2. TRIAL—DEMURRER TO EVIDENCE—OPERATION AND EFFECT.

A demurrer to evidence admits all the facts directly proved by, or that a jury might fairly infer from, the evidence, and the court is justified in finding a fact in favor of the demurrant only when the evidence is such that a contrary finding, if made by a jury, would be set aside.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 356.]

Morris, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of West Virginia.

John W. Davis (Geo. R. Sanderson, on the brief), for plaintiff in error.

John Bassel (Melville Peck, on the brief), for defendant in error.

Before MORRIS, BRAWLEY, and PURNELL, District Judges.

BRAWLEY, District Judge. This is an action of assumpsit upon a policy of insurance, commenced in Barbour county, W. Va., and removed by the defendant, plaintiff in error, to the United States Circuit Court for the Northern District of West Virginia. The plaintiff in error issued its policy of insurance for \$2,000 on the life of Estella Koon, September 25, 1896. She died February 26, 1899, and her husband, J. L. Koon, the beneficiary of the policy, assigned it March 9, 1899, to J. N. B. Crim, defendant in error, who brought suit thereon July 13, 1899. The defendant company pleaded, first, the general issue; and, second, that the insured had made false answers in her application to certain questions propounded in the application for insurance, and warranted her answers to be true; that these answers were material, were falsely made, and that the policy had therefore been obtained by fraud. To the specifications of defense the plaintiff entered a general replication denying each allegation as to the several questions seriatim, and tendered a special replication, which alleged, in substance, that on March 9, 1899, J. L. Koon, the beneficiary, assigned the policy to the plaintiff for the sum of \$2,000, the face value thereof, the terms agreed upon being the payment of \$500 in cash to Koon, and the remainder, \$1,500, to be paid when the policy was collected from the defendant company. Shortly after the assignment Koon exhibited to the plaintiff two letters of date March 7, 1899, and March 15, 1899, of C. E. Rawson, president of the defendant company, which are as follows:

"Des Moines, Iowa, March 7, 1899.

"J. L. Koon, Speers, Pa.—Dear Sir: I am just in receipt of a letter from Mr. Loar notifying us of the death of your wife. As per request I herewith enclose your blanks for making proofs. Kindly see that they are carefully filled out and returned to us at your earliest convenience, and if found satisfactory to our board you may rest assured that the claim will be paid in full within the ninety days allowed by the terms of the policy.

"Yours respectfully,

[Signed]

C. E. Rawson, President."

"Des Moines, Iowa, March 15, 1899.

"J. L. Koon, Speers, Pa.—Dear Sir: Yours of the 13th enclosing proofs as stated came this morning. This matter will come before our board in a few days, and if anything further is needed will notify you.

"We are not authorized to do business in Pennsylvania, and for that reason we cannot send our agent there to solicit. However, if you want a policy with us you have a perfect right to apply direct to the office for it, and it seems to me that the full payment ought to satisfy you something of the way we do business, and you certainly know enough of the history of the company to satisfy yourself as to its future. I enclose you a little of our late printed matter, which will show you something of what we are doing.

"Yours respectfully,

[Signed]

C. E. Rawson, President."

And the defendant in error alleged that he was induced to believe and did believe that the defendant fully intended to pay the policy upon proofs being made, and, relying thereon, he paid Koon

the further sum of \$1,500; that he would not have made such payment except for the statements contained in the letters; that Koon was insolvent; and that plaintiff in error was estopped from setting up the matter as relied upon in its specifications of defense. To this special replication plaintiff in error demurred. Demurrer was overruled, and exceptions taken. The defendant then entered a general rejoinder to the special replication, and at the same time joined issue upon the general replication to the special plea.

The case came on to be heard April 23, 1902, before a jury, and the following verdict was rendered:

"J. N. B. Crim vs. Des Moines Life Association. In Assumpsit.

"This day came again as well the parties, by their counsel, as the jury which was impaneled and sworn to try the issue joined in this case, and, having heard the completion of the evidence and the arguments of counsel, on their oaths do say: 'We, the jury, find for the plaintiff the sum of \$2,367.77, if upon the defendant's demurrer to the evidence the court shall be of the opinion that the law of the entire case is for the plaintiff; and if the court shall be of the opinion that the law of the case is for the plaintiff only so far as the \$1,500.00 paid before the receipt of the letters of C. E. Rawson is concerned, then we find for the plaintiff the sum of \$1,758.25; and if the court shall be of the opinion that the law of the case upon said demurrer is for the defendants, then we find for the defendants.'"

And the following order was entered by the presiding judge:

"The defendant having demurred to the evidence in this case before the rendition of the verdict aforesaid, in which demurrer the plaintiff joined, the same was argued by counsel, and the court takes time to consider its judgment thereof."

At the October term, 1903, the following judgment was entered:

**"J. N. B. Crim, Assignee of J. L. Koon, vs. Des Moines Life Association.
In Assumpsit.**

"This day came the parties by their attorneys, and the plaintiff here waiving claim to the larger sum found by the jury in its verdict found herein on the 28th day of April, 1902, and being willing to accept judgment for the alternative sum found by the said jury, to wit, the sum of \$1,758.25, therefore it is considered by the court that the defendant's demurrer to the evidence be overruled as to said sum, and that the plaintiff do recover of the defendant the said sum of \$1,758.25 and \$758.25, with interest thereon from April 28, 1902, the date of the said verdict; and it is further considered that the plaintiff do recover of the defendant his costs in this behalf expended."

The errors assigned are: First, in overruling the demurrer to the special replication; second, in holding that the matters and things in said special replication alleged were sufficient to constitute an estoppel in pais; third, in overruling the demurrer to the evidence; fourth, other errors apparent upon the face of the record.

The greater part of the argument before us has been addressed to the question of estoppel raised by the plaintiff's special replication to the defendant's pleas, and the error of the court in not sustaining the defendant's demurrer to it, but it seems to us that in pleading over and in going to trial upon the issue of fraud in the procuring of the policy, and the judgment of the court below being against the company upon that issue, the question of estoppel is not properly before us. The plaintiff below, in his special replication to the defendant's plea that the policy was void through fraud

in its procurement, has, in effect, said that, granting that the company has a good defense on the merits, and that the policy was in fact procured through fraud, yet the company, by its acts or representations, has intentionally or negligently induced plaintiff to believe that the policy was good, and, acting upon that belief, the plaintiff has paid out his money in the purchase of the policy, and will be prejudiced if the company is permitted to deny its validity. The defendant company, by its demurrer, has asserted that it has done no act, concealed no fact, made no misrepresentation, which would legally prevent its making its defense, and by the overruling of the demurrer the case went to trial upon the merits of its defense. Now, if there was no fraud in the procuring of the policy, and the same is valid, and is an existing obligation of the company, the question of estoppel is immaterial. We are inclined to think that the letters of Rawson did not create an estoppel; but in our view a decision on that point is unnecessary, for, the case having gone to trial upon the issue made by the special plea, and the court below on the demurrer to the evidence having decided against the company upon that issue, we feel ourselves bound by that judgment. If the record sustained the plaintiff in error's contention that the court below found "that there was fraud in the procuring of the policy which vitiated it, but that plaintiff in error was estopped by the letters written Koon, and by him exhibited to the defendant in error, from claiming this defense as against the defendant in error," the case would be otherwise; but counsel for defendant in error denies the correctness of this statement. In explanation of the fact that judgment was entered only for the sum of \$1,500 and interest, they say that, after the case had been held under advisement for more than a year, being anxious to get their money, they expressed a willingness to take judgment for the lesser amount, and judgment was so entered. The judgment, as entered, contains these words: "And the plaintiff here waiving claim to the larger sum found by the jury in its verdict found herein on the 28th day of April, 1902, and being willing to accept judgment for the alternative sum found by said jury," etc. We must take the record as it comes to us. We cannot read into this judgment what does not appear upon its face. There is no motion for new trial or exceptions, and the only question therefore is whether, upon the case as presented in the record, the judgment should be sustained. As already stated, the case went to the jury upon issues of fact, and at the conclusion of the testimony on both sides it was taken from the jury by a demurrer to the evidence and submitted to the judge, who, after long deliberation, gave the judgment appealed from. The issues of fact made in the pleadings and to which testimony was directed on the trial were that Estella Koon had made false answers to certain questions in her written application for insurance, and the defendant averred "that she was not then in good health; that she was then afflicted with lung disease of a tuberculous character; that she was afflicted with various diseases pertaining to her menstrual functions; that she had previously suffered from various illnesses and local diseases; that she had sustained a personal injury or

accident previous to the making of said answers by being thrown from a horse and seriously injured; that she had several miscarriages; and that numerous members of her family had died with consumption." The testimony upon the trial was that she was a healthy woman at the time of her application for insurance and up to a short time before her death; that she died of acute pneumonia, after a short illness, and there had been an epidemic of pneumonia in the neighborhood where she was living at the time of her death, and that she did not have consumption. Upon that issue we think it clear that the defendant company failed in its proofs. There was testimony that one of her brothers had died with consumption, and there was some testimony that one of her aunts had died of the same disease. Her father and mother were proved to be both alive. There was some testimony that she had had some irregularities in menstruation, but the medical witness who gave this testimony upon cross-examination said "they were just the irregularities that occur to all women." There was some testimony of a hearsay character that she had been thrown from a horse, but nothing to show that she had been seriously injured thereby, and that one of the miscarriages proved was attributed to this fall; the testimony leaving it in some doubt as to whether she knew at the time that she had a miscarriage, though, of course, she must have known it after it occurred; and it is in proof that the medical witness who attended her at the time (and the chief witness for defendant at the trial), about two years afterwards, when the policy now sued on had lapsed for nonpayment of premiums, upon an application of Estella Koon to reinstate the same, gave a certificate that she was at that date in good health, and a proper insurance risk. The testimony is that the answers to the questions in the forms described in the application were all written by the medical examiner; most of them are in form of "Yes" or "No," to nearly 100 questions; and the testimony leaves it in doubt whether each question was propounded directly to the applicant. There is no doubt whatever in our minds that if the case had been submitted to a jury the verdict would have been for the plaintiff for the full amount sued for, and it is at least doubtful whether the judge would have set aside the verdict. That the woman was in good health at the time the policy was taken out, and up to her last illness was a healthy woman, was fully proved, and there was no proof that her death was due to any hereditary tendency to consumption, or that the miscarriages contributed to it.

The practice of demurring to evidence, although of ancient origin, is now little availed of. It prevails in the state of West Virginia, where this case was tried. Barton's Law Practice states the principle that governs in the state of Virginia, and, so far as we have examined cases in other states where the same practice is recognized, it is a correct statement of the rule. On page 222 he says:

"In ascertaining the facts proved directly or by inference, we must not be unmindful of the effect of a demurrer to evidence. By it the demurrant allows full credit to the evidence of the demurree, and admits all the facts directly proved by, or that a jury might fairly infer from, the evidence; and in de-

termining the facts inferable inferences most favorable to the demurree will be made in cases in which there is a grave doubt which of two or more inferences shall be deduced. In such cases it would not be sufficient that the mind of the court should incline to the inference favorable to the demurrant to justify it in making that inference the ground of his judgment. Unless there be a decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to be made. The demurrer withdraws from the jury, the proper triers of facts, the consideration of the evidence by which they are to be ascertained; and the party whose evidence is thus withdrawn from its proper forum is entitled to have it most benignly interpreted by the substitute. He ought to have all the benefit that might have resulted from a decision of the case by the proper forum. If the facts of the case depend upon circumstantial evidence, or inferences from facts or circumstances in proof, the verdict of a jury ascertaining these facts would not be set aside merely because the court might have made inferences different from those made by the jury. To justify the grant of a new trial when it depends on the correctness of the decision between different inferences to be drawn from the evidence, it would not suffice that, in a doubtful case, the court would have made a different inference. The preponderance of argument or probability in favor of this different inference should be manifest. When the question is whether or no a fact ought to be taken as established by the evidence, either directly or inferentially, in favor of the demurrer, I do not know a juster test than would be furnished by the inquiry, would the court set aside the verdict had the jury on the evidence found the fact? If the verdict so finding the fact would not be set aside, it ought to be considered as established by the evidence demurred to."

The judgment of the court below is affirmed.

MORRIS, District Judge, dissents.

UNITED STATES v. CINCINNATI & M. V. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 3, 1904.)

No. 1,323.

1. BRIDGES—CONSTRUCTION OF STATUTE AUTHORIZING BUILDING OF RAILROAD BRIDGE—RIGHT TO RENEW PARTS.

A grant by a state to a railroad company of authority to build and maintain a bridge across a river for the use of its road, without restriction as to time, or the materials of which it should be constructed, authorizes the company to renew parts of the bridge from time to time for the purpose of maintaining it or better adapting it to the exigencies of business, without substantial change in its form, whether it be done with the same or some other suitable material.

2. SAME—"BRIDGE" DEFINED.

Defendant railroad company built a bridge for its road across the Muskingum river under authority given by the state of Ohio, which then exercised control over the river. Subsequently the state transferred its rights in the river to the United States, which accepted the same. By Act April 2, 1888, c. 53, 25 Stat. 74, Congress prescribed regulations to govern the building of bridges across the river between certain points: requiring any bridge thereafter erected to have at least one channel span of stated width and stated height above the water, and providing that any person or corporation having lawful authority "may hereafter erect bridges across said river for railroad or other uses upon compliance with the provisions and requirements of this act," but not otherwise. *Held*, that the word "bridge," as used in the act, comprehended not only the span or roadway, but also the abutments and piers upon

which it was supported, and that the replacing by defendant of the wooden superstructure of its bridge, which had become unsafe from decay and long use, by a new superstructure of iron, did not constitute the erection of a new bridge, so as to bring it within the provisions of the act.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

The following is the opinion of the Circuit Court (Thompson, District Judge):

The line of the railway of the defendant the Cincinnati & Muskingum Valley Railroad Company crosses the Muskingum river about seven miles below Dresden, Ohio. The bridge upon which it crosses the river, and over which its trains are run, was built in 1870, under authority granted to it by the Board of Public Works of the state of Ohio, and was a lawful structure. Afterwards, in 1886, the state of Ohio transferred to the United States its "rights in said river and its improvements" (see volume 83, Ohio Laws, p. 412), and on April 2, 1888, Congress passed "An act regulating the construction of bridges over the Muskingum river, Ohio" (25 Stat. 74, c. 53), which provides:

"That any person or corporation having lawful authority to erect a bridge or bridges across the Muskingum river, Ohio, between its mouth and Dresden, may hereafter erect bridges across said river for railroad or other uses, upon compliance with the provisions and requirements of this act, but no bridge shall be erected across said river which does not comply therewith.

"Sec. 2. That every bridge hereafter erected across the Muskingum river, Ohio, shall have its axis at right angles to the current at medium and high stages, and its piers shall be parallel to the current. No riprap or other outside protection for insufficient foundations will be permitted around the channel piers and all cofferdams, piling and other temporary works must be removed by the owners of the bridge before it is open to traffic.

"Sec. 3. That if the bridge be built as a continuous bridge, it shall have at least one channel span, the center of which shall be in the middle of the channel usually run in high stages by steamboats descending the river with barges or rafts in tow; said channel span to have a clear opening of two hundred and fifty feet, measured at the low water line, and the lowest part of the span to be forty feet above highest navigable water, as determined by a straight line connecting the tops of the lower lock gates at the head and foot of the pool in which the bridge is to be built. The other spans may have such grades as may be desired."

"Sec. 9. That the right to alter, amend, or repeal this act as to prevent or remove all material obstructions to the navigation of said river by the future construction of bridges is hereby expressly reserved."

This law relates to bridges to be constructed after its passage, and manifestly, in the use of the word "bridge," Congress intended to include not only the superstructure, but also the piers and abutments. As already shown, it provides that its piers shall be parallel to the current, and that no riprap or outside protection for insufficient foundations will be permitted around the channel piers, and that the channel span shall have a clear opening of two hundred and fifty feet, measured at the low-water line. This language could not have reference to a bridge, the construction of which did not include piers and abutments, but only the superstructure. Congress had in mind such a structure as Bouvier defines a bridge to be, namely: "A structure erected over a river, creek, stream, ditch, ravine or other place to facilitate the passage thereof; including by the term both arches and abutments." It is equally clear that Congress did not intend by this law to interfere with existing bridges. This appears from the language of the ninth section, where it is said "that the right to alter, amend, or repeal this act so as to prevent or remove all material obstructions to the navigation of said river by the future construction of bridges is hereby expressly reserved." There is no provision in the law for the removal of obstructions caused by bridges which were in existence at the time the law was passed.

It is complained in this case that the defendants are erecting a bridge across the Muskingum river in violation of the act of April 2, 1888, and other laws relating to the subject, and the complainant prays that they be perpetually enjoined from proceeding with the work of constructing said bridge. It is conceded that the work which the defendants are doing is the replacing of the present wooden superstructure of the bridge with an iron superstructure, and the question presented is whether the superstructure constitutes a bridge, within the meaning of the act of April 2, 1888. No action has ever been taken by the government to remove any obstruction to navigation caused by this bridge and its piers, probably because the river between the bridge and Dresden is not used, and, without the construction of dams and locks, cannot be used, for the purpose of navigation, other than by flat-boats and other small craft; but, if the improvements necessary to navigation by larger craft should be made, it would then be necessary to remove the obstructions caused by the bridge, whether the superstructure should remain as it is, or be replaced by an iron one; and it is suggested that, in the event of the removal of the bridge after the iron superstructure is placed thereon, the compensation which the government would be required to make therefor would be increased to the extent of the added value of the iron superstructure. But that is a question which does not arise here. The superstructure cannot be regarded as the bridge, within the meaning of the act, and the changing of the superstructure will not be the erection of a bridge in violation of the act.

The bill, therefore, will be dismissed.

Sherman T. McPherson, U. S. Atty.

Lawrence Maxwell, Jr., William W. Ramsey, and Joseph S. Graydon, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The United States seeks by this bill to obtain an injunction restraining the appellee the Cincinnati & Muskingum Valley Railroad Company from renewing the superstructure of its bridge over the Muskingum river. The locality of the bridge is six miles below Dresden, in Ohio. The river is navigable for small craft from Dresden to the place where it empties into the Ohio. It appears that the state of Ohio had and maintained control over the Muskingum river prior to 1886, and had constructed numerous improvements thereon, and had authorized the building of several bridges across it—among them, the bridge of this railroad company. In May of that year the state, by a joint resolution of its General Assembly, found in 83 Ohio Laws, p. 412, transferred all its rights, interests, and franchises in the Muskingum river, "subject to the paramount interests of navigation," to the United States. Congress assented to the transfer, and the United States assumed control of the river August 5, 1886 (24 Stat. 324, c. 929). On April 2, 1888, Congress passed an act (25 Stat. 74, c. 53) regulating the construction of bridges across the Muskingum river between its mouth and Dresden, and it is upon the provisions of the third section of this act that the present bill is founded. The original bridge of the railroad company was built 30 or more years ago, with piers and abutments of stone, and a wooden superstructure. The bridge was built in conformity with the authorization of the state, and was maintained in its form and materials of construction until 1903, when, the superstructure having become unsafe on account of age, decay, and wear, the railroad company resolved to replace it with one of iron. The government objects to this, not so much, as we

infer, because it is proposed to build the superstructure of iron, but because the railroad company cannot lawfully rebuild it at all without conforming its entire bridge, including its piers and abutments, to said section 3 of the said act of Congress of 1888, which reads as follows:

"That if the bridge be built as a continuous bridge, it shall have at least one channel span, the center of which shall be in the middle of the channel usually run in high stages by steamboats descending the river with barges or rafts in tow; said channel span to have a clear opening of two hundred and fifty feet, measured at the low water line, and the lowest part of the span to be forty feet above highest navigable water, as determined by a straight line connecting the tops of the lower lock gates at the head and foot of the pool in which the bridge is to be built. The other spans may have such grades as may be desired."

The channel span of the bridge, as it was originally built and still stands, is 127 feet long, and the height of the superstructure above low water has been 30.38 feet. The question, therefore, is whether the renewing the superstructure of an old bridge is the building of a bridge, within the meaning of the act of 1888, for we think it cannot be doubted that, if the superstructure could be renewed in any way, the question whether it should be of wood or iron would be one of mere expediency, resting in the preference of the railroad company. In the original grant of authority there was no restriction in respect to the kind of material of which the superstructure should be built. The grant was not for a limited time, shorter than the uses of the railroad company should require. In the nature of things, it must have been known and appreciated that the superstructure of the bridge, especially, would be subject to dilapidation and decay from the effects of time and use, and might be injured or destroyed by fire or flood. It could not have been contemplated that in such case the company should be obliged to relocate and rebuild the masonry composing the piers and abutments of the bridge, so as to make an entirely new bridge. The grant must be construed with reference to the subject-matter, and, while it should be construed liberally in favor of the grantor, it should be construed reasonably, and in such manner as to fulfill the intention of the parties. Conceding that no alteration of the bridge could be made which should derogate from the rights of the public—as, for instance, by making it narrower or lower than it was authorized and built—yet it would seem that, subject to this restriction, the company was authorized to maintain any such bridge at this point as its uses might reasonably require.

We are not required, however, to decide how the case might be if the bridge should be entirely destroyed, and its restoration by a new structure should become necessary. But we have no hesitation in holding that the renewal of parts of the bridge from time to time for the purpose of maintaining it, or better adapting it to the exigencies of business, without substantial change in its form, whether it be done with the same or some other suitable material, is well within the privilege of the company, under the authorization of the original grant. Counsel for the government protests that this view would result in enabling the railroad company to change the entire structure of the bridge, providing it is done piecemeal, and the government would be powerless to stop it. Very likely this might be so. But the government would have no right to stop such changes as are necessary to the maintenance

of the structure, unless it is in position to claim the advantage of all dilapidation or decay, or the insufficiency of some part to sustain a heavier traffic, which might ensue. This would be tantamount to saying that the privilege of the grant would endure only so long as the material of the original bridge should last—a proposition which we think altogether untenable.

It is clear, also, from the language of the act of 1888, that it was not intended to apply to bridges which had already been built under lawful authority. The first section of the act is as follows:

"That any person or corporation having lawful authority to erect a bridge or bridges across the Muskingum river, Ohio, between its mouth and Dresden, may hereafter erect bridges across said river for railroad or other uses, upon compliance with the provisions and requirements of this act, but no bridge shall be erected across said river which does not comply therewith."

And the ninth:

"That the right to alter, amend or repeal this act as to prevent or remove all material obstructions to the navigation of said river by the future construction of bridges is hereby expressly reserved."

And it is evident that the act contemplates as its subject the building of entirely new bridges, having substructures and superstructures, for its regulations involve them. It is true that the word "bridge" is something used in a sense restricted to the span or roadway of a bridge, but that is not the whole of what is generally intended by the word, and especially in the customarily precise language of statutes, as in the act of 1888, where the word "bridge" comprehends not only the span or roadway, but also the supports and abutments thereof. In the common case of delegation to counties or other municipalities of power to build bridges, or to supervise and control them, we are not aware that it has ever been held that less than the whole structure was intended, and such we believe is the common understanding. *Howe v. Com'rs of Crawford Co.*, 47 Pa. 362; *Commonwealth v. Pittston Ferry Bridge Co.*, 148 Pa. 621, 24 Atl. 87; *People v. Supervisors of Queen Co.*, 142 N. Y. 271, 36 N. E. 1062; *State v. Commissioners of Gibson Co.*, 80 Ind. 478, 41 Am. Rep. 821. And in 5 Cyc. 1053, it is said that "both at common law and equally under our statutes a bridge includes the abutments and approaches necessary to make it accessible and convenient for public travel," citing numerous decisions. In *A. & E. Encycl. of L.* (2d Ed.) 919, in definition, it is stated that it includes the abutments and approaches. In the case of the Clinton Bridge, 10 Wall. 454, 19 L. Ed. 969, Mr. Justice Nelson said that by the word "bridge" Congress, in declaring it a lawful structure, meant to include its abutments, piers, superstructure, draw, and height. In *Bardwell v. Jamaica*, 15 Vt. 438, the Supreme Court of Vermont said:

"In speaking of a bridge in connection with the use for which bridges are erected, we can no more exclude the abutment than the flooring or framework of the bridge."

And in *Sussex County v. Strader*, 18 N. J. Law, 112, 35 Am. Dec. 530, it was said:

"The abutment is as much a part of the bridge as the pier, the arches, or the timbers. It consists of that mass of stone or solid work at the end of the bridge by which the extreme arches or timbers are sustained."

A similar view appears to have been entertained by Goff, Circuit Judge, and Jackson, District Judge, in the case of a bill filed by the United States against the Baltimore & Ohio Railroad Company and the American Bridge Company in the Circuit Court of the United States for the Northern District of West Virginia (no written opinion filed) to restrain the rebuilding of a bridge across the Ohio, and making it a much heavier structure to accommodate the increased weight of motive power and heavier traffic of the railroad company. The United States relied upon the act of February 14, 1883, c. 44, 22 Stat. 414, which forbids the construction of bridges across that river unless the plans are approved by the Secretary of War. But the bridge had been built before the passage of that act, and the injunction prayed was refused.

Our conclusion is that for both reasons—namely, that the renewal of the superstructure, in the circumstances existing, was within the privilege of the company under its grant from the state, and that the act of Congress of August 5, 1886, 24 Stat. 324, c. 929, did not contemplate the application of its provisions to the construction of new parts, in place of old, required for the maintenance of bridges already built under lawful authority—the bill cannot be maintained.

We are of opinion that the decree of the Circuit Court should be affirmed, except so far as it allows costs against the United States, which was probably an inadvertence, and as to which the decree should be reversed.

THE PRUDENCE.

O'KEEFE et al. v. TICE et al.

(Circuit Court of Appeals, Second Circuit. December 12, 1904.)

1. COLLISION—SCHOONER AND BARGE IN TOW—FAULT OF TUG.

A tug with three barges in tow on a long hawser, the last being 600 fathoms behind, *held* solely in fault for a collision in the night, in Delaware Bay, between the last tow and a meeting schooner, which was at the time tacking and on a crossing course, on the ground that, although the schooner's lights were seen half an hour before, when she was approaching on the other tack, no proper lookout was kept for her return, and no measures taken to avoid collision when she was seen again.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding the steam tug *Prudence* solely in fault for a collision between the schooner *William D. Marvel* and the barge *Drifton* in tow of the tug. The opinion of the District Court is reported 124 Fed. 939.

Samuel Park, for appellants.

E. L. Owen, for appellees.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The schooner was beating into Delaware Bay through the entrance between the Breakwater and Overfalls

Shoal. The tug was towing three barges tandem out to sea, the Drifton being the last in order, with 200 fathoms of hawser between the tug and the first barge and 150 between the several barges, a total of 500 fathoms of hawser plus the length of the barges. The District Judge has stated the facts very fully, and reference may be had to his opinion for a narrative of what took place as given by both sides. 124 Fed. 939. It is erroneously stated therein that the tide was ebb, instead of flood, as both parties here agreed. Moreover, if the statement in the opinion that when the schooner was on her last starboard tack before collision she showed her red light to the tug is to be taken as a finding of fact, instead of a statement of what the tug contended to be the fact (the text is not entirely clear), we think it is erroneous. The reasons which induce us to affirm the decision may be briefly stated. The night was good for seeing lights. The schooner saw the tug when she was coming in past the lightship on her first starboard tack. The tug saw the schooner while the latter was on her port tack from the Breakwater over towards the Overfalls Shoal, more than 15 minutes before she came about on her second starboard tack. Both vessels were navigating in plain sight of each other's lights, each knowing of the other's presence, and with plenty of sea room. Under these circumstances improper navigation must have been the cause of the collision. Inasmuch as the rules required the schooner to hold her course and the tug to keep her tow clear of that course, while in fact the schooner did hold her course until in the jaws of collision, she tried to come about, and missed stays, encountering the Drifton, which was actually in her course, it would be natural to find that the improper navigation was by the tug, which failed to haul the Drifton clear of that course. In defense it is urged that the schooner failed to avoid obvious danger, and misled the tug as to her course till it was too late for the tug to keep her tow out of that course. It is charged that the schooner failed to keep a proper lookout. The evidence, however, fails to sustain this charge. The schooner saw the tug long before the collision, saw her repeatedly, the lookout reported her, and the navigating officers made out her lights, and therefore knew she had more than one vessel in tow, and that the length of the tow exceeded 600 feet. They also made out the lights on two of the barges. In the face of such testimony it cannot be held that there was any failure by the schooner to maintain a careful lookout. The fact that no one on the schooner made out the third barge or her lights until too late to avoid her is not persuasive to the contrary in view of the circumstance that there is no evidence that the Drifton's lights were sufficient, while there is evidence of their dimness.

The main contention for the defense is that after the schooner had crossed the bows of the tug, standing to the eastward on the port tack, she failed to run her tack out and came about too soon, thus improperly embarrassing the tug. The schooner's explanation is that she was as close to the Overfalls Shoals as her navigator thought it prudent to go. It is not necessary to determine whether this be so or not, and the testimony, read in connection with the chart, would seem to indicate that she might have stood on further without risk of stranding. A sailing vessel, even with abundant sea room ahead, is not bound to run out

her tacks when navigating in the vicinity of another vessel. In *The Coe F. Young*, 49 Fed. 167, 1 C. C. A. 219, this court said:

"The sloop was entitled to assume that the tug was navigating with a proper lookout, and with reasonable attention to the obligations laid upon her. If, under that assumption, the sloop's maneuver was not calculated to mislead or embarrass the tug, it is immaterial whether or not she ran out her port tack. The testimony shows that she had gone about and filled upon the starboard tack before collision. The disputed question is whether there was abundant time and space to enable the tug, seeing her maneuver, to keep out of the way."

And we held the tug liable because the sloop had sailed on her new tack a distance which gave the tug ample time to conform her own navigation to the sloop's course, if she had seen the latter come about as she should have done. In the cause at bar the navigator of the schooner did not come about immediately after crossing the tug's bow. According to the testimony of those on the tug he held on for 15 minutes longer, till he ran out of their sight, and it was 10 or 15 minutes after that when they saw him coming back on the starboard tack. He ran so far to the eastward that, when he did come about, his new course, without the slightest assistance from the tug, carried him so far astern of her that he would easily have cleared the second tow, which, because of the insufficient light on the *Drifton*, was the last one he expected to find. The propriety of his navigation is to be tested by the conditions under which it was decided upon. He was not in fault for not making out the lights of the *Drifton* before he came about. He was far enough to the eastward to clear all he had seen, or had reason to expect, and he was entitled to rely on assistance from the tug as soon as his new course was taken. The navigator of the tug did not see the schooner come about. How long afterward it was before he again picked her up is not entirely clear. His navigation, however, is to be tested by what he was bound to expect. He knew she was beating in, and that there were shoals to the eastward, which might be expected to set her on the starboard tack again. On a night such as this her lights could have been seen soon after she was on the new course. The tug's course was known. The northerly limit of the schooner's course beating up on a wind not exactly steady, but blowing freshly from a general north-northeasterly direction, was reasonably inferable. If the enormous length of the tow made it doubtful whether the schooner could clear it while holding her new course, it was for the tug to shape her own course so that the schooner would not collide with the tow. The witnesses for the tug undertake to show that when the schooner was sighted on her new course there were no indications of danger; that both vessels were red to red, and moving on substantially opposite courses. In our opinion, the weight of evidence is to the contrary. The witnesses from the schooner all testify that after they got about, and shaped the new course, the tug was on their starboard bow, and thus red to green. Moreover, it is very evident that the vessels were not on opposite courses with that wind. Putting them on crossing courses (remembering that the tug concedes that when the schooner was seen again on her new tack she was still on the port bow of the tug), it will be found that after the change of course the schooner's green light must have been exhibited to the tug, and the

navigation of the latter should have been conformable thereto. We concur with the District Judge in the conclusion that a "prudent way for her to navigate was to starboard her helm when the schooner was made out on her own port bow, and pass the schooner starboard to starboard." If they saw her green light, and failed to make this change, their navigation was faulty. If they failed to see the green light because after she had passed to the eastward on the port tack they gave themselves no more concern about her whereabouts, and therefore kept no lookout for her return, they were careless in that respect.

The decree of the District Court is affirmed, with interest and costs.

HUNTER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 21, 1904.)

No. 30.

1. CUSTOMS DUTIES—CLASSIFICATION—ENVELOPES—MANUFACTURES OF PAPER.

Pieces of paper which have been cut into shapes and sizes adapting them to be folded so as to constitute envelopes, but which are not shown to have been commercially known as envelopes at and prior to the time of the passage of the tariff act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], are not dutiable as "paper envelopes," under paragraph 399, Schedule M, § 1, of said act, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672], but as manufactures of paper, under paragraph 407, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673].

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (126 Fed. 894), affirming a decision of the Board of General Appraisers (G. A. 4,768, T. D. 22,497), which sustained the collector of the port of New York as to the rate of duty on certain merchandise imported under the tariff act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626].

W. W. Smith, for appellant.

D. Frank Lloyd, for the United States.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The articles in question might appropriately be described as "envelope blanks." They consist of pieces of paper which have been cut by machinery into certain appropriate shapes and sizes, which adapt them to be folded so as to constitute envelopes of desired shapes and sizes. They were assessed for duty under paragraph 407, Act July 24, 1897, c. 11, Schedule M, § 1, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], as "manufactures of paper, or of which paper is the material of chief value, not specially provided for in this act." It is not disputed that they are manufactures of paper; the only question in the case being whether they have been manufactured into the articles provided for in paragraph 399 (30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]), which reads as follows:

"399. Paper envelopes, plain, twenty per centum ad valorem; if embossed, printed, tinted or decorated, 35 per centum ad valorem."

The Standard Dictionary defines "envelope" as "a case or wrapper, usually of paper, with gummed edges for sealing, in which a letter or like may be sent through the mail or inclosed for any purpose." Manifestly the paper blank is not within this definition. A second and broader definition is also given: "Any inclosing integument or covering. A wrapper." Broad though this is—and it is comprehensive enough to cover a pea pod or a chestnut burr—it would not include a mere piece of cloth, paper, or what not, however convenient its shape and size, until it was actually put to use as a wrapper, thus becoming an "inclosing" integument or covering. In common everyday speech, the word "envelope" is used as implying the actual case or wrapper, of paper or cloth, in which a letter or the like may be inclosed. The "blanks" here imported have not yet become such case or wrapper, even though they may be of such shape and size as to unfit them for other purposes. It is still necessary to fold over the flaps, and to apply gum to the edges of some of them, and actually to stick together the side and bottom flaps. These are substantial steps in the process of manufacture—manifestly more substantial than was the mere act of cutting the individual veil from the roll of veils in *Oppenheimer v. United States*, 66 Fed. 52, 13 C. C. A. 327, on which appellant relies. Nor is appellant's contention sustained by *Isaacs v. Jonas*, 148 U. S. 648, 13 Sup. Ct. 677, 37 L. Ed. 596, in which packages of cigarette papers, and the paper covers therefor, imported separately with the intention of pasting them together after they were withdrawn and before selling, were held dutiable as "smoker's articles." It was said by the court that:

"The mere pasting together of the papers and the covers was in no proper sense a process of manufacture, and did not change the use or the character of the articles."

But that language is to be interpreted in the light of the facts in the case then under consideration. It was held that:

"The leaves of paper were fit for nothing else but to be made into cigarettes, and smoked with the tobacco wrapped in them; and they were used in the same way, whether never put into a cover at all, or first pasted into a cover, and afterwards torn out one by one. The covers were fit for nothing except to hold and protect the papers until made by the smoker into cigarettes."

Evidently the court was of the opinion that packages and covers were equally "smoker's articles," and therefore held that their character was not changed by merely pasting them together.

There remains the question of commercial designation. The Board of General Appraisers found that "the merchandise is known as 'flat envelopes,' but have to be folded and gummed to make them the envelope of commerce." The testimony of the single witness who testified does not bear out this finding. He said that in trade there were two kinds of envelopes (flat envelopes, such as the importation, and folded envelopes, of which he produced a sample), and that, in ordering those goods or in describing them, no other term is used except the term "envelopes" (flat envelopes or folded envelopes, as the case may be). There is no testimony in the case upon which any finding of trade designation can be made. The witness properly qualified himself by stating that he had been engaged in the paper business since 1883, but he was

asked only as to present meanings of the terms used in that trade. No question was put tending to elicit whether there was any special trade meaning of the word "envelopes" at and immediately prior to the passage of the act of 1897.

The decision of the Circuit Court is affirmed.

GORMAN-WRIGHT CO. et al. v. WRIGHT.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 546.

1. CORPORATIONS—PLEDGE OF STOCK—RIGHTS OF PLEDGEE.

A pledgee of stock has such an equitable interest therein as will entitle him to be heard in a court of equity, to the same extent, at least, as the pledgor, concerning its preservation and the protection of his interests therein.

2. COURTS—JURISDICTION OF FEDERAL COURT—DIVERSE CITIZENSHIP.

Under Act Cong. March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], withdrawing from the cognizance of the Circuit and District Courts any suit by an assignee on a promissory note or other chose in action, unless such suit might have been prosecuted in such court if no assignment had been made, a pledgee of stock cannot, on account of the diverse citizenship existing between himself and the corporation, sue the corporation in the federal court for the appointment of a receiver where his pledgor is a resident of the state of which the corporation is a citizen.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

3. SAME—APPEAL—DENIAL OF JURISDICTION.

Where the record before the Circuit Court of Appeals clearly shows the want of jurisdiction of the federal courts in the premises, it is its duty to deny jurisdiction on its own motion if the question is not raised by appellant.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 816, 818.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, in Equity.

G. A. Hanson and A. L. Holladay, for appellants.

H. A. Foushee and S. S. P. Patteson (J. S. Manning, on the brief), for appellee.

Before GOFF, Circuit Judge, and MORRIS and PURNELL, District Judges.

GOFF, Circuit Judge. This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Virginia, by which a receiver was appointed, with directions to take possession of the stocks, money, bonds, and other assets of the corporation known as the Gorman-Wright Company. The appellee, R. H. Wright, complainant below, was, when he filed his bill, neither a creditor of said company, nor a stockholder in the same, but was, as he alleged in his bill, a pledgee of 100 shares of the capital stock of that company, of the par value of \$100 each; the same, having been transferred to him

by J. N. Gorman, one of the defendants below, as collateral security only for the payment of a certain sum of money due the appellee by said Gorman for said stock, which he had purchased from Wright. The appellee is a citizen and resident of the state of New York. The Gorman-Wright Company, one of the appellants, is a corporation organized under the laws of the state of Virginia; having its principal office at Richmond, in the Eastern District of that state. J. N. Gorman, the other appellant, is a citizen and resident of the Eastern District of Virginia. The bill charges that the Gorman-Wright Company is greatly indebted, that it has been improperly and carelessly managed, that its board of directors has failed to properly discharge the duties required of it, that the company is in fact insolvent, and that, unless a court of equity intervenes by taking charge of the assets of the company, the creditors and stockholders of the same would suffer great loss, to the damage of the complainant, who would thereby, as pledgee of said 100 shares of stock, lose the security he had contracted for. The prayer of the bill was for the appointment of a receiver for the care and protection of the assets of the company, for the sale of the same, and the proper distribution of the proceeds among those entitled thereto. An injunction was also asked for, inhibiting the officers and agents of said company from in any manner interfering with the receiver in the discharge of his duties as such official. The appellee, as stated, did not claim to be a creditor of the Gorman-Wright Company, but alleged that he was a creditor of J. N. Gorman; nor did he claim to be a stockholder of that company, except as the assignment of said stock to him by Gorman as collateral security, before mentioned, would make him a stockholder. The court below, on consideration of the bill, exhibits, and affidavits, granted the prayer of the bill, by appointing the receiver and issuing the injunction asked for. From this decree the appeal we now consider was allowed.

The appellants insist that the court below did not have jurisdiction of the case made by the bill. The appellee maintains that, as pledgee of the stock transferred to him as collateral security, he was entitled to the aid of a court of equity in protecting his interest therein, and that the court below had jurisdiction because of the citizenship of the parties.

We think it beyond question that the pledgee of stock has such an equitable interest in it as will entitle him to be heard in a court of equity concerning its preservation, and the protection of his interests therein, to the same extent, at least, as the stockholder pledging it would have. 2 Thomp. Corp. § 2657; 22 A. & E. Ency. of Law (2d Ed.) 907; 2 Kent's Com. (14th Ed.) 349. But while it is true that the pledgee of stock may sue in equity concerning it, with the same rights and privileges that the pledgor had, does it follow that the court below had jurisdiction of this case? It appears from the bill that the pledgor, J. N. Gorman, is a citizen of the state of Virginia, and that the Gorman-Wright Company is likewise a citizen of that state. There can be no doubt but that Wright, as the pledgee of Gorman, can maintain a suit against him as pledgor, in conjunction with the Gorman-Wright Company, in the proper court of the state of Virginia; but it does not follow that Wright can also sue his pledgor and that company in the

Circuit Court of the United States for that state. Can Gorman, a citizen of Virginia, and a resident of the Eastern District thereof, sue the Gorman-Wright Company, also a citizen of Virginia, doing business in the Eastern District thereof, in the Circuit Court of the United States for that district? Certainly not. Then can Wright, as pledgee of Gorman, sue in a jurisdiction where Gorman himself could not have maintained a suit? Clearly not, for the statute, in express terms, prohibits it.

By the first section of the act of March 3, 1887, c. 373, 24 Stat. 552, relating to the jurisdiction of Circuit Courts of the United States, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], no Circuit or District Court has cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of any assignee, unless such suit might have been prosecuted in such court to recover said contents if no assignment or transfer had been made. This provision of the statute has been construed in a number of cases, and its meaning declared to be that no assignee, or person occupying the position of assignee, can bring a suit in a Circuit Court of the United States, unless such suit might have been prosecuted by the assignor if no assignment had been made; and the Supreme Court of the United States has held that:

"The term 'assignee,' in the statute, covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of a transfer to him, can claim its beneficial interests." *Plant Investment Co. v. Jacksonville, Tampa & Key West Railway Company*, 152 U. S. 71, 14 Sup. St. 483, 38 L. Ed. 358.

We therefore find ourselves compelled to regard Wright as the assignee of Gorman, and to hold, quoad the question of jurisdiction, the stock so in his hands was a chose in action, within the meaning of said jurisdictional statute; and hence it follows that, as Gorman could not have sued in the court below concerning the same, Wright, his assignee, was also without that privilege. *Newgass v. New Orleans* (C. C.) 33 Fed. 196; *Rollins v. Chaffee Co.* (C. C.) 34 Fed. 91; *Wilson v. Knox County* (C. C.) 43 Fed. 481; *Church et al. v. Citizens' St. R. Co. et al.* (C. C.) 78 Fed. 526; *Barksdale et al. v. Finney et al.*, 14 Grat. 338; *Sere & Leralde v. Pitot et al.*, 6 Cranch, 332, 3 L. Ed. 240; *Sheldon and Wife v. Sill*, 8 How. 441, 12 L. Ed. 1147; *Corbin v. County of Black Hawk*, 105 U. S. 659, 26 L. Ed. 1136; *King Bridge Co. v. Otoe County*, 120 U. S. 225, 7 Sup. Ct. 552, 30 L. Ed. 623; *Shoecraft v. Bloxham*, 124 U. S. 730, 8 Sup. Ct. 686, 31 L. Ed. 574; *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; *Parker v. Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654; *New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; *Mexican National Railroad Company v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672.

The appellee, who claimed the right to sue by virtue of an assignment made to him, should have shown affirmatively in his bill that both he and his assignor were citizens of a state or states other than the state of which the Gorman-Wright Company was a citizen, as the jurisdiction he sought was based on the citizenship of the parties. In

fact, his bill shows to the contrary, for he alleges that his assignor and the Gorman-Wright Company are citizens of the same state.

If the question of jurisdiction had not been raised by the appellant, it would have been the duty of this court to have denied its own jurisdiction on its own motion, because the record before us clearly shows it. Reaching this conclusion, it is not necessary that we should consider the other assignments of error. There is error in the decree complained of, and it will be reversed, and this case will be remanded, with directions to the court below to dismiss the bill.

Reversed.

SCRIVEN et al. v. NORTH et al.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 526.

1. APPEAL—FINAL DECISION—DECREE IN PART FINAL AND IN PART INTERLOCUTORY.

Where a bill in a Circuit Court set up four distinct causes of action, one for infringement of a patent, one for infringement of a trade-mark, and two for unfair competition, a decree dismissing the bill as to the first three causes of action is a "final decision" thereon, in such sense as to be appealable, although as to the fourth cause of action the bill is sustained and an accounting is directed thereunder.

[Ed. Note.—Finality of judgment for purpose of review, see notes to Central Trust Co. v. Madden, 17 C. C. A. 238, and Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co., 28 C. C. A. 482.]

2. UNFAIR COMPETITION—IMITATION OF DRESS—INTENT TO DECEIVE.

Complainants established the manufacture of a peculiar style of men's drawers, having a strip of elastic knitted material inserted at the seams. The body of the garment was white, and the seam strips made of Egyptian yarn, the natural color of which is yellow or buff, and which was selected deliberately and because of its distinctive color. Complainants also adopted the name "Scriven's Elastic Seam," and the arbitrary number "50," which were stamped upon each garment. Thirteen years or more later, and after complainants' garment had become well known by reason of such distinctive features, and had acquired a high reputation and large sale on its merits, defendants began the manufacture and sale of an inferior and cheaper garment, but having the same general appearance. They were stamped with the words "Standard Stretchy Seam" and the same numeral, "50," in a style imitating that of complainants. When complainants changed the form of their stamp, defendants changed theirs to correspond. They also advertised their goods as "Elastic Seam Drawers." In some cases defendants also used a cheaper domestic yarn in making the seam strips, dyed to imitate the Egyptian yarn used by complainants. *Held* that, aside from any question of trade-mark or of defendants' right to make and sell their goods without resorting to deception, such facts showed a deliberate intention to deceive purchasers by palming off their goods as those of complainants, which constituted unfair competition, and entitled complainants to an injunction; it being further shown that purchasers were in fact deceived, and that defendants' goods were largely advertised and sold by dealers as "Scriven's."

[Ed. Note.—Unfair competition, see notes to Scheuer v. Mueller, 20 C. C. A. 163, and Lare v. Harper & Bros., 30 C. C. A. 376.]

3. SAME—GROUNDS FOR RELIEF.

The general principle that no man has a right to pass off his goods as and for the goods of another is broader than the rules applicable to

strict trade-mark, and extends to all cases of unfair competition; the difference between cases for infringement of trade-mark and those for relief against unfair competition being mainly in the matter of proof, the imitation of a trade-mark raising a conclusion presumptive of fraud, while in cases of unfair competition actual fraud or misleading of the public, or conduct calculated and intended to mislead it, must be shown by the proofs.

4. PATENTS—INFRINGEMENT—UNDERGARMENTS.

The Scriven patents, No. 378,465 and No. 472,555, each for improvements in undergarments, construed, and *held* not infringed.

Appeal from the Circuit Court of the United States for the District of Maryland.

For opinion below, see 124 Fed. 894.

Arthur v. Briesen (Edwd. N. Rich and Henry M. Turk, on the brief), for appellants.

Edgar H. Gans and W. Calvin Chesnut, for appellees.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

BRAWLEY, District Judge. The bill of complaint charged the defendants with the infringement of two patents for certain improvements in undergarments, and asked for an injunction and an accounting. It also charged the infringement of certain trade-marks or trade-names, and asked an injunction restraining the same and damages resulting therefrom. It charged, also, unfair competition in trade in making and stamping the garments in question, alleged to be infringements of the patents. It charged, also, unfair competition in trade in using a box of peculiar style.

The decree of the court below was: (1) That the defendants had not infringed the letters patent, or either of them, and directed that the bill, in so far as it relates to each and both, be dismissed. (2) That complainants had no valid trade-mark, and that defendants had not infringed any rights of complainants in so far as related to the alleged trade-mark, and directed that the bill be dismissed. (3) That defendants had not infringed or violated any rights of complainants in the manufacture of the garments mentioned, and directed that the bill be dismissed in so far as it sought to enjoin or in any wise interfere with the manufacture and sale of said garments by the defendants. (4) It held that the defendants had put up and offered for sale the drawers made by them in boxes made in imitation of those adopted by the complainants; that the imitation was intentional and for the purpose of unfair competition, to enable the defendants' goods to be deceptively substituted for complainants' goods; and therefore enjoined and restrained the defendants from selling their garments in boxes resembling or imitating complainants' boxes, and decreed that the complainants recover the damages which defendants had caused by their unlawful and unfair competition, and referred it to a master to take an account of defendants' said profits and to make an assessment of damages sustained by complainants by reason of such unlawful and unfair competition in trade—the decree closing in these words:

"The matter of costs is reserved for final consideration by the court on the coming in of the master's report and the final decree."

The complainants appeal from all of that part of the decree which orders the bill of complaint to be dismissed, and we are met on the threshold by a motion to dismiss the appeal on the ground that the decree was not a final decree. The act establishing this court provides that it shall "exercise appellate jurisdiction to review final decisions in Circuit Courts." It has been held that the phrase "final decisions" is equivalent to the words "final judgments and decrees" in the act governing appeals to the Supreme Court. Act Feb. 18, 1895, c. 96, 28 Stat. 666, amended the original act, so as to allow appeals in certain cases from interlocutory decrees, where an injunction shall be granted, continued, refused, or dissolved; but by act June 6, 1900, c. 803, 31 Stat. 660 [U. S. Comp. St. 1901, p. 550], section 7 of the act of March 3, 1891 (26 Stat. 828, c. 517), was amended by omitting the provisions for appeals in cases where an injunction is refused or dissolved, restoring the original phraseology, without mentioning Act Feb. 18, 1895. As our jurisdiction is not invoked under the last-mentioned act, we assume that it is conceded that Act June 6, 1900, repeals by implication this amendment, and that an appeal does not lie from an interlocutory decree denying an injunction. We have, then, to determine whether the decree appealed from is a final decree.

By its terms it is not, because the court reserves the question of costs for the coming in of the master's report and the final decree; but whether it is appealable is a question which must be determined by this court upon a consideration of what was done by the lower court in essence, and not by the name given to it. The complainants had four separate and distinct causes of action: (1) Infringement of patents; (2) infringement of trade-marks; (3) unfair competition in the manufacture and sale of undergarments; (4) unfair competition as to the use of the box. As to the three first mentioned, the decree in its essence and in terms is final. The injunction prayed for is refused, and the bill is dismissed. As to the fourth cause of action, the bill is retained and an account ordered to be taken. Each is a severable matter from the other subjects of controversy, and the accounting as to the unfair competition in the matter of the boxes does not affect the finality of the decree as to the three other distinct and separate causes of action.

The general rule as to what constitutes a final decree is well settled. It must so far terminate the litigation between the parties on the merits that in case of affirmance nothing would remain to be done but to execute the judgment or decree; and the reason for the rule is that thereby a multiplicity of appeals in the same case is prevented, and the case will not be heard by piecemeal. There are some exceptions to this rule, among the earliest of which is *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404, which is generally treated as exceptional. The object of the bill in that case was to set aside sundry deeds for lands and slaves, and for an account. The court declared the deeds to be fraudulent and void, directed the property to be delivered up to complainant, and that the master take an account of the profits. It was held that the decree was appealable, although Chief Justice Taney said: "Undoubtedly it is not final in the strict technical sense of that term."

The opinion in that case went largely upon the ground that the decree not only decided the title to the property in dispute, but awarded execution. The reason for the exception seems to exist here. The complainants assert property in certain patents. That property is the exclusive right to use it and for a limited period, and the decree dismissing the complaint annuls the patents and deprives complainants of their rights in the patents, and in the trade-marks, which they claim as property. That loss may be irreparable, for a material part of that period during which they may be entitled to exclusive use is gone and cannot be regained.

There is another consideration proper to be taken, and that is that if the appeal is delayed until the coming in of the master's report as to the boxes, and this court should decide that the complainant was entitled to the other relief asked for, there would have to be a new accounting, while if the court grants the relief now the master can proceed with it coincidentally with that already ordered. Upon the whole, we have determined not to dismiss the appeal.

The testimony shows that in the year 1884 Jeremiah A. Scriven, manufacturer of underwear, began the manufacture of a new style of men's drawers, the body portion of which was of white jeans, with longitudinal insertions of elastic knitted fabric inside and outside of the legs and at the back. Until that time drawers were all made of a uniform color, and in order to make his garments distinctive Scriven had the body portion of his garments made white and the elastic insertions yellow or buff. The selection of this buff color was deliberate and for the purpose of making it conspicuous and different from other similar garments. He gave these drawers the name of "Elastic Seam," and the distinguishing number, "50," both the words and the number being stamped upon the drawers. These drawers were first manufactured under Brown's patent of 1881, of which Scriven seems to have become the owner about that time. Subsequently Scriven obtained letters patent Nos. 378,465, February 28, 1888, and 472,555, April 12, 1892. The business which was established by him in 1884 was continued by a firm of which he was a partner until 1891, when the complainant corporation, of which Scriven is president, was formed and took over the business, and the two patents in suit were transferred to the corporation. The business was successful, and the uniformity and excellence of the product, which came to be known and sold as the "Scriven Drawers," gave them a valuable reputation in the market, and the trade in them reached large proportions, extending throughout the United States. At the expiration of the Brown patent in the autumn of 1898, the defendants and a number of manufacturers began to manufacture and to put upon the market a type of drawers similar to Scriven's. The drawers manufactured by the defendants are inferior in quality to Scriven's and were sold much cheaper. Before the alleged infringement began Scriven's elastic seam drawers sold at \$8.50 a dozen. The defendants' No. 50 drawers were sold at \$3.75 a dozen, and their No. 57 at \$4.25 a dozen, to jobbers. The bill of complaint was filed March 26, 1901, and charged infringement of patents, infringement of trade-marks, and unfair competition.

We will consider the question of trade-marks and of unfair competition together, for they both rest upon the same principle, which is that no man has a right to pass off his goods upon the public as and for the goods of another, or, as Mr. Justice Strong says, in *Canal Company v. Clark*, 13 Wall. 311, 20 L. Ed. 581, considering a trade-mark case:

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another."

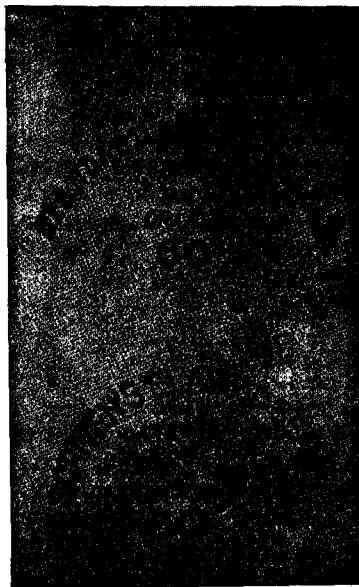
The defendant North testifies that under professional advice, as the Brown patent of June, 1881, had expired by limitation, he commenced in 1899 the manufacture of "what is now known as our Garland No. 57 jean drawer. This drawer is the exact counterpart of Mr. Scriven's No. 50 drawer"; and again he says:

"When I commenced the manufacture of Garland No. 57 drawer I sent out for a pair of Scriven's drawers and made the Garland No. 57 in every particular like theirs, with the exception that I put pearl buttons on the Garland No. 57, and the laced back, and sewed down the piece in the crochet so as to make a reinforce out of it. I also stamped the drawer with an oval stamp, at first in black ink, and subsequently in blue ink. The following year (1900) I introduced the 'Standard Stretchy Seam Drawer' to the trade, and cheapened it, in order that the garment might be sold for 50 cents retail. I cut this garment with the one seam stomacher, single stitching seam, put on pearl buttons and laced back, and stamped it in blue ink. I had the Scriven drawer before me at the time, and endeavored not to conflict in any way with their 'Elastic Seam Drawer No. 50.' This drawer as manufactured was not intended to be put in competition with theirs."

The "Standard Stretchy Seam Drawer No. 50" was put on the market and sold as "No. 50" until, after the commencement of this suit, under advice of counsel, they dropped that number. Several trade journals have been offered in evidence, wherein it appears that North Bros. & Strauss, under the heading, printed conspicuously, of "Elastic Seam Drawer," announced to the trade that they have "decided to place on the market a new elastic seam jean drawer, to be known as the 'Standard Stretchy Seam Drawer, Lot No. 50.'" The testimony also shows that the defendants' drawers have elastic insertions, arranged like the Scriven drawers and of the same color, buff or yellow. This elastic insertion in Scriven's drawers was made of Egyptian yarn, the natural color of which was buff. The defendant North testifies that at the time he was being examined they were using some domestic yarns dyed to imitate the Egyptian yarns; that he did not know the yarn was dyed until lately, his attention being called to it, owing to its cheapness; that it is a good imitation, but it does not answer the purpose which the Egyptian yarns do, on account of the fact that in stretching the anklets it takes all the elasticity out of them.

The designation, "No. 50," of Scriven's drawers, is merely an arbitrary one. It does not indicate anything as to the size of the drawers, but in the trade it had come to signify Scriven's standard elastic seam drawers, so that a purchaser could identify it by that number. The testimony is abundant that at the time of the commencement of this suit complainants' drawers had attained a high reputation; that they were distinguished from all other drawers then upon the market by the buff color insertion in the legs, which color had been especially selected for the purpose of so distinguishing them; that they were marked with an

oval stamp, "Scriven's Elastic Seam," in a semicircle, with three straight printed lines below and the number, "50." A copy of the stamp and a copy of the defendants' stamp will show that the defendants used a stamp, "Standard Stretchy Seam," printed in a semicircle, with three straight printed lines and the number, "50," below; the stamps closely resembling each other in shape, in the like number of straight lines, and in the numeral, as will appear by inspection.



When Scriven's drawers were first put in the market, the words were stamped in straight lines. The defendants also marked their drawers in straight lines, and when the complainants adopted the oval stamp the defendants followed with a similar oval stamp. It thus appears that complainants' drawers had certain distinctive marks and indicia: First, in the buff-colored insertions in the legs, which made them unique in appearance, for before they began the manufacture nothing of the kind was known in the market; second, by the adoption of the name "Elastic Seam," which words the court below held to "precisely describe and express the peculiarity of the complainants' garment." We are not clear that this phrase is precisely descriptive, for in point of fact a seam is nothing more than a line of stitches, and is not and cannot be elastic. It was the buff-colored insertion that was elastic. However that may be, the proof seems to show clearly that the words "Elastic Seam," which we incline to believe is a fanciful designation, was identified with the complainants' goods. Whether in fact it avoids being a technical trade-mark, because it is a description of the goods, it was adopted by the complainants to describe their goods. It was a phrase not used before for such purpose, and did, in fact, so identify complainants' drawers as to be known to the trade as indicating the complainants'

product, and was so generally recognized. The numeral, "50," was also adopted by the complainants, not as descriptive of the size of the drawers, but as one of the distinguishing characteristics of their standard elastic seam drawers, and so became associated in the public mind with their goods.

We do not find that there was anything of a peculiar nature in the oval stamp adopted by the complainants, as the proof shows, and it is a matter of common knowledge that stamps of that shape are in common use; but it is not without significance that, with the wide field of choice before them, the defendants should first have adopted a straight stamp, and afterwards, when complainants began to use an oval stamp, should have followed them by adopting a stamp of like shape, with lettering and lines so arranged as would be likely to mislead the careless observer. The use of the words "Stretchy Seam" by the defendants is intended to convey to the mind of the purchaser precisely the same idea as is conveyed by the words "Elastic Seam," and, while descriptive words are not subject to an exclusive appropriation, we are of opinion that defendants adopted and applied the name "Stretchy Seam" to their garments for the purpose of imitating the name which had been adopted by the complainants. In their advertisements and otherwise they have endeavored to convey the impression that the two names are synonymous. Their own trade-mark was the word "Garland," and they certainly did not adopt the words "Stretchy Seam" for the purpose of individualizing their own garments. They advertised them to the trade as elastic seam drawers, and if they did not stamp them in that name it was most probably due to an apprehension that "Elastic Seam" was a valid trade-mark, and, if so, they hoped to escape infringement by the use of the words "Stretchy Seam." So, the stamping of the numeral, "50," on their stretchy seam drawers in precisely the same place where the same numeral appears on the stamp of the complainants, seems to us to indicate an intention to so stamp their drawers as to make them as nearly alike as possible to the complainants'; and the putting of the words "perfect made drawer" in three straight lines indicates a like intention to imitate the three straight lines appearing in the same place on the complainants' stamp. Certainly "perfect made drawer" could not be intended to mean that they were in fact perfect, for the testimony shows that the drawers so stamped were inferior in quality and make, not only to the "Elastic Seam Drawer No. 50" of the complainants, but to their own "Garland No. 57."

Upon the whole, we cannot resist the conclusion that the defendants have manufactured the drawers of an inferior quality to the complainants', and have so stamped them as to deceive the unwary, and thus mislead the public into purchasing such inferior goods in the belief that they were of the complainants' manufacture; and this seems to have been the conclusion of the learned judge below, who says:

"There is evidence that confusion has arisen very detrimental to the complainants' business and reputation. The complainants have established a reputation for producing a high grade of goods, and have built up an extensive and valuable good will, and the defendants can have but one purpose in dressing the goods of their manufacture to look so precisely like the complainants', and that is to deceptively induce buyers to take an article which looks like the manufacture of the complainants, but which is made by the

defendants. The defendants make their drawers of white jean and select a buff-colored insertion, which causes them to look precisely like complainants', and they imprint on the waistband a stamp which at a careless glance is not at once distinguishable from complainants'."

If the defendants have used habitually for their elastic insertion an inferior quality of American yarn dyed a buff color to imitate the natural color of the superior quality of Egyptian yarn used by the complainants, the intention to deceptively imitate complainants' product would be conclusively established. We do not think that it would be proper to forbid by injunction the use of a like color of insertion, if that was the natural color of the material used, as appears to be the case with the Egyptian yarn; but the use of an inferior material, dyed to imitate the color adopted by complainants, ought clearly to be forbidden, for this color was originally selected by complainants for the purpose of distinguishing their goods, and the use of inferior material dyed to imitate it could have no other purpose than to deceive, and would be calculated to mislead, the public, accustomed to the distinctive characteristics of the complainants' garment, into buying an inferior article.

The defendants, if they wish to sell their goods on their own merits, have a wide field of selection, and, if they use dyed insertion, may dye them red, or blue, or black, as they may choose. They may make and sell cheaper garments than complainants', for cheapness, notwithstanding some pronouncements against it lately from high political quarters, is not yet an offense denounced by legal penalties; but no person has the right to make or sell a cheap and inferior article, dressed in the guise of a superior article made by another, and so deceptively palm it off. This is an injury both to the honest manufacturer and to the public. The courts of justice would not be worthy of the name if all their lawful powers could not be invoked to prevent it, and we think that the learned judge below erred in holding, as he did, that he was without power; for, following the language from his opinion above quoted, he says:

"There are imitations, no matter with what motive done, the court cannot enjoin, because, if the complainant has no patent which is infringed, any one may copy the complainants' make of drawers, and the stamp imprinted is one in common use, and, when examined, is different."

He seemed to lose sight for the moment of the doctrine of unfair competition, which, as we will see later, is as well established as the law of patents, or of trade-marks, and he himself has invoked it in the matter of the boxes, for he says in the opinion:

"The shape, color, and lettering of the boxes in no way results from the manufacture, but is an intentional imitation of the style of putting up complainants' goods, by which they have come to be known in the trade, and which must have been designedly adopted by the defendants for the deceptive purpose of misleading as to the origin of the goods, and of causing their goods to be deceptively substituted for the complainants'."

The question of the boxes is not before us on appeal, and it would be unfair to defendants to raise any implication that they are content with this finding because they have not appealed from the decree restraining the use of the boxes, for they may, and, doubtless, do, prefer to wait a final decree on that point; but we cannot ignore such a finding of fact, for, if correctly found, it throws a flood of light upon the other

acts of the defendants, the testimony regarding which tends to show a like deceptive and misleading purpose, and these now remain to be considered.

Outside of the inferences to be drawn from the similitude in the stamp, name, and number, and which we have already considered as leading to the conclusion that there was a deceptive purpose in adopting them, there is little direct testimony connecting the defendants or their authorized agents with any positive acts. In the nature of things this would be so, for persons about to engage in unlawful or questionable undertakings are not likely to proclaim their purposes on the house-tops; but there is some testimony which tends to show that the defendants directly, through their authorized agent, endeavored to market their goods under the guise of the complainants', and that is the testimony of Anderson, who was the manager of their New York branch for several years prior to January 1, 1902. He says that he kept a sample of the Scriven drawer on the counter in the New York office: that when customers came in and asked for an elastic seam drawer he would sell them defendants'; if they asked for "the Scriven drawer," he would show them defendants' and sell it; and so if they asked for a No. 50. The following questions and answers illustrates the method:

"Then you made a difference between 'a' Scriven drawer and 'the' Scriven drawer, is that it? A. Yes; when a man asked for a Scriven drawer, I knew that he wanted the side seam drawer, and I showed him ours. Q. And sold him yours? A. Yes, sir."

And in another answer, he says:

"We had a sample of the Scriven drawer on our counter, and I have said that it was made the same as Scriven's drawer, with the exception of the crotch piece in the seat."

The inference seems to be clear that this sample of Scriven's drawers was kept, not for the purpose of showing the difference between the two, but to show the absolute identity between them, so that purchasers, mainly jobbers, who bought to sell again, could see that the defendants' were such an imitation of the Scriven drawers that they could easily be sold again as genuine Scriven. What might readily be expected to happen from the putting on the market of such cheaper imitation, the testimony abundantly proves actually did happen. The proofs show that in Denver defendants' drawers were displayed in the show window, with the sign on them reading, "Scriven's Elastic Seam Drawers." Like garments were shown in Topeka, with the sign reading "Scriven's Drawers." In Omaha the plaintiffs' traveling agent bought and had billed to him the defendants' drawers as Scriven's. The same witness bought like goods in Sedalia, Mo., as "Scriven's Elastic Seam Drawers," In Danville, Va., a haberdasher advertised in the newspaper there "Scriven's Elastic Seam Drawers, full-bleached, sold everywhere at 85 cents, here in all styles this week at 59 cents," and exhibited in his show window a card, which read, "75 cts. Scriven drawers, as advertised, 59 cts.," and sold defendants' drawers at that price. In New York, Charles Broadway Rouss, a large wholesale dealer, advertised drawers "same as Scriven's," the cuts for this advertisement being supplied by the defendants. A number of other cases appear in the record where defendants' goods were advertised and offered as Scriven's. The tes-

timony does not show any connection of defendants with these misleading advertisements. There is some testimony as to statements made by one of their traveling salesmen, implicating the defendants, but the testimony of that witness has been discredited. The testimony is abundant that the goods of defendants were sold as Scriven's, and there is sufficient resemblance in make and marks as to make that deception easy and practicable, and we do not think it is a sufficient answer to say that there are differences which a careful examination would disclose, or that the retailer to whom the manufacturer sells is not himself deceived, if the goods are put up in such a way and marked in such a way that the ultimate purchaser could be deceived into buying them as Scriven's goods, or that the manufacturer should not be held to liability because the shopkeeper to whom he sells practices a fraud upon his customers.

The question as to the measure of such liability and the extent of it might arise upon an accounting, but if he knowingly puts it in the power of the shopkeeper so to deceive he should be enjoined. The power of the courts is not usually invoked for the protection of the strong and shrewd, who commonly can take care of themselves. It is the ignorant and the unwary that generally demand their protection, and courts will be without power to afford a remedy in most cases if their right to grant relief was limited to those cases where the immediate customers were deceived. A stamp with the words printed in straight lines would identify the defendants' goods as easily as the oval stamp. Granted that the oval form is in common use, the straight is equally common, and was, in fact, used formerly by defendants and complainants alike; and when the proof shows, as it does, that after the complainants adopted the oval form the defendants adopted a stamp resembling it, when they show no good reason for such change, or any reason at all, except that, being a common form, they had the right to use it as well as complainants, and when we find, as we do, that there is a resemblance between the two, and no reason appears for such resemblance, except that it was calculated to deceive, we must conclude that it was adopted for that purpose.

We will now consider some of the cases which we think establish the principle which should govern and sustain the conclusion which we have reached. Some of them are trade-mark cases, and there seems to be a tendency in this country to limit the field of technical trade-marks, and to extend the field of unfair competition; but the principle is the same in both, the differences being mainly matter of proof. There are certain elements of property right in a technical trade-mark, and the use by one dealer of a sign, symbol, or word which constitutes the trade-mark of another raises the conclusive presumption of fraud, and proof of actual intention to injure is dispensed with, and injunction goes as of course; while in cases of unfair competition, which rest upon a somewhat broader principle than technical trade-marks, actual fraud or misleading of the public, or conduct calculated to mislead it, must be shown by the proofs, either of actual intention to do the wrongful act, or of the adoption of means calculated to effect that result. It becomes, therefore, largely a question of fact, and is far more complicated than a question of trade-marks simply. The foundation prin-

ciple is the same, and that is that no manufacturer or trader should be allowed to dress up his goods in such a style and form, and by the use of such names and marks, or colorable imitations thereof, as are calculated to mislead the public, induce purchasers into buying his goods as for the goods of another, who, by the adoption of certain distinctive marks and indicia, and by a long course of fair dealing, has made the public familiar with his goods and trustful as to their quality. Courts cannot forbid the use of words, which, standing alone and in their ordinary signification, are common property, or of numerals, which all the world is free to use, or of labels and stamps of common form, in which no one can claim an exclusive use, even though it may be shown that careless persons may in some instances be misled; but if they are so collocated and stamped upon an article in manifest imitation of a form previously adopted by another as a means of distinguishing his goods, with the deceptive purpose to mislead, disguising one's own goods thereby, and inducing the public to believe that they are the goods of another, such conduct falls under the ban.

The general principle that no man has a right to pass off his goods as and for the goods of another is broader than the rules applicable to strict trade-mark. In this country this principle is generally designated as "unfair competition in business." One of the earliest English cases where relief was granted against unfair competition was that of *Knott v. Morgan*, 2 Keen, 213, where the plaintiff had been doing business under the name of the "London Conveyance Company," and the defendants began to run omnibuses painted like those of plaintiff and with servants clothed in similar style. There was no question of trade-mark, but the defendant was enjoined, the court saying:

"It is not to be said that plaintiffs have any exclusive right to the words, 'Conveyance Company' or 'London Conveyance Company,' or any other word: but they have a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business, while attracting custom on the false representation that carriages, really the defendants', belong to and are under the management of the plaintiffs."

In *Croft v. Day*, 7 Beav. 84, the defendant was a nephew of the elder Day, who had originated the famous blacking, known as "Day & Martin's." He dressed his goods in the same style, and, while the court held that he had a right to use his own name on his boxes of blacking, it granted an injunction, saying:

"The accusation which has been made against the defendant is this: that he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling goods which are manufactured by the manufactory which belongs to the testator in this cause. It has been very correctly said that the principle in these cases is this: that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has the right to dress himself in colors or to adopt the bare symbols to which he had no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. It is, of course, conceded that the defendant had the right to use his own name on his boxes of blacking."

In *Wotherspoon v. Currie*, L. R. 5 H. L. 508, the plaintiff had purchased the business and trade-mark of a firm which had manufactured starch at Glennfield, in Scotland, which was labeled and widely known as "Glennfield Starch," and had removed the works to Paisley. The defendant, who had previously done business at Paisley, began manufacturing starch at Glennfield, and selling it as "Glennfield Starch." This was held to be unlawful by the House of Lords, on the ground that the word "Glennfield" had become detached from its original geographical meaning and acquired a secondary signification in connection with the starch, so as to mean starch made by the plaintiff, and the latter had thereby acquired an exclusive property in the word. Some of the judges apparently held that, as the defendant was guilty of an actual fraudulent intent, he should be enjoined, irrespective of the existence of a trade-mark.

So, in *Montgomery v. Thompson* [1891] App. Cas. 217, the plaintiffs and their predecessors had carried on a brewery at Stone, in Staffordshire, for more than a hundred years, and their ales were known as "Stone Ales." The defendant, living in Liverpool, established a brewery in Stone. It was held that plaintiffs had no trade-mark in the words "Stone Ales," yet defendants were enjoined from selling their ales as "Stone Ales"; Lord Justice Lindley saying that, although plaintiffs had no exclusive right to the words "Stone Ales," or any right to prevent defendant from selling his goods as having been made at Stone, yet—

"As against the particular defendant, who is fraudulently using or going to fraudulently use the words, with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders. The evidence in this case convinces me that any ale which may be sold by this particular defendant as 'Stone Ale' may be intended by him to be passed off as plaintiff's ale."

Lord Hannon said in the House of Lords:

"The appellant is undoubtedly entitled to brew ale at Stone, and to indicate that it was manufactured there; but there are various means of stating that fact without using the name which has now become a designation of the respondent's ale."

One of the most important cases, frequently cited, is that known as the "Camel Hair Case," *Redeaway v. Banham*, from the House of Lords, 1896. In that case Redeaway manufactured a kind of belting, which became popular, and was advertised and sold as "Camel Hair Belting." This was made from a yarn similar to that used in the manufacture of carpets. The defendant, who had been an employé of Redeaway, began making similar belting, which he at first called "Arabian Belting," and after his business was sold to a limited company they began advertising their goods as "Camel Hair Belting," stamping the words upon the goods, without any distinguishing words or marks, and without putting the company's name on it. The case was tried by a jury, which found that in the trade "Camel Hair Belting" meant Redeaway's belting, as distinguished from others, and that defendants so described their belting as to be likely to mislead purchasers into buying it for that made by the plaintiffs and that defendants in fact endeavored to pass off their goods for those of the plaintiffs. At the time

when the plaintiffs had begun their manufacture, it was not known that the material composing it was, in fact, camel hair. It was believed to be a mixture of the hair of sheep, goats, and other Eastern animals; but it was proved that the material was, in fact, the hair of the camel. An injunction was granted, but the same was reversed by the Court of Appeals, on the ground that, as "camel's hair" accurately described defendants' goods, they could not be prevented from using the term. This decision was reversed in the House of Lords, on the ground that in the trade "Camel Hair Belting" meant Redeaway's belting. It appeared at the trial that for about 14 years no belting had been sold under that name except Redeaway's. It was supposed originally that the term "Camel Hair" was a fanciful one, and the counsel for the defendants contended that, as the expression "Camel Hair Belting" was the simple truth and described the material of which their goods were composed, they could not be held liable for mistakes that the public might make; but it was held that the whole merit of the description for the defendants' purposes lay in its duplicity, that it found a market because it was supposed to be Redeaway's belting, and Lord Macnagton said:

"I venture to think that a statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it. It is not sterling coin. It has no right to the genuine stamp and impress of truth."

Lord Morris said that he had some difficulty in concurring in the judgment, for it established, in his opinion, for the first time, the proposition that a trader is not permitted to merely tell truthfully and accurately the material of which his goods are made; but he felt bound by the finding of the jury, which amounted to holding that "Camel Hair Belting" had become so identified with the name of the appellant, Redeaway, as that "Camel Hair Belting" had in the market attained the meaning of Redeaway's belting. Said he:

"That finding establishes as a fact that use of the words 'Camel Hair Belting,' simpliciter, deceives purchasers, and it becomes necessary for the respondents to remove that false impression so made on the public; that something which to my mind is obviously done when the respondents put prominently and in a conspicuous place on the article a statement that it was 'Camel Hair Belting,' manufactured by themselves. Having done so, they would, as it appears to me, fully apprise the purchasers that it was not Redeaway's make by stating that it was their own make."

The Glennfield Case and the Stone Ale Case were cited with approval by the Supreme Court of the United States in *Lawrence Mfg. Co. v. Tenn. Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997, and the cases establishing the same doctrine in this country are so numerous that it would unduly expand this opinion if all of them were referred to. Many of them are collocated in the note to *Scheuer v. Muller*, 20 C. C. A. 163, and the note to *Blake Lare v. Harper & Bros.*, 30 C. C. A. 376. Among those that may be profitably consulted are *Putnam Nail Co. v. Bennett et al.* (C. C.) 43 Fed. 800; *Pillsbury v. Pillsbury-Washburn Co.*, 64 Fed. 841, 12 C. C. A. 432; *Dennison Mfg. Co. v. Thomas Mfg. Co.* (C. C.) 94 Fed. 651; *Fuller v. Huff*, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332; *Sterling Remedy Co. v. Spermine Medical Co.*, 112 Fed. 1000, 50 C. C. A. 657; *Enterprise Mfg. Co. v. Landers, Frary & Clark* (C. C.) 124 Fed. 923; *Coates v. Thread Co.*, 149 U. S.

562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. These cases all illustrate the fundamental principle that no man may be permitted to sell his goods as and for the goods of another, and, if strict trademark rules are inadequate to enforce this principle, the courts will resort to the broader rules relating to unfair competition, and, as summed up by the Supreme Court in the *Coates Thread Case*, this rule is:

"Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents; but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

It is to be remembered that a purchaser of an article of general use, which in the course of years has come to be known as of superior quality, and recognized by certain catchwords and certain visible marks, may be easily deceived into buying articles of inferior quality, designated by words of similar signification and superficially resembling the genuine; for he does not usually have the opportunity of seeing the genuine and the imitation side by side. He commonly has in mind only the characteristic features in the designation and appearance of the article he wishes to buy, and is exposed to imposition if the imitation, though slight, is of those salient features, and thus the reputation and good will established by years of advertising and production of articles of superior quality would be frittered away, if inferior goods, sufficiently resembling the genuine to be mistaken for them, are put on the market and readily sold as and for the genuine. The imitation goods may not be identical in any one feature, but, if similar in all and designated by similar marks and similar catchwords, the sale should be enjoined, or the imitation permitted only under such limitations as will prevent misapprehension on the question of its real character, and so differentiated that the public will not be imposed on or the complainant defrauded.

We concur in the conclusions of the court below that there has been no infringement of the patents in controversy, and adopt as our opinion so much of the opinion as relates thereto. It is as follows:

"In 1885 the firm of J. A. Scriven & Co. began putting upon the market a special make of drawers, the body portion of which is of white jean, and along the seams on the inside and outside of the legs, and along the seam at the back of the upper portion, there were longitudinal insertions of buff-colored elastic knitted fabric, joining together the portions made of white jean. These garments were made after the method of the United States patent to C. A. Brown, No. 243,498, June 28, 1881 (now expired), of which patent Jeremiah A. Scriven was the owner, and they were so stamped. The specifications of that patent described an undershirt and drawers made of a woven material with gores or gussets of an elastic knitted fabric inserted at places where it was desirable to give the garment greater elasticity, and the claim was for the combination of the woven body fabric and the knitted insertions. The garments put upon the market by the complainants were called 'Scriven's Patent,' 'Elastic Seam 50,' and 'Scriven's Elastic Seam Drawer 50,' and since 1892 have been put up in white paper boxes, with gilt edges, of the form known as a 'telescope box,' and had and continue to have printed in blue ink, in large script letters, on its front side and also on its top, 'Scriven's Patent Elastic Seam Drawer,' and the number '50,' and an

illustration of a pair of drawers. The drawers originally sold by the complainants, and which as to the elastic seam are similar to those made by both the complainants and defendants, were marked by a stamp on the waist-band as being made under the patent of 1881; those made since 1892 are stamped 'Scriven's Elastic Seam, patented Feby. 28, 1888; April 12, 1892, 50.' The patents alleged by the bill of complaint to have been infringed are the two patents last above mentioned.

"Patent No. 378,465, February 28, 1888, was granted to the complainant Jeremiah A. Scriven for an improvement on the kind of undergarment described in the expired Brown patent, No. 243,498, June 28, 1881, which was composed of a woven body with knitted insertions. This patent is for a similar undergarment made of two different kinds of knitted fabric. The insertions are, as in Brown's patent, of a knitted fabric, but differing from Brown's patent. The body was also of a knitted fabric, longitudinally elastic, but less laterally elastic than the insertions. The claim is for the garment made of a knitted body longitudinally elastic, with laterally and longitudinally elastic knitted insertions, the insertions to be more elastic than the body. The sole novelty of this combination was the use for the body material of a knitted fabric, instead of a woven material, as appears both from the specifications and claim, and by the file wrapper and contents; and this is all that differentiates it from the expired Brown patent of 1881. As the material of which the body of defendants' garment is made is the woven jean of the Brown patent, I find there is no infringement of the patent of 1888.

"It is urged by the complainant that in the Brown patent the insertions are shown only as gores and gussets at certain points in the drawer, and not as a continuous insertion along the whole length of the seams. Observing the drawing which illustrates the Brown patent and shows this invention, it would be difficult to hold that it required invention to extend the insertions until they should be continuous. The construction that complainants put on the Brown patent is evidenced by their making drawers similar to those now made by them, and marking them as made under that patent. If the continuous insertion was not covered by the Brown patent, then it is not covered by any patent, for it is not claimed or indicated as an invention in any subsequent patent put in evidence.

"The other patent, in respect to which the bill of complaint charges infringement, is No. 472,555, April 12, 1892, to Jeremiah A. Scriven, for an improvement on the articles of underwear described in the above-mentioned patent, No. 378,465, of February 28, 1888. The improvement claimed is intended to be applied to drawers. The insertion for the inside of the legs is made continuous across the crotch, and the insertion at the back is also continued at right angles across the crotch, and the novelty consists in not sewing down the overlying piece of insertion to the underlying piece. By leaving the upper piece unattached at its edges to the under piece, it is claimed that the requisite strength is obtained at the crotch, while the desired elasticity is not lost, as, it is claimed, would be the result if the upper piece was sewed down at its edges to the under piece. The use of this device by the defendants is denied, and the evidence leaves it at least doubtful. The defendant does stitch the upper strip of insertion to the under strips, but the complainant charges that it is stitched very lightly at the edges, and with the intent that as soon as the garment is laundried the stitches will break, and the overlap, coming loose at the edges, it attains the elasticity which is the purpose of the method described and claimed in patent No. 472,555. There is contradiction between witnesses as to whether, in fact, the edges of defendants' overlap do break away in ordinary washing, and the proofs leave the question of fact so doubtful that I could not base a decree upon it, even if I held the patent valid."

We are of opinion that the complainants have failed to establish a valid technical trade-mark; but, inasmuch as the testimony shows unfair competition, which entitles them to an injunction, it is deemed unnecessary to discuss the distinctions which seem to differentiate this case from one of trade-mark, pure and simple—the foundation prin-

ciple upon which relief is granted being substantially the same and the like remedy invoked.

The defendants should be enjoined from advertising or selling the drawers manufactured by them as "Elastic Seam" or "Stretchy Seam" drawers, from the use of the curved stamp, so nearly imitative of the stamp of the complainants as to be readily mistaken for it, or required, in case they use a curved stamp, to so modify the form of lettering that it would be easily distinguished from complainants', with the addition of words showing that their drawers are not manufactured by Scriven. They should be enjoined from further use of the numeral, "50," on their stamp, and from the use of any insertion at the seam dyed buff or yellow, in imitation of Scriven's. They cannot be enjoined from the use of Egyptian or other yarns for such insertions, the natural color of which may be buff or yellow. The defendants should be required to account for any damages that complainants may have sustained from unfair competition.

The case is remanded, with instructions to modify the decree in accordance with this opinion, and in all other respects it is affirmed.

WINDLE v. PARKS & WOOLSON MACH. CO.

(Circuit Court of Appeals, Second Circuit. December 6, 1904.)

No. 85.

1. PATENTS—ANTICIPATION—CLOTH-MEASURING MACHINES.

The Windle patent, No. 507,300, for a cloth-measuring machine—the feature of novelty claimed being the use of a split and expansible ring for the ends of the measuring cylinder, and means for forcing the ends apart so as to enlarge the circumference of the cylinder to adapt it to the varying elasticity of the cloth to be measured—is void for anticipation; such rings having been previously used on other machines made and sold by the patentee.

2. SAME—DESCRIPTION OF INVENTION—RESORT TO DRAWINGS.

While a doubtful or ambiguous description in the specification of a patent may be aided and made plain by the drawings, they cannot supply the entire absence of any written description of a feature of the invention.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 243.]

Appeal from the Circuit Court of the United States for the District of Vermont.

For opinion below, see 128 Fed. 58.

Geo. N. Goddard, for appellant.

Nathan Heard, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The specification states that "cloth is now measured by contact with a rotating cylinder, which latter draws the cloth at the surface speed of the cylinder, each rotation of the cylinder being recorded." The proof shows that, besides the machines in which the cloth passed over the cylinder and was drawn by it, there

were machines in which the measuring cylinder rested on the cloth, and was revolved by the forward movement of the same. The latter may, for convenience, be called "undershot wheels." It is self-evident, and the record of earlier devices shows, that, while a narrow wheel might be used as an undershot one, efficient working would require a wheel broad enough to support the full width of the cloth when the latter passes over the wheel. Sometimes the measuring surfaces of these cylinders were unbroken, and sometimes they were composed of a succession of strips parallel with the axis of rotation, and close enough together to properly sustain the cloth. The specification proceeds:

"Goods to be measured vary very much as to the quality of elasticity; that is, some goods stretch much more than others when being fed by contact with the measuring cylinder, and some goods stretch so much that accurate measurement cannot be made by the usual cylinder. In my experiments to improve cloth-measuring machines employing a cylinder, and thereby overcome the trouble of inaccurate measurement, I have discovered that all fabrics may be accurately and satisfactorily measured, provided the measuring cylinder is adapted to be varied as to its circumferential length, as thereby it is possible to compensate by increase or decrease of such length for the extra stretch of the cloth; the cylinder being expanded in proportion to the stretch of the fabric of the cloth."

The record shows that in the earlier art an increase in the circumference of the rotating cylinder was accomplished by winding more or less cloth, or the like, around the periphery of the cylinder. It is stated in appellant's brief that increase in the circumference of the cylinder by providing some form of expanding device is "disclosed in patents long since expired," but no such patents are referred to, except the Hoyer patent, which has no cylinder, and we have not been able to find any in the record. The proof shows that the actual degree of expansion required is extremely slight; amounting, at most, to not more than one-eighth to one-fourth of an inch on a drum of two yards circumference.

The specification proceeds:

"The frame, A, and the inclined board, B, from which the cloth going to the cylinder is taken, are and may be all as usual. The frame has suitable bearings for the reception of the shaft, C, of the measuring cylinder, said cylinder being composed of a series of expansible spiders and a series of bars or legs, d, attached thereto by suitable screws." These bars are parallel to the axis of the cylinder, and together make up its circumference—a method of construction found in the earlier art (Watson patent). "The spiders are composed each of a metallic ring, D, split or separated as at D', and connected by spokes, d², with a hub, d^x, which is secured in suitable manner to the shaft, C, the ends of the rings having heels, d³, attached to or forming a part of them; said heels being separate pieces attached by screws, 18; the lower ends of the heels being normally drawn toward each other by a contracting device, herein represented as composed of a bolt, b, extended through them, and provided with two springs, each spring acting against a heel. Each hub has a spoke having a suitable bearing for a shaft, 5; said shaft having mounted upon it, at suitable intervals, pins or projections; said shaft and pins or projections constituting an expanding device, and being located one end of the pin in the slot between the ends of the ring, D, referred to, the other end of the pin resting between the heels, d³. The partial rotation of the expanding device causes the pins or projections thereof to act one against one end of the ring, the other against the heel connected to the other end of the ring, thus expanding the ring so that the circumference of the cylinder

composed of the lags or rings [sic., should be lags or bars] is thereby enlarged more or less; that depending upon the extent to which the rod, 5, is rocked or turned."

Means for turning the expanding device are then described, and the specification concludes:

"In practice the bars or lags, d, making up the exterior of the measuring cylinder, will be covered with sand or emery coated paper or cloth; such rough surface enabling the cylinder to positively engage the cloth, and carry it with it at the surface speed of the cylinder." The use of sandpaper for this purpose had been pointed out in Watson's patent (359,583, of March 15, 1887). "This invention is not limited to the exact construction shown of the cylinder, nor to its expanding device, as the same may be varied without departing from my invention."

The claims are:

"(1) In a cloth-measuring machine, a rotating shaft, and a cylinder having the rings of its spiders or heads split, combined with an expanding device for said rings or heads whereby the effective length of the circumference of the cylinder may be varied to compensate for the elasticity of the cloth being measured, substantially as described.

"(2) A rotating shaft having a series of spiders thereon, each having a ring split from one to its other edge to thus form ends, combined with an expanding device, a portion of which is located between the opposite ends of each ring, and devices to move said expanding device and confine it in its adjusted position to operate, substantially as described."

No contention is made that there is patentable novelty in widening the rotating cylinder by increasing the number of spiders, or skeleton wheels, and connecting them by slats, which, when covered with sandpaper, would constitute a rotating cylinder with an integral periphery. The one feature of novelty is the enlarging of the circumferential length, not by wrapping the cylinder with cloth or other material, but by enlarging the split rings, which are, so to speak, the tires of the skeleton wheels; thus expanding the slatted cylinder itself. If the prior art were confined to the patents which have been introduced, we should have no difficulty in sustaining the patent, for we find none in which the rotating cylinder, wide or narrow, has been expanded by springing it open from a slit in the circumference. It appears, however, that the patentee, Windle, had taken out an earlier patent (No. 230,381, July 20, 1880) for an undershot measuring wheel, which shows no split tire or rim, and, unlike the "spider" of the patent, is apparently solid. Subsequently, and long prior to the patent in suit, Windle cast some of these wheels with spokes, split their tires or rims, and inserted screw devices for pushing the tires open. The defendant concedes that "old Windle machines with a skeleton wheel have been in commercial use," and that "some of these old machines put out by Windle contained a skeleton wheel cast in the form in which it was designed to use the proposed expanding device." The proof shows that the rims of these wheels were only partly cut through for safety in shipment, but yet were cut sufficiently to split at the tap of a hammer. Complainant contends that such wheels were merely an "unsatisfactory and abandoned experiment." But the wheels that were sold and went into commercial use were not experiments. Their users were free to split them with a hammer tap, and to force them open with the screw device which had been inserted before they were sold for that

very purpose, and to use them expanded or contracted. One of those wheels is before us. Hub, four spokes, and rim or tire are all cast solid. The rim or tire is split midway between two spokes. There is a screw device for enlarging the split, and it has been found practicable with an ordinary screw-driver to enlarge it the necessary quarter inch. When Windle, several years before applying for the patent, made and sold wheels thus adapted to secure an enlargement of the measuring cylinder by pushing open the abutting ends of the rim or tire, he made such wheels a part of the prior art, and could not subsequently by patent reappropriate the features which they disclosed. These old wheels were unsatisfactory. As the complainant's expert says:

"This old Windle measuring wheel is made from a single casting, and the rim and spokes are integral with each other. If, therefore, the rim is cut through in any place, the gap in the rim cannot be opened without crowding apart the spokes on either side of the gap. There was no arrangement whatever whereby the rim can be expanded independently of the spokes. These wheels are made of cast iron, which is more or less brittle, and which cannot be bent or put under a bending strain without danger of rupture. Any attempt, therefore, to expand the rim of any old Windle measuring wheel, is very risky, as even a very slight expansion of the rim would be liable to break the latter."

The patentee has improved the structure of these expansible wheels, and it is upon that improvement that complainant relies to sustain the patent. It is contended in the brief that:

"The Windle idea was that the spider should be made up of two things: (1) A central supporting structure, here shown as a hub with radial spokes; and (2) a split ring loosely connected with the central structure at its rim, and bearing upon it the measuring surface, whereby the ring, as a complete entity, should be left free to be expanded and contracted to vary the measuring circumference, independently of the central supporting structure."

It was upon this theory that the patent was sustained in the court below, the court saying:

"The necessary rigidity of the arms and rings in the old wheels appears to have prevented proper expansion and contraction of the circumference by this means. The plaintiff appears to have invented a split ring between the rigid rims and the measuring circumference, with means to expand and contract that, and thereby lengthen or shorten the circumferences, independently of the length of the rims."

The difficulty with this argument, however, is that it finds no support in either the specifications or the claims. In neither claim is there any suggestion of a loose attachment of the cylinder or of the rings to the spiders. The specification describes spiders, composed each of a metallic ring, split, and connected by spokes with a hub. There is no hint of any difficulty resulting from rigidity of structure, or of any correction of such difficulty by providing a looser connection of the parts. It is stated in the brief that:

"The drawing of the Windle patent shows the split ring pivotally connected to one of the spokes at the lower end by a bolt, and to the two horizontally disposed spokes by a slot and bolt connection, * * * so that the split ring could expand and contract throughout its length, independently of the central supporting structure."

But that is not the written description of the invention which the statute calls for. "A description which is said to be vague and uncertain may be made clear by the drawings, which are a part of the specification. An imperfect written description will be aided by correct drawings, but when the written description is not only silent in regard to a feature of the invention, but places the novelty upon a different and described feature, the drawings will not help an entire omission, because the necessity of a written description is made absolute by the statute. Doubtful or ambiguous specifications can be aided and made plain by drawings, but they cannot supply an entire absence of description in the specifications." *Gunn v. Savage* (C. C.) 30 Fed. 366.

In the case at bar the specification places the novelty upon the feature of a split and expandible ring, and it is that which is claimed. Inasmuch as such rings are found in the prior art, the claims cannot be sustained.

The decree is reversed, with costs, and cause remanded, with instructions to dismiss the bill, with costs.

RUMFORD CHEMICAL WORKS v. NEW YORK BAKING POWDER
CO. et al.

(Circuit Court of Appeals, Second Circuit. July 7, 1904.)

No. 172.

1. PATENTS—INVENTION—BAKING POWDER.

The Catlin patent, No. 474,811, for a baking powder in which the phosphoric acid element is in granular form essentially free from pulverulent material, instead of in a finely pulverized condition, as in prior compounds, discloses invention, it being shown that the change in form of such element enhances the keeping quality of the preparation, and prevents its loss of efficiency for use by exposure to the atmosphere. The patent also held valid as against the defenses of prior use and abandonment, and infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 125 Fed. 231.

This action was commenced in the Southern District of New York for the infringement of letters patent No. 474,811, granted to Charles A. Catlin, assignor to the Rumford Chemical Works, of Providence, R. I., May 17, 1892, for improvements in baking preparations. The Circuit Court (125 Fed. 231) dismissed the bill upon the authority of *Glue Co. v. Upton*, 97 U. S. 3, 24 L. Ed. 985.

Philip Mauro, for appellant.

Arthur von Briesen and Paul Bakewell, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The patent in suit relates to that class of baking preparations in which the active acid agent is, in whole or in part, some form of phosphoric acid or acid phosphate. Broadly stated the invention consists of a baking preparation in which the phosphoric

acid element is, practically, in a granular condition free from pulverulent phosphatic material. The patentee asserts that this granular material possesses peculiar and distinctive properties and characteristics of great value and is a new product or article of manufacture.

The specification states that baking preparations prior to Catlin's discovery, though in other respects satisfactory, were liable to deteriorate when exposed to the atmosphere, compelling the employment of expensive means in packing to protect them. The aim of the manufacturer had theretofore been to produce the phosphatic element in the finest pulverulent condition possible. Catlin discovered that this condition was not only unnecessary but detrimental to the highest efficiency and that a baking powder having the phosphatic element in a granular condition augments leavening efficiency, prevents deterioration of the preparation and increases the slow evolution of the gas, with a consequent increase in baking efficiency. Acid phosphates, particularly when reduced to a fine powder, possess a highly deliquescent property, greedily absorb moisture and produce in any mixture, of which they form a considerable part, a sticky, clammy condition. When the acid element is packed separately, in the powdered condition, this absorption causes it to harden into a useless crystalline mass. All of these difficulties, the specification asserts, are remedied by using the acid phosphate in a uniformly granular condition, namely, a condition where the granules are approximately of such a size that they will pass through a No. 9 silk bolt, but not through a No. 16 silk bolt. The patentee does not, however, restrict himself to the method of sifting described or to the particular size of the granules. The claims are as follows:

"(1) A baking preparation containing phosphoric acid or its compounds in granular condition essentially free from pulverulent phosphatic material, substantially as described.

"(2) A baking preparation composed of a phosphoric-acid element in granular form essentially free from pulverulent phosphatic material, in admixture with a carbonate or bicarbonate, as set forth."

The invention, then, briefly stated consists in substituting granular for pulverulent phosphatic material in baking preparations. The defenses are lack of novelty and invention, abandonment, insufficient description, public use for more than two years and noninfringement. Of these the most important is the question of invention. The court below found this issue in favor of the defendants upon the authority of *Glue Co. v. Upton*, 97 U. S. 6, 24 L. Ed. 985, confining the discussion principally to the question whether or not the proof sustained the assertion of the specification that the patented preparation produces "a marked increase in baking efficiency." We are not disposed to disagree with the finding of the court below that this assertion has not been established by the proof. We are, however, of the opinion that there is another ground upon which patentability can be sustained, namely, the alteration and improvement in the properties of the material, incident to the change from fine powder to the granulated condition, by which its keeping qualities are enhanced. If this change prevents the preparation from deteriorating and keeps in a condition of high efficiency and continued usefulness that which would otherwise spoil

and become a useless mass, it would seem that enough has been shown to support the patent. A baking powder which, on being exposed to the atmosphere, acquires a sticky, clammy condition, certainly loses its baking efficiency. If it will not keep, it will not bake. If, then, the patentee has produced a preparation that will retain all its useful properties to the end without resort to expensive and inconvenient means of preservation, he has certainly made a discovery which entitles him to consideration.

There can be no doubt that one of the principal difficulties which the complainant encountered in its long experience in phosphatic baking powders was the liability of the preparation to deteriorate upon exposure to the atmosphere—it would not keep. Was Catlin the first to remedy this difficulty and did it require an exercise of the inventive faculty to accomplish it? It seems that he was the first to conceive the idea which culminated in success. The word “granular” appears over and over again in the prior art, but never in the sense in which Catlin employs it. There is no indication to the chemist that the granular, coarse or brittle powder mentioned in the prior patents, in combination with the other ingredients necessary in a baking powder, would produce the phenomena referred to. The effort of the prior art was to avoid coarse, gritty particles in the commercial preparation and reduce it to a fine impalpable dust. Dealers vied with each other in this endeavor and he secured the customer who could show the finest pulverization. Of course granular particles appeared in the general mass, but no one, before Catlin, had thought of sifting out and rejecting as useless the fine particles and utilizing only those granules which are practically uniform in size. The phosphoric acid element of the prior art was in a uniformly pulverulent condition; the same element in the patented product is in a uniformly granular condition. The former was essentially free from granular phosphatic material; the latter is essentially free from pulverulent phosphatic material. A percentage of coarse particles was found in the former and a percentage of fine particles is found in the latter, but the predominating characteristics are that the former was essentially fine and the latter essentially granular.

But it is urged that in chemistry the proposition is elementary that the reaction between materials deliquescent in character is facilitated or retarded as the particles are made smaller or larger. Not only was it known to chemists, but it was a matter of common knowledge as well, that deliquescent substances have a greater tendency to melt in a foggy, humid atmosphere than in a cold, dry, rarefied atmosphere, and only common business sense was required to reduce as much as possible the surface of such substances when exposed to a moist atmosphere. In other words, the likelihood of deliquescence is decreased in proportion as the exposed surface is lessened. To do this was not the work of the inventor, say the defendants, but of one having only a rudimentary knowledge of chemistry. The chief difficulty with this argument is its inapplicability to the facts shown in the record. Catlin was dealing, not with a well-known substance, like sugar or glue, the properties of which were familiar to all, but with a chemical substance only recently discovered. He had for his ultimate object not

an improved acid-phosphate but an improved baking powder, the acid being considered not alone but in relation to the other ingredients of the preparation. The acid element must be preserved, but so must the other elements in combination. The leavening efficiency if not improved at least must not be diminished. The tendency to cake and crystallize must be avoided. What was there in the prior art to inform the inventor that this complicated problem could be solved by getting rid of the fine powder, which was supposed to be indispensable to success, and using a powder in a uniformly granulated condition? To assert that the substitution was obvious is to impeach the ability of a number of learned chemists who were working for a solution of the difficulty and who never thought of Catlin's remedy. Indeed, they refused to believe in its efficacy even after it was fully explained to them. The necessity for the fine powder was everywhere recognized. To change or tamper with this supposed essential was looked upon as rank heresy by those best acquainted with the subject. Accordingly the search for a remedy had proceeded principally along the line of packing the preparation in air tight receptacles. Catlin's invention made the cheapest and most attractive packages available by changing the properties of the powder so that it was transformed from a preparation which spoiled when exposed to the atmosphere into a successful commercial article.

In determining the question of invention each case must depend upon its own facts, the inquiry always being whether what has been done required the exercise of the inventive faculties. Has a new or better result been obtained? Is it cheaper and more durable? Has it new capabilities? Does it perform new functions? These questions in the present controversy must, we think, be answered in the affirmative. *Smith v. Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177, and cases cited in *King v. Anderson (C. C.)* 90 Fed. 500.

The other defenses were overruled by the court below and, as we agree with the Circuit Judge in thinking that "infringement is plain and the various other defenses—anticipation, abandonment, and prior use—are not especially persuasive," but little need be added. The defendants' powder is known as "Lion Baking Powder." Assuming, as defendants contend, that it contains from 10 to 12 per cent. of phosphatic material, which will pass through a No. 16 silk bolt, and may be denominated pulverulent, nevertheless we think the phosphatic element is generally granular in condition and essentially free from pulverulent matter. It is sufficiently so to produce all the results claimed by the patent. There is no proof, however, that the defendant Gordon has infringed the patent and as to him the bill was properly dismissed. We incline to the opinion that the alleged prior use by Herreshoff is entitled to greater consideration than the other attempts in the same direction. It will not be necessary, therefore, to consider the others in detail. In several of them the testimony emanates from interested and ignorant witnesses. Mr. Herreshoff, on the contrary, is an educated gentleman with no apparent interest in the controversy. After leaving college he studied chemistry and became an assistant of Prof. Horsford, the president of the complainant. He

was employed by the complainant at various times and at one time was superintendent of its works. And yet, though we believe him to be entirely honest, we cannot credit his story that Catlin's invention was practiced at complainant's works in 1867 and 1868. At the time of giving his testimony he was 67 years of age and was testifying to the minute details of transactions occurring 34 years before. Human memory is incapable of such miraculous achievements. He says he secured the granular material by grinding and describes the mill, made by him, which was used for this purpose. It is doubtful if any mill ever constructed could reduce the material to a granular condition, retaining the uniform particles and blowing away the fine powder, but certainly the mill described by the witness could not accomplish such a result. Again, it is simply incredible that this invention could have been practiced in the complainant's works while under the direction of Prof. Horsford. The persons employed there, from the president down, were men of intelligence and, if what Herreshoff describes actually took place, they must have known it. Is it possible that a number of enterprising business men with such a treasure in their hands would have deliberately thrown it away? And yet when Catlin made his proposal years later it was met by these same men with the most discouraging skepticism. The inference is irresistible that what Herreshoff describes did not take place; he is mistaken. It is enough to say of this and all the so-called prior uses that they have not been proved beyond a reasonable doubt.

The invention was not abandoned. The testimony of which abandonment is predicated tends rather to prove that the uses referred to were experimental in character and were intended to test the invention thoroughly before offering it to the public.

The proposition that the invention is without utility is sufficiently answered by the fact that the defendants persistently use it, and by the further fact that the granular phosphate commands a much higher price in the market than the powdered phosphate.

It follows that the decree in so far as it relates to the defendant Gordon is affirmed, with costs. *Hutter v. Stopper Co.*, 128 Fed. 283, 286, 62 C. C. A. 652. In other respects the decree is reversed, with costs, and the cause is remanded to the Circuit Court with instructions to enter a decree for the complainant in the usual form.

WILCE et al. v. BUSH TEMPLE OF MUSIC CO.*

(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)

No. 1,062.

1. PATENTS—INVENTION—FLOORING.

The Wilce & Burnham patent, No. 531,711, for an improved floor, in which the ends as well as the edges of the boards are united by a tongue and groove joint, the joinder being made "bit-or-miss," without reference to the joists, is void for lack of invention in view of the prior art, which disclosed both features of the alleged invention, which were merely brought together by the patentee.

* Rehearing denied January 3, 1905.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Appeal from a decree dismissing a bill for infringement of letters patent No. 531,711 for flooring, granted to Thomas Wilce and John P. Burnham, January 1, 1895.

Appellants' bill for infringements of letters patent No. 531,711, Jan. 1, 1895, to Wilce and another, for improvements in flooring, was dismissed for want of equity.

The nature of the alleged invention is sufficiently described in the claims, which are as follows:

"(1) In a floor, the combination of the joists with long narrow flooring boards or strips of varying lengths laid there and jointed together at their meeting ends by interfitting integral tongues and grooves formed thereon, the separate flooring boards or strips thus jointed together at their meeting ends forming continuous strips or boards extending across the joists and resting thereon and secured thereto at intervals, the tongue-and-groove joints at the meeting ends of the boards in one such continuous strip, breaking joints with those in adjacent continuous strips, whereby the necessity of joining the boards over the joists and nailing each separate board or strip at each of its ends to a joist is obviated, substantially as specified.

"(2) The improved floor herein shown and described, comprising a series of supporting joists and a series of flooring boards of varying lengths, jointed together at their ends by interfitting integral tongues and grooves formed thereon and also at their sides by interfitting tongues and grooves, the separate flooring boards or strips thus jointed together at their ends forming continuous strips or boards extending across the joists and resting thereon and secured thereto at intervals, the tongue-and-groove joints at the meeting ends of the boards in one such continuous strip, breaking joints with those in adjacent continuous strips, whereby the necessity of joining the boards over the joists and nailing each separate board or strip at each of its ends to a joist is obviated, substantially as specified."

Lysander Hill and John W. Hill, for appellants.

Edward Rector and Charles E. Pickard, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts). Down to quite recent times the usual way of putting flooring directly upon joists was this: The boards were tongued and grooved along the sides. The workman, having regard to knots or other defects and to the necessity of breaking joints properly with those of boards already laid, would saw off the particular board in hand at such a length that each end would extend to the middle of a joist. The floor, when laid, would then have to be smoothed of any unevenness at the joints.

The advantages of appellants' method over the above are very great. Knots and split ends may be cut out at the factory; and short pieces, say two feet, which formerly would have to be thrown aside as flooring, may now be used successfully. The joints in a strip clear across the floor may fall where they will so far as the location of the joists is concerned. The workmen need pay attention only to the proper breaking of the joints of that strip with the joints of the abutting strip. No cutting and fitting is required except where the floor meets the wall. When laid, the floor is smooth and even without further dressing. A saving of 10 per cent. in material and 30 to 50 per cent. in labor is effected.

If appellants, as the file wrapper and contents show they and the Patent Office believed to be the case, took the step across the intervening gap, the merits of their patent might not be successfully assailed. But the record belies the premise.

The development was this: First. The old method of end-butting a joint over a joist. Second. The desirability of tonguing and grooving the ends to make a better joint than end-butting. This was shown in prior standard publications on joinery. The result was to furnish a tighter joint. The particular reason advanced why end-tonguing was superior to end-butting was that the joint would better keep out air and water. But of course the disclosure carried with it all the necessarily resulting advantages, including the prevention of warping at the ends of the boards, which was likely to happen with end-butted joints. The authors of these publications did not reach the idea of "hit-or-miss" joints irrespective of the location of the joists, but required the joints to be at the joists. Third. The idea of the "hit-or-miss" joints irrespective of the location of the joists. Meyer produced at his factory and sent forth in bundles ready for immediate use without cutting and fitting except next to the walls, hardwood flooring strips, tongued and grooved on the sides, carefully and accurately end-butted at the factory, and smoothed and planed so that the floor when laid would need no further dressing. Knots and split ends were cut out in the making; and the strips were of such varying length, from two feet up, as could be cut advantageously from the particular timber in hand. The flooring was designed to be laid, and was laid and used, on the "hit-or-miss" plan, with the resulting saving in material and labor that appears in appellants' method. Fourth. Appellants' substitution in the Meyer flooring of end-tonguing for end-butting.

Meyer disclosed the "hit-or-miss" plan for joints. The writers on joinery showed how a better joint could be made by substituting end-tonguing for end-butting. Appellants' selection among known means, though increasing the degree of efficiency, did not rise to the dignity of independent invention. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307; *Hollister v. Benedict Co.*, 113 U. S. 73, 5 Sup. Ct. 717, 28 L. Ed. 901; *Atlantic Works v. Brady*, 107 U. S. 199, 2 Sup. Ct. 225, 27 L. Ed. 438; *Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co.*, 125 Fed. 761, 60 C. C. A. 529.

The decree is affirmed.

**JEFFERSON ELECTRIC LIGHT, HEAT & POWER CO. v.
WESTINGHOUSE ELECTRIC & MFG. CO.**

(Circuit Court of Appeals, Third Circuit. January 16, 1905.)

No. 44.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction should not be granted where the defendant in a suit for infringement is merely a user of the alleged infringing device, and it is not shown that irreparable injury or any special injury will result to complainant from its continued use, and where the preliminary proofs on a defense of *res judicata* pleaded leave the question in serious doubt.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Arthur Keithley, for appellant.

Thomas W. Bakewell, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

PER CURIAM. This is an appeal from an order awarding a preliminary injunction upon a bill filed by the Westinghouse Electric & Manufacturing Company against the Jefferson Electric Light, Heat & Power Company, charging the defendant with infringement of two patents for the electrical transmission of power. 128 Fed. 751. The defendant (here the appellant) was the user of alleged infringing meters manufactured by the Diamond Meter Company, of Peoria, Ill., and its alleged infringement consisted altogether in such use. The defendant set up by plea the defense of *res adjudicata*, based upon a decree of the United States Circuit Court of Appeals of the Second Circuit (121 Fed. 831, 58 C. C. A. 167), in a suit on the same patents, brought by this complainant against the Catskill Illuminating & Power Company, which decree adjudged each of the patents to have been anticipated by earlier inventions, and therefore to be void; and the plea further averred that the Diamond Meter Company manufactured and sold to the Catskill Illuminating & Power Company all the meters described in the bill against that company, and agreed to and did defend that suit (including the proceedings in the Circuit Court of Appeals) at its own expense, and to the knowledge of the complainant. This defense was supported by proofs which included the complainant's own admission in a bill which it filed against the Diamond Meter Company in the Circuit Court of the United States for the Southern Division of the Northern District of Illinois. The case, it is probable, will ultimately turn upon this defense of *res adjudicata*. The preliminary proofs relating thereto are very conflicting. The defendant is a mere user of these meters. No irreparable injury, or, indeed, any special injury, to the complainant from the defendant's use of the meters, is alleged or shown. Under the circumstances, then, we think that the court should have forborne to act until full proofs were before it.

Without intending to intimate any opinion upon the merits of the case, we will reverse the order granting a preliminary injunction. And it is so ordered.

CONFECTIONERS' MACHINERY & MFG. CO. v. PANOUALIAS.

(Circuit Court of Appeals, Second Circuit, December 12, 1904.)

No. 32.

1. PATENTS—CONSTRUCTION OF LICENSE CONTRACT—ROYALTY.

A contract which requires the licensee under a patent to pay a royalty on each machine "sold or delivered" covers machines delivered by the licensee to customers, but which were returned, and not paid for.

In Error to the Circuit Court of the United States for the Southern District of New York.

The plaintiff in error, who was the defendant below, brings this writ of error to review a judgment of \$3,263.95, recovered against it in the Circuit Court for the Southern District of New York for royalties under a written agreement between the parties, dated August 21, 1901. The defendant in error, plaintiff below, is the inventor of certain improvements in chocolate coating machinery for which various letters patent were granted. The agreement in question grants the defendant an exclusive license under these patents, the defendant agreeing to manufacture machines containing the said improvements, to use its best endeavors to sell the machines in the United States and foreign countries and to render quarterly statements to the plaintiff. The clause of the agreement which is the subject of controversy is as follows:

"The party of the second part (defendant) agrees to pay unto the said party of the first part as royalties or license fees a sum equal to twenty-five per cent. upon the gross selling price of each machine and each dipping-basket sold or delivered by the said party of the second part; the said royalties to be paid upon the said first days of January, April, July and October. for all machines and dipping-baskets sold or delivered during the preceding quarter."

The court denied the motion made at the close of the evidence to direct a verdict for the defendant and an exception was duly saved. The defendant also excepted to that portion of the charge where the court instructed the jury, in substance, that the plaintiff was entitled to recover royalties on all machines sold or delivered for use irrespective of the fact that the defendant took them back without being paid therefor. The only assignments of error argued relate to these two exceptions.

Avery F. Cushman, for plaintiff in error.

Geo. H. Taylor, Jr., for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The exceptions present the single question whether under the terms of the agreement the plaintiff could recover for royalties upon machines which the defendant had delivered to its customers but which had not been paid for and had been subsequently returned by them.

It is argued that although the contract requires the payment of royalties on all machines "sold or delivered," the intent of the parties was that payment should be limited to machines "sold and delivered" and that the court should have so interpreted the contract. We cannot accede to this view. There is no ambiguity about the contract; its language is perfectly plain. In the short clause providing for the payment of royalties the words "sold or delivered" are twice used. There is no room for interpretation.

There is no pretense of fraud and no evidence of mutual mistake, but even if there were, defenses based upon such considerations cannot be

availed of in a court of law. They should be presented to a court of equity. It seems improbable that there could have been any misunderstanding in the use of language deliberately chosen and twice repeated. There is certainly insufficient proof to warrant such a conclusion. The agreement was, perhaps, an improvident one for the defendant, but from the plaintiff's point of view the stipulation as to delivery was a wise precaution, for otherwise the defendant by entering into agreements with its customers which fell short of an actual sale could easily have defeated the payment of royalties.

The question whether or not actual deliveries were made was fairly presented to the jury and we see no reason for disturbing their verdict. The judgment is affirmed.

PARSONS v. NEW HOME SEWING MACH. CO. et al.*
(Circuit Court of Appeals, Seventh Circuit. October 4, 1904.)
No. 1,072.

1. PATENTS—INFRINGEMENT—SEWING MACHINE RUFFLERS.

The Parsons patent, No. 354,577, for a sewing machine ruffler, held valid as to claims 2, 7, and 8, but, as limited by the prior art, not infringed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

For opinion below, see 125 Fed. 386.

John G. Elliott, for appellant.

Henry Lore Clarke, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. Appellant failed in his suit to hold appellees for infringement of claims 2, 7, and 8 of letters patent No. 354,577, December 21, 1886, issued to appellant for improvements in ruffler attachments for sewing machines. We fully agree with the Circuit Court's holding of noninfringement; and the reasons therefor are adequately expressed, we think, in that court's opinion, which is reported in 125 Fed. 386. Other questions affecting the merits are consequently immaterial.

Appellees ask us to review the overruling of their motion to suppress the depositions of two of appellant's witnesses for their refusal, on advice of appellant's counsel, to answer certain cross-examining questions. The matter has become purely moot in this case.

Appellant urges upon our consideration an alleged error of the court in overruling his motion to tax against appellees the costs occasioned by their propounding alleged improper cross-examining questions to appellant's witnesses. The motion is based on the proposition that a cross-examiner in an equity suit may not go beyond the scope of the direct examination. Even on that basis the ruling was right, because the cross-examining questions were germane to the matters in issue, which had been opened up on direct examination.

The decree is affirmed.

* Rehearing denied January 3, 1905.

MESICK et al. v. HASSLER.

(Circuit Court, D. Massachusetts. January 4, 1905.)

No. 1,545.

1. PATENTS—INFRINGEMENT—MACHINES FOR BRAIDING WHIPLASHES.

The Turner patent, No. 432,582, for improvements in racers used in machines for braiding whiplashes, claim 3, must be limited to the combination of the specific elements described, and, as so limited, is not infringed by the machine of the Hassler patent, No. 683,276, which lacks one of the essential and characteristic elements of such combination.

In Equity.

Oliver R. Mitchell, for complainants.
Allen Webster, for defendant.

COLT, Circuit Judge. The present bill is brought for infringement of the Turner patent of July 22, 1890, No. 432,582, for improvements in racers used in machines for braiding whiplashes. The defendant's device is constructed under the Hassler patent of September 24, 1901, No. 683,276.

Racers are carriers for delivering the strands of leather to be braided in a whiplash-braiding machine. There are several racers in each machine, and they operate to pass each strand alternately over and under other strands as they travel around a ring in a sinuous path. It is necessary that the strands should be delivered from the several racers under a strong and equal tension, and it is also important that the tension members should be capable at any time of being opened for the purpose of inserting a strand, and then closed, without destroying the tension adjustment.

A racer is composed of several groups of mechanism: (1) A frame to which are attached a foot, shank, and tail-piece or guide; (2) a spool and its connecting mechanism; (3) tension devices; (4) a fixed tension member and a relatively moving tension member, and means for adjusting the movable tension member to the fixed tension member to regulate the tension, and means to open and close the tension members for the purpose of introducing a strand.

The Turner patent in suit is for improvements in spool mechanism, the tension mechanism, and the mechanism for adjusting and separating the tension members.

It is not contended that the defendant's racer embodies either the spool mechanism or the tension mechanism proper which form the subject-matter of claims 1, 2, and 4 of the Turner patent. The alleged infringement is limited to claim 3, which covers the means for adjusting and separating the two tension members. The claim reads as follows:

"(3) In a racer, the frame, 6, provided with a pivot, 29, the spring, 28, the block, 30, arm, 31, cam-screw, 33, and set-screw, 34, all so arranged and combined that the screw, 33, shall operate as an adjustable cam to produce pressure by means of spring, 28, on saddle, 25, while for the purpose of adjusting the thread or strand to the tension apparatus the spring, 28, may be opened or thrown back from the saddle."

This is a combination claim, and the question we have to determine is whether the defendant's racer contains this combination. More specifically stated, the question resolves itself substantially into the inquiry whether there is found in the defendant's racer the "arm, 31," which constitutes one of the elements of the combination.

The tension devices proper in the Turner organization are a ratchet wheel and its braking mechanism. Co-operating with this ratchet wheel is a semicircular pressure-piece called the "saddle," which presses against the strand as it passes between it and the ratchet wheel. The saddle is connected with the frame, and by means of a slot in the frame is adapted to move to and from the ratchet wheel. A spring, which is pivoted to the frame, presses the saddle against the ratchet wheel, or, rather, against the strand upon its periphery. To hold the spring against the saddle, there is provided a block, which is also pivoted to the frame near the base of the spring. Passing through the block is an adjustable cam screw, which comes in contact with the spring. This adjustable cam screw, co-operating with the spring, regulates the pressure of the saddle upon the ratchet wheel. There is also a set screw which holds the cam screw in position, and thus permits no change in the pressure of the spring during the operation of braiding. To move the saddle away from the ratchet wheel in order to insert the strand, and at the same time not destroy the cam-screw tension adjustment, the end of the spring is thrown back from the saddle, which permits the saddle to move back in its slot. In order to accomplish this, the pivoted block is provided with a long lever or "arm, 31," bent at the outer end, and adapted to move outward from the frame. There is also a small recess cut in the frame, into which the end of the arm is sprung when it is moved back to the frame. When it is desired to move the saddle from the ratchet wheel, the "arm, 31," is moved outward, which causes the block, with its cam screw, to move upward; thereby relieving the pressure of the spring on the saddle, and permitting it to move away from the ratchet wheel. When the strand is inserted, the arm is moved back into the recess, thereby moving the cam screw back to its original position, and thus restoring the same tension between the saddle and the ratchet wheel.

In the defendant's organization there is no tension ratchet wheel, but the strand is held between a fixed and a movable tension member. The defendant's device discloses only an "abrasive" or rubbing tension, in place of the predominant brake-wheel tension of the Turner patent. There is, however, in defendant's racer, a movable tension member, which may be said to correspond to the saddle of the Turner patent. There is also a spring, attached to the movable tension member, which may be said to correspond to the spring of the Turner device. There is likewise in defendant's organization a block pivoted to the frame, and passing through this block an adjustable cam screw, which co-operates with the spring to press the movable tension member against the two fixed tension posts; and by means of a nut this cam screw may be set. There is also a notch in the spring, which holds the cam screw and block

in a fixed position. These last-mentioned parts may likewise be said to correspond to the block, cam screw, set screw, and recess of the Turner device.

We do not find, however, in defendant's racer, the long "arm, 31," of the Turner patent. This arm is an essential and characteristic feature of claim 3. It is by means of this lever that the spring, as set forth in the claim, "may be opened or thrown back from the saddle." It is this lever which turns the block, and so disengages the cam screw from the spring. It is by means of this lever that the block and cam screw are returned to their normal position, with the same tension adjustment.

There is no part in the defendant's organization which can properly be said to correspond to this arm of the Turner device. In defendant's block the cam screw passes through a projection or lug in the block. The main purpose of this projection is to provide a suitable part for the insertion of the cam screw. This projection is not in any legitimate sense an arm or lever, within the meaning of the Turner patent. The fact that the lug affords a projection which may be taken hold of by the hand in order to move the block does not make it the equivalent of the long arm of the Turner racer. If we eliminate the arm from the Turner structure, we have left substantially the defendant's organization.

In operating the Turner device, the long arm is simply moved outward from the plate with one hand of the operator. In operating the defendant's device, one hand first presses the spring to one side, while the other hand grasps the lug and pushes down the block. It may be true that the defendant's device is capable of being operated by turning the block upward with one hand. It is doubtful, however, if this way of operating the device is practical; but, even if it were practical, we still fail to find any such lever action as characterizes the Turner device.

Tension devices of many kinds are old in the mechanical arts. Claim 3 of the Turner patent must be limited to the combination of the specific elements mentioned. *Mesick v. Moore* (C. C.) 100 Fed. 845. The invention, by reason of its limited scope, cannot be enlarged beyond the particular combination set forth. This is not a patent calling for that liberality of construction sometimes given to inventions which mark an important advance in the art, or which separate success from previous failures. Since there is absent from the defendant's device one of the distinguishing and characteristic elements of the patented combination, there is no infringement, and a decree must be entered dismissing the bill.

Bill to be dismissed.

UNITED STATES WHIP CO. v. HASSLER.

(Circuit Court, D. Massachusetts. January 4, 1905.)

No. 1,672.

1. PATENTS—REISSUE—LIMITATION TO ORIGINAL INVENTION.

A reissued patent must be confined to the invention which was intended to be secured by the original patent. Devices or parts which, although described or shown in the specification or drawings of the original patent, were not a part of the invention, as therein disclosed, cannot be covered by a reissue.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Patents, §§ 206-213.]

2. SAME—TENSION FOR BRAIDING MACHINES.

The Turner reissued patent, No. 12,058 (original No. 679,650), for a tension device for the racers of braiding machines, is void, as not being for the same invention as that of the original patent.

In Equity. Suit for infringement of reissued letters patent No. 12,058, for a tension for braiding-carriers, granted November 25, 1902, to Julius A. Turner. On final hearing.

Oliver R. Mitchell, for complainant.

Allen Webster, for defendant.

COLT, Circuit Judge. This is a bill in equity for infringement of the Turner reissued patent, No. 12,058, dated November 25, 1902. The patent relates to tension devices for racers used in whiplash-braiding machines. The original patent was issued July 30, 1901. This case was heard at the same time as the closely related case of Mesick v. Hassler, 134 Fed. 395. In the opinion of the court in that case, the subject of tension devices is considered in connection with an earlier Turner patent.

The first ground of defense in the present case is that the claims of the reissued patent are invalid because they are not for the same invention as the original patent.

A reissue may be granted for the invention intended to be secured by the original patent, but which the patentee, through inadvertence, accident, or mistake, has failed to secure by that patent. The validity of the reissue in suit involves, therefore, two inquiries: First. What invention did the patentee intend to cover by his original patent? Second. Do the claims of the reissued patent cover this invention, or a different invention?

It may be first noted that the brake-wheel tension of the earlier Turner patent has been discarded in the patents in suit, and that we now have a device confined to the abrasive or rubbing tension type.

Turning now to the original Turner patent in suit, we find that the purpose of the invention is stated at the beginning of the specification in the following language:

"The purpose of the invention is to provide a simple tension for racers for braiding-machines, particularly whiplash-braiding machines, comprising a fixed guide-block, a pivoted pressure-block, and a convenient means for moving the pressure-block and regulating its pressure against the thread or strand."

Outside of a comparatively minor improvement relating to the reel mechanism, it will be found that what follows in the specification is entirely consistent with this statement. In other words, the substantial invention which Turner intended to cover by his original patent related to the means by which the movable tension member may be made to bear with greater or less pressure against the fixed tension member, and also to the means whereby the movable tension member will have such a rocking movement as will enable it to accommodate itself to any irregularities in the strand of leather.

The specification continues:

"The invention consists in the novel construction and combination of the several parts, as will be hereinafter fully set forth, and pointed out in the claim."

Then follows a description of the improvement in the reel devices, which comprise a spring-controlled brake and a cap so suspended as to impart motion to the reel when the "cap is forced down to a frictional engagement with the cone of the reel." The specification then proceeds, in substance, as follows: With reference to the tension device, a thread-guide, or fixed tension member, is located on the bedplate. This thread-guide comprises upper and lower plates connected at their ends by posts set in the base or frame. The strand passes into engagement with the inner face of both of the posts, and around one of the posts and over another fixed guide-pin to the work. Adjacent to the thread-guide, or fixed tension member, apertured lugs are removably attached to the base, and a stem or rod is mounted to slide freely in the apertures of these lugs. This rod is provided at a point between the lugs with a threaded section. A spring is also coiled around the rod, having bearings against one of the lugs and against a nut on the threaded portion of the rod. By adjusting the nut, the spring may be placed under more or less tension. At one end of the rod there is a knob, and at the opposite or inner end a pressure-block, or movable tension member, which is pivotally attached to the rod. The thread passes between the pressure-block, or movable tension member, and the thread-guide, or fixed tension member. The pressure-block is also provided at the end nearest the reel with a forked foot, which serves properly to direct the thread. The above description relates to the adjustable means employed, by which the movable tension member may be made to bear with greater or less pressure against the fixed tension member. The specification then goes on to describe the means by which the movable tension member is given a rocking movement: There are two lugs on the edge of the pressure block, and a head upon the rod, which enters the space between these lugs. A pivot-pin passes through these lugs at their center, and through the central portion of the head.

"Thus it will be observed that the pressure-block is capable of a rocking movement, and may accommodate itself to irregularities in the thread; and that it will have at all times a perfect bearing against the length of the thread with which it comes in contact."

The specification then declares that a strand may be inserted between the thread-guide and the pressure-block by drawing out the rod through the medium of the knob, and that by adjusting the nut the

spring will cause the pressure-block to bear with greater or less force against the thread, "so that the tension on the thread may be minutely regulated."

The last paragraph in the specification describes how the rod may be placed in position in the lugs when the lugs are removed from the base, and how it may then be returned to its proper position on the base.

The single claim of the patent reads as follows:

"In a tension for braiding-carriers, the combination, with a base, a reel mounted to revolve upon the base, a brake for the reel and a stationary thread-guide secured upon the base at one side of the reel, which guide is in the form of a rectangular block, of a tension rod or stem, one end of which faces the thread-guide, supports in which the rod or stem has sliding movement, said rod or stem being provided with a thread between its ends, a nut upon the threaded portion of the rod or stem, and a spring encircling the rod, resting against the nut and a bearing for the rod, a knob at the outer end of the tension-rod, and a head at its inner end, a pressure-block parallel with and close to the stationary thread-guide, a pivotal connection between the pressure-block and head of the tension-rod, and a bifurcated guide member at one end of the pressure-block, extending in direction of one end of the stationary thread-guide, as set forth."

This examination of the original Turner patent shows that the essence of the invention intended to be secured by that patent lay in the movable tension member, which, by virtue of its compound vertical and pivotal movements, was capable of nice adjustment with respect to the thread-guide or fixed tension member. That this was the real invention is further illustrated by claim 1 and an extract from claim 3 of the rejected claims contained in the original application:

"(1) A tension device for the racers of braiding machines, comprising a stationary thread-guide, a spring-controlled pivoted pressure-block movable to and from the thread-guide, and a regulating device for the spring-controlled pressure-block."

"(3) * * * whereby the pressure-block may be made to bear with greater or less force against the thread at the main thread-guide, and whereby also the pressure-block will have even bearing upon the thread and will accommodate itself to any irregularities."

Turning now to the specification of the reissued patent we find that the "guide-pin, 16," of the original specification, becomes the "tension pin, 16." This is the guide-pin which is located on the frame nearest the work. The following lines are also added to the original specification:

"This pin, 16, forms a second guide for the strand, 15, and is so located as to cause the strand between the reel and the work to make an abrupt change in its direction at said pin itself, and also at the lower or inner end of the first tension. The frictional resistance to the movement of the strand produced by this arrangement results in putting a normal drag on the strand, and means are provided for adding to this normal drag as may be desired and to any extent within practical limits by pressing the strand against the face of the first tension-block in advance of an angular change of direction of the first strand about this first tension-block."

At the close of the reissued specification follow these somewhat remarkable claims, as descriptive of the invention:

"(1) In a braiding-carrier, the combination of a base; a reel mounted thereon; a tension-block fast to the base; a pressure-block; means to force the pressure-block forward to cause the strand to be pressed against the tension-

block and another tension-block fast to the base and positioned to cause the strand to make an abrupt change of direction between the first-mentioned tension-block and the work.

"(2) In a braiding-carrier, the combination of a base; a reel mounted thereon; a tension-block fast to the base; a pressure-block; adjustable means to press the pressure-block forward to cause the strand to be pressed against the tension-block; another tension-block fast to the base and organized and arranged to cause the strand to make an abrupt change of direction between the first-mentioned tension-block and the work.

"(3) In a braiding-carrier, the combination of a base; a reel mounted thereon; a tension-block fast to the base; a pressure-block; means to press the pressure-block forward to cause the strand to be pressed against the tension-block, the parts being organized and arranged to cause the strand to make an abrupt change of direction around the tension-block as it passes to the work.

"(4) In a braiding-carrier, the combination of a base; a reel mounted thereon; a tension-block fast to the base; a pressure-block; means to press the pressure-block forward to cause the strand to be pressed against the tension-block; there being means to cause the strand to make an abrupt change of direction around the tension-block as it passes to the work."

On reading these claims, we are at once impressed with the circumstance that they contain no reference to the specific means for adjusting the pressure-block or movable tension member. By reason of this omission they ignore the main purpose of the invention, as set forth by the patentee in his original patent, which was "to provide a simple tension for racers * * * comprising a fixed guide-block, a pivoted pressure-block, and a convenient means for moving the pressure-block and regulating its pressure against the thread or strand." In these claims the invention is shifted from the complicated and delicate adjustable mechanism of the movable tension member to the comparatively unimportant fixed guide-pin near the top of the base, which does not appear to have been considered of sufficient consequence to be mentioned either in the claim of the original patent or in the twice rejected series of claims filed with the first application. The patentee has now discovered that his real invention lay in this guide-pin, or, rather, in the position of this guide-pin when so located on the base as to cause the strand to make an abrupt turn around the outer end or post of the fixed tension member. And upon this ground it is sought by this reissue to enlarge the invention to a mode of operation which will cover all tension devices in which, by reason of a fixed pin or other means, the strand, as it passes out from between the fixed tension member and the movable tension member, will make an abrupt change of direction between the fixed tension member and the work.

There are two fatal objections to these claims: They do not describe the actual invention which Turner intended to patent, as disclosed in his original patent; and, further, by reason of their breadth, they become void in view of the prior art. With respect to the first objection, we have already pointed out that the actual invention which Turner contemplated related, except as to a minor improvement in the reel mechanism, to the adjustability of the moving tension member. As to the second objection, it is manifest that, in the existing state of this art, there was no invention in causing a strand to make an abrupt turn around the fixed tension member by means of another tension pin. When the strand leaves the two tension members proper, it would be the most natural thing to locate the additional pin which leads the

strand to the work so as to gain additional tension by abruptly changing the direction of the strand. This feature was known in the infancy of the tension art, as it was known to the first sailor who ever wound a rope around a belaying pin.

The complainant's argument respecting reissued patents is founded upon an unsound proposition. It is not true that anything which is disclosed in the original patent may be covered by a reissue. The fundamental inquiry is, what was the invention which the patentee intended to patent? Whatever else the original specification contains is dedicated to the public. It is true that the specification and drawings of the original Turner patent disclose the fixed guide so located that the strand makes an abrupt change of direction between the fixed tension-block and the work, but this circumstance alone is not sufficient to entitle the patentee to the broad claims contained in the reissue. Upon this point the language of the Supreme Court in *Parker & Whipple Company v. Yale Clock Company*, 123 U. S. 87, 8 Sup. Ct. 38, 31 L. Ed. 100, is very applicable. In that case the court, in commenting on the case of *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33, said:

"In these extracts from the opinion it is seen that the court adheres strictly to the view that, under the statute, the commissioner has no jurisdiction to grant a reissued patent for an invention substantially different from that embodied in the original patent, and that a reissue granted not in accordance with that rule is void. In what is there said about redescribing the invention, and about including in the new description and new claims what was suggested or indicated in the original specification, drawings, or Patent Office model, it is clearly to be understood, from the entire language, that the things so to be included are only the things which properly belonged to the invention as embodied in the original patent; that what that invention was is to be ascertained by consulting the original patent; and that, while the new description may properly contain things which are indicated in the original specification, drawings, or Patent Office model, though not sufficiently described in the original specification, it does not follow that what was indicated in the original specification, drawings, or Patent Office model is to be considered as a part of the invention, unless the court can see, from a comparison of the two patents, that the original patent embodied, as the invention intended to be secured by it, what the claims of the reissue are intended to cover." 123 U. S. 98, 99, 8 Sup. Ct. 44, 31 L. Ed. 100.

The claims of the Turner reissued patent, not being for the same invention as that of the original patent, must be held to be void.

Bill to be dismissed.

SAMPLE v. AMERICAN SODA FOUNTAIN CO. et al.

(Circuit Court, E. D. Pennsylvania. January 14, 1905.)

1. PATENTS—SUIT FOR INFRINGEMENT—REHEARING AFTER FILING OF DISCLAIMER.

A patentee has the right to file a disclaimer in the Patent Office during the pendency of a suit for infringement, although the case has been heard on appeal; and where such a disclaimer has been filed for the purpose of avoiding the grounds on which the appellate court declared the patent invalid, and before a decree has been entered, the Circuit Court has power in its discretion to grant a rehearing on equitable terms, the patent as it stands being essentially a new one, the validity of which was not before the appellate court.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 226, 228.]

In Equity. On motion for rehearing.
For former opinion, see 126 Fed. 760.

J. B. McPHERSON, District Judge. In an opinion reported in 126 Fed. 760, this court sustained the validity of claims 1 and 5 of the patent in suit, and decided that they had been infringed. The Circuit Court of Appeals, in reversing the decree (130 Fed. 145), held the claims to be invalid for want of patentable novelty, and instructed the Circuit Court to enter a decree in conformity with that ruling. The mandate further directed "that such execution and further proceedings be had in said case, as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding." Application to the Supreme Court for a writ of certiorari having been refused, the complainant filed a disclaimer in the Patent Office on December 27, 1904, by which he seeks so to restrict the claims in controversy as to avoid the effect of the anticipating devices referred to by the Court of Appeals, and he is now asking for a rehearing of the cause. It is clear, I think, from the authorities, that a disclaimer may be filed at any time during the pendency of a suit (*Smith v. Nichols*, 88 U. S. 112, 22 L. Ed. 566; *Dunbar v. Meyers*, 94 U. S. 192, 193, 24 L. Ed. 34; *Sessions v. Romadka*, 145 U. S. 40, 12 Sup. Ct. 799, 36 L. Ed. 609; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 435, 22 Sup. Ct. 698, 46 L. Ed. 968); and I see no ground upon which the statutory right should be denied merely because there has been a hearing upon appeal. The suit is still pending, since no decree has yet been entered dismissing the bill, and therefore the discretion of the Circuit Court (for the application is not of right—*Roemer v. Bernheim*, 132 U. S. 103, 10 Sup. Ct. 12, 33 L. Ed. 277) may be exercised, unless the petition asks for the rehearing of a question that has already been passed upon by the Court of Appeals. In that event it is undoubtedly true that the Circuit Court has no power to reopen such a question without the permission of the appellate tribunal (*Re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994); but it seems clear to me that the present application is not of this kind. In *Re Potts* the Supreme Court had decided that the patent was valid, and had been infringed, and the Circuit Court afterwards heard newly discovered evidence on this point, and upon such evidence decided the patent to be void. This was a clear invasion of the Supreme Court's decree, and there can be no doubt that the Circuit Court had no power, of its own motion, to re-examine a question that had been finally decided on appeal, even in the light of after-discovered evidence. It was for the Supreme Court alone to determine whether it would permit its own decree upon a specific question to be opened, and new evidence to be heard. But in the present case the complainant's patent, as it now stands, has never been before the Circuit Court of Appeals, and has therefore never been considered. It is, in effect, a new patent, and the subject of its validity or invalidity has never been decided by any tribunal.

In my opinion, therefore, it is proper for the Circuit Court to entertain the petition for a rehearing, and I have accordingly considered it, and have come to the conclusion that it should be granted, but upon

condition that the complainant within 30 days pays all the costs that have heretofore accrued, both in the Circuit Court and in the Court of Appeals. If payment is not made, the petition will be refused.

Ex parte RIGGINS.

(Circuit Court, N. D. Alabama, N. D. October 24, 1904.)

1. CONSTITUTIONAL LAW—CIVIL RIGHTS.

The first section of Civil Rights Act April 9, 1866, c. 31, 14 Stat. 27, now codified in substance as section 1977 of the Revised Statutes [U. S. Comp. St. 1901, p. 1259], but first passed in the exercise of power claimed by Congress under the thirteenth amendment, prescribes, as the standard of the freedom the amendment gave the emancipated race, perfect equality of civil rights with the white race. The enjoyment of this civil equality with the white race constitutes, in the constitutional sense, the freedom intended to be bestowed, and is a right, privilege, or immunity given or secured by the Constitution and laws of the United States to members of the emancipated race.

2. SAME—INTERFERENCE.

When a negro citizen is assailed by white men, with the intent to prevent the enjoyment by the negro, because of his race, of any civil right given by law to the white citizen, it is an interference with the negro's enjoyment of equality of civil rights, because of his race, and therefore constitutes an attack upon the right, privilege, or immunity—the freedom—the thirteenth amendment and the acts of Congress secure to him.

3. EQUAL PROTECTION OF THE LAWS.

It is impossible for private persons to prevent, in the constitutional sense, the enjoyment of the right to the equal protection of the laws, since the right is actually enjoyed when a citizen or person is not improperly discriminated against in the making or execution of state laws. The fourteenth amendment in this respect confers only the right to a legal status, which status can be created, in the first instance, only by legislation, and, when conferred, can be impaired only by acts of officials who wield state power in the execution of its laws.

4. SAME—DUE PROCESS OF LAW.

The vital constituents of due process of law, when the state undertakes to punish the citizen for crime, are dependent upon or secured by the Constitution of the United States, by the very force of the words "due process of law," which had a well defined and settled meaning when they were inserted in the fourteenth amendment; and the right, privilege, or immunity to have the state afford these things to the citizen, when taken in custody to punish him for crime, is secured by or dependent upon the Constitution of the United States.

5. SAME.

When the state takes a person or citizen into custody for trial on accusation of crime against its laws, the Constitution of the United States compels the state to afford him the enjoyment of many rights, among them, in this state, the protection of the prisoner while in confinement awaiting trial, the bringing of the prisoner into court, the assembling of a jury, the hearing of the witnesses and prisoner's counsel, the charge of the judge, the seclusion of the jury from outside interference, the return by the jury of a verdict in the presence of the prisoner, the passing of judgment upon him according to the verdict, and freeing or condemning him accordingly, and, if found guilty, allowing him an appeal, and suspending execution of sentence until the appeal can be heard in the appellate court. Individuals who forcibly take the prisoner from the custody of the state authorities and murder him, to prevent his being dis-

posed of by due process, make it impossible for the state to afford him the enjoyment of the proceedings which make up the state's established course of judicial procedure, and in the strictest constitutional sense prevent and destroy the citizen's enjoyment of the right, privilege, or immunity to have the state afford him due process of law.

6. SAME—FOURTEENTH AMENDMENT—POWER OF CONGRESS.

The authority given Congress to enforce the provisions of the fourteenth amendment regarding the equal protection of the laws, and affording due process of law, involves the exercise of power of a two-fold nature. As to the first provision, the power is contingent, and dependent for rightful existence upon the necessity for correcting wrongs by the state or its officers. As to the other provision, the power to enforce it includes and involves the power and duty to legislate for the protection of the right, privilege, or immunity of the citizen, which the amendment creates, to have the state afford him due process, although the state itself may not be at fault, against obstruction or impairment by private individuals, who defeat the efforts of the state to afford due process when it is seeking so to do, and thereby destroy the citizen's enjoyment of the right, privilege, or immunity to have the state afford him due process of law. The latter power Congress may exercise under the implied power given by the fourteenth amendment itself, or under it and section 8 of article 1 of the Constitution.

(Syllabus by the Court.)

Habeas Corpus.

The petitioner applies for discharge on habeas corpus, on the ground that the indictment under which he is held does not charge any offense against the laws of the United States. He is indicted, with others, for conspiracy, and acts done in furtherance of it, under sections 5508 and 5509 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712].

The indictment contains six counts. Each of the counts alleges, in substance, that Maples, a citizen of the United States, was, at the time of his murder, lawfully confined by the sheriff of Madison county, state of Alabama, in the jail thereof, to answer the charge of murder under the laws of the state of Alabama; and that the sheriff and a detachment of the Alabama National Guard, which he had summoned to his assistance, were endeavoring to safely keep Maples, to prevent the conspirators from hanging him, that he might have a trial according to law; and that the conspirators, in the city of Huntsville, within the jurisdiction of the court, went upon the highways and streets of the city of Huntsville on September 7, 1904, and murdered Maples by hanging him by the neck until he was dead, in order to prevent his enjoyment of the rights and privileges named in the several counts. Some of the counts allege that Maples was a negro citizen, and the conspirators who formed the conspiracy and committed the murder were white men, and that they were moved to the conspiracy and acts done in pursuance thereof, because Maples was a negro, with the intention, on that account, to deprive him of the rights, privileges, and immunities specified in the counts. All the counts allege that the conspiracy and acts done in furtherance of it were "to injure, oppress, threaten, and intimidate" Maples in the enjoyment of a right, privilege, or immunity "secured to him by the Constitution and laws of the United States," specified respectively in the counts as follows: (1) The right, privilege, and immunity secured to him under the Constitution and laws of the state of Alabama to be tried by due process of law, and acquitted, if innocent, and punished if found guilty, in the courts of the state of Alabama. (2) The right, privilege, and immunity to have the state of Alabama, acting by and through its officers, to afford him a trial by due process of law, and to be held harmless if innocent, and to be punished if guilty, only after trial in the courts, upon accusation of crime preferred against him, when he was in the custody of the officers of the law of the state of Alabama, upon the charge against him of murder under the laws of said state, and was then and there being held by the officers of said state in the jail of Madison county, Ala., for the purpose of affording him

such trial. (3) The right or privilege to enjoy immunity against the lawless acts of white men, intended to deprive him of the enjoyment of civil equality before the law with the white race as to a trial and right of trial by due process of law in the courts of the state of Alabama, as is enjoyed by white men under the laws of the state of Alabama when accused of crime against its laws. (4) The right, privilege, and immunity to have the state of Alabama, acting by and through its officers, to afford him a trial by due process of law upon accusation of crime preferred against him, when he was at the time in the custody of the officers of the law of the state of Alabama upon the charge of murder under the laws of said state, and was then being held in the county jail of Madison county for the purpose of affording him such trial. (5) The right to the full and equal benefit of the laws of the state of Alabama for the security of his person as is enjoyed and exercised by white citizens thereof, and the right not to be deprived of his life, without due process of law, on account of being a citizen of African descent and of color. (6) The right not to be denied, on account of his race, the full and equal benefit of the laws of the state of Alabama for the security of his life and person when confined by state authority upon the charge of murder, and due process of law in having the accusation heard and determined by a court of the state and by the verdict of a jury of his peers.

Cóoper & Foster and Shelby Pleasants, for petitioner.
Thos. R. Roulhac, Dist. Atty., opposed.

JONES, District Judge (after stating the facts). Whether or not Maples, a negro citizen, had the right, privilege, or immunity, under the Constitution and laws of the United States, to be free from lawless violence at the hands of white men, intended, on account of his race, to prevent his enjoyment of civil equality before the law, "as is enjoyed by white citizens," depends upon the proper construction of the thirteenth amendment and valid legislation under it.

In the Civil Rights Cases, 109 U. S. 20, 3 Sup. Ct. 28, 27 L. Ed. 835, the Supreme Court said that the thirteenth amendment "is undoubtedly self-executing, and by its own unaided force and effect abolished slavery and established universal freedom." It was further said that "it authorized legislation for the protection of the freedom it intended to secure, which might be direct and primary in its nature, operating upon the acts of individuals, whether sanctioned by legislation or not." In *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676, speaking of the thirteenth amendment, as well as of the fourteenth and fifteenth amendments, the court said:

"One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude, in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the state."

It is further said of the thirteenth amendment, as well as the others, in the *Slaughterhouse Cases*, 16 Wall. 36, 21 L. Ed. 394:

"One pervading purpose found in them all, and lying at the foundation of each, and without which none of them would have been even suggested, was the freedom of the slave race, and the security and firm establishment of that freedom, and protection of the rights of the newly made freeman and citizen from the oppression of those who had previously exercised unlimited dominion over them."

The condition of affairs existing in some of the states shortly after the adoption of the amendment, as stated in the *Slaughter-*

house Cases, 16 Wall. 36, 21 L. Ed. 394, resulted in the passage of an act on April 9, 1866, c. 31, 14 Stat. 27, commonly known as "the Civil Rights Bill," entitled "An act to protect all persons in their civil rights and furnish the means of their vindication." The first section, codified as section 1977 of the Revised Statutes [U. S. Comp. St. 1901, p. 1259], was readopted in substance after the adoption of the fourteenth amendment. That section provides that:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, penalties, licenses, taxes, and to exactions of every kind, and to no other."

If the thirteenth amendment, as the Supreme Court declares, "by its own unaided force abolished slavery and established freedom," and Congress was expressly vested with power to enforce it, it is impossible, in the light of its known history and purpose and the decisions cited above, to doubt that Congress had authority to pass the first section of that act. Mr. Justice Swayne, in *United States v. Rhodes*, 1 Abb. 28, Fed. Cas. No. 16,151, held that the "emancipation of one who was a native-born slave, by removing the disability of slavery, made him a citizen without any further act of Congress." Mr. Justice Bradley, in *United States v. Cruikshank*, 1 Woods, 308, Fed. Cas. No. 14,897, said:

"As the disability to be a citizen and enjoy equal rights were deemed one form or badge of servitude, it was supposed that Congress had the power under the amendment to settle this point of doubt, and place the other race on the same plane of privilege as that occupied by the white race. Conceding this to be true, which I think it is, Congress then had the right to go further, and to enforce its declaration by passing laws for the prosecution and punishment of those who should deprive or attempt to deprive any person of the rights thus conferred upon him. Without having this power, Congress could not enforce the amendment. It cannot be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person, or to hinder him in the exercise and enjoyment, of rights and privileges conferred by the thirteenth amendment, and the laws thus passed in pursuance thereof. * * * To constitute the offense, therefore, of which courts of the United States have the right to take cognizance under the amendment, there must be the design to injure a person or deprive him of the equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude."

The views of Mr. Justice Bradley and Mr. Justice Swayne, in the cases cited, as to the power of Congress to protect the freedom given by the amendment, and in what it consisted, were approved by the Supreme Court of the United States in *The United States v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290. See, also, what is said of *Cruikshank's Case* in this regard in *Logan v. United States*, 144 U. S. 288, 12 Sup. Ct. 617, 36 L. Ed. 429.

The character of the freedom intended to be conferred and enjoyed was symbolized, in the minds of the framers of the constitutional amendment, and the legislation intended to accomplish its purpose, by the civil rights enjoyed by the dominant race, or, to quote the language of that section, "as is enjoyed by white citi-

zens." This civil equality must not be confounded with social or political rights. As this was the standard of the freedom conferred and the measure of the rights which constituted that freedom, and as the purpose of the legislation, under the amendment, was to secure and protect the former slave race from the aggressions of the master race, it is quite clear that the right to be free from attacks by members of one race, designed and intended to prevent the other race from enjoying the civil rights which go to make up that freedom, is a right, privilege, or immunity "accorded by, or arising under, or dependent upon the Constitution," and that such rights may be protected by Congress. *Cruikshank v. United States*, 1 Woods, 303, Fed. Cas. No. 14,897, *United States v. Rhodes*, 1 Abb. 28, Fed. Cas. No. 16,151; *Civil Rights Cases*, 109 U. S. 23, 3 Sup. Ct. 18, 27 L. Ed. 835; *United States v. Morris* (D. C.) 125 Fed. 322.

Whatever may be said of any other murder of a negro by white men, it is undeniable, when a negro is taken by white men from the custody of the state authorities, when he is being held for trial on accusation of crime against state laws, and put to death to prevent his having such trial, because of race hostility, that the manifest result, as well as intent, of such act, is to deprive him, because of his race, of the enjoyment of a civil right accorded by law to white freemen. Such an act, perpetrated in that manner, and with that intent, because of race malevolence, assails the negro's civil equality because of his race, and, by denying the enjoyment of that right with that motive, attacks the enjoyment of the freedom—the civil equality—which the amendment, and legislation under it, secures to him.

2. It is said, of the counts based upon violations of rights or privileges claimed under the fourteenth amendment, that no complaint is made of the laws of the state, or of the modes of enforcing them, but that, on the contrary, it is shown the state was without fault, and that its civil and military power was overwhelmed while the state was endeavoring to protect Maples from the mob, in order to afford him a trial by due process of law; and, this being so, it is insisted that a case is presented in which the United States has no power to legislate for the punishment of the offenders in any aspect in which the matter may be viewed. The fact that the state was without fault and endeavoring to do its duty, however, does not take away all power of Congress to legislate under that amendment, and is material only in determining the channels in which that power may be exercised. The duty of affording due process of law to all persons was an original duty of the state, and, prior to the fourteenth amendment, was not a matter of concern to the general government. That amendment made the performance of the duty by the state a matter of national concern, and, if need be, of national supervision. It was not the intention of the states, in adopting this amendment, to confer power upon the general government to undertake the general or initial duty of affording due process of law. The purpose was that the state should continue to administer justice and punish crime, but subject to the authority

conferred by the fourteenth amendment upon Congress. When, therefore, the amendment contemplates that the state shall continue to discharge the duty, and forbade the states, in the performance of it, to deny due process, the prohibition, ipso facto, inevitably became nothing more or less than a positive command that the states shall afford due process to all persons, and certainly to all citizens. It resulted from the judicial power of the United States that the Supreme Court became the final arbiter of what constituted due process of law and the equal protection of the laws; yet the main purpose of the amendment was to increase the power of Congress. It is Congress to which is given the power "to enforce" the duty by appropriate legislation. *Ex parte Virginia*, 100 U. S. 345, 25 L. Ed. 676. The Supreme Court has declared of these provisions that "they are to some extent declaratory of rights, and, though in form prohibitions, they imply immunities such as may be protected by congressional legislation." The power of Congress under the amendment, as to the performance of the duty thus enjoined upon the state, has therefore a twofold aspect. The first concerns the right to interfere with state laws or state power. That can be done only when the state is at fault—when the state either refuses to afford due process of law, or its officers refuse to execute the laws, or execute them with vicious purpose or uneven hand. Then, and not until then, can federal power step in and displace or alter state laws, or interfere with state officers. Then the interference with state law or power must be confined to dealing with the particular evil, and to providing an effective cure for it. The other phase of the power concerns the protection of the rights which the amendment gives, though the state may not be at fault, and the power of Congress to aid the state, in the performance of its duty, by removing obstruction or resistance, by private lawlessness, to the successful performance of the duty.

The vital purpose of the amendment in imposing the duty upon the state under this clause is not merely to secure formal recognition of the right in the Constitution and laws of the state, and provisions to enforce them, which, unless they are enforced, amount only to parchment due process of law, but that the duty should be so performed that it will result not merely in having proper laws and officers, but in the full enjoyment of the benefits of the operation of due process of law in individual cases. When a private individual takes a person charged with crime from the custody of the state authorities to prevent the state from affording him due process of law, and puts him to death to punish the crime and to prevent the enjoyment of such right, it is violent usurpation and exercise, in the particular case, of the very function which the Constitution of the United States itself, under this clause, directs the state to perform in the interest of the citizen. Such lawlessness differs from ordinary kidnapping and murder, in that the dominant intent and actual result is usurpation and exercise by private individuals of the sovereign functions of administering justice and punishing crime, in order to defeat the performance of duties required of the state by the supreme law of the land. The inevitable effect of such

lawlessness is not merely to prevent the state from performing its duty, but to deprive the accused of all enjoyment, or opportunity of enjoyment; of rights which this clause of the Constitution intended to work out for him by the actual performance by the state of all the things included in affording due process of law, which enjoyment can be worked out in no other way in his individual case. Such lawlessness defeats the performance of the state's duty, and the opportunity of the citizen to have the benefit of it, quite as effectually and far more frequently than vicious laws, or the partiality or the inefficiency of state officers in the discharge of their constitutional duty. It is a great, notorious, and growing evil, which directly attacks the purpose which the Constitution of the United States had in view when it enjoined the duty upon the state.

Upon what principle, then, can it be said, because the state is not at fault, that all power given Congress by this amendment is thereby rendered inert, and that it cannot exercise even the incidental power of punishing lawless resistance by private individuals to the state's performance of this duty in order to protect the right, when such exercise of the power by Congress does not displace state laws or interfere with state officers? Such legislation is certainly "appropriate," in the sense that it is adapted to carry out the purposes of the amendment, and certainly directly aids its accomplishment. If it can be criticised as not being "appropriate," it can only be in the sense that it is in excess of authority. If we regard the rule that "when the end is required the means are given" (*Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060; *Legal Tender Cases*, 12 Wall. 536, 20 L. Ed. 287; *The Legal Tender Case*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204); the right of Congress to legislate against such acts of private individuals is plainly implied in the power given to enforce the amendment. Section 5508 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712], as applied to such a case, can be sustained under that power; for its application deals only with acts that subvert the performance of the duty, without in any way interfering with or touching the power of the state or its laws.

If, however, such power is not implied in that amendment, it is certainly not prohibited by it, and may be exercised by Congress if it can be found in any other provision of the Constitution. It is stated by Mr. Justice Strong, in delivering the opinion of the court in the *Legal Tender Cases*, 12 Wall. 536, 20 L. Ed. 287, that "the existence of a power may be deduced from one or more of the substantive powers expressed or defined, or from them all combined, and that it is allowable to group any number of them, and infer from them all that the power has been conferred." It was also declared in the same case that a "power may exist as an aid to the execution of an express power, or the aggregate of such powers, though there is another express power given relating to the same subject, but less extensive." 12 Wall. 536, 20 L. Ed. 287. The last clause of section 8, art. 1, empowers Congress to make all laws which shall be "necessary and proper" for carrying into execution the "foregoing powers and all other powers vested by this Constitution in the

government of the United States, or any department thereof." The Supreme Court has held that the amendment is an "additional guaranty" for the enforcement of due process of law at the hands of the state, and that the power was conferred upon Congress to see that the duty guarantied was performed. Certainly, if the legislative power to guaranty the performance of the duty is vested in Congress by the fourteenth amendment itself, Congress has power under section 8 of article 1 to pass all laws which shall be "necessary and proper" to carry into execution that guaranty. The legislative power to make good the guaranty involves the power to protect state officers when endeavoring to discharge the constitutional duty, and to punish private individuals who resist the execution of the laws, by whose enforcement alone the duty can be accomplished, and the rights, privileges, and immunities enjoyed, which the amendment intended to bestow, when it required the performance of the duty at the hands of the state.

The principle upon which such legislation is vindicated is illustrated and upheld in *Ex parte Siebold*, 100 U. S. 372, 25 L. Ed. 717. In that case laws of the United States were involved which imposed penalties upon state officers for not performing their duty as commanded by state law, so far as it affected the election of Congressmen and presidential electors. The court held that the duties to be performed were "due to the United States, as well as to the state," and that Congress could rightly make such violation of state laws an offense against the United States. It was said this power necessarily followed from "the direct interest" which the national government had in the subject. The national government, having a direct interest in the performance of the duty here, can protect officers who are charged with it. The right to protect the officer in discharge of the duty involves the power to punish private individuals who assail the officer to prevent his performing it. The general government, certainly, has as direct and deep an interest in securing the successful performance of the duty to furnish due process of law, which is required of the state to secure the enjoyment of fundamental rights of citizens of the United States, as it has in the performance of duties, by state officers under the state law, affecting the election of congressmen and presidential electors. It has also been held in numerous cases that the function which a party is performing determines whether Congress has the right to protect him in performing a duty enjoined or in the exercise of a right or privilege. A state officer in attempting to afford due process in a particular case is discharging a duty imposed upon him, as the representative of the state, by the Constitution of the United States, for the benefit of its citizens. The prisoner also, while confined and being protected against lawless violence, that he may have a trial according to the law of the land, is in the exercise or enjoyment of a right given him by the Constitution. Congress may protect the right by protecting the performance of the duty, and the rights which flow from it, by declaring that violations of state laws on the subject constitute offenses against the United States. *Ex parte Siebold*, *supra*. Indeed, whether an act constitutes an

offense against the United States, as well as the state, very frequently turns upon the intent with which it is done. *United States v. Cruikshank*, 1 Woods, 308, Fed. Cas. No. 14,897; *United States v. Waddell*, 112 U. S. 80, 28 L. Ed. 673. Congress, instead of making violation of state laws which protect the right a substantive offense under the federal law, may strike at the evil effect of private lawlessness upon the right, and punish conspiracy to harm the right, and, in that connection, acts done to carry it out. Sections 5508 and 5509 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712] are framed upon this latter principle.

It is nothing new in our jurisprudence for Congress to legislate against lawless acts of private individuals, to aid and protect state officers in the performance of duties which the Constitution of the United States requires of them, although such duty is due only to the public or government, and not directly due to any particular individual, and although the provisions of the Constitution imposing the particular duty give Congress no power to coerce or supervise its performance. Under the Constitution, Congress is without power to compel the state to which the fugitive from justice has fled to surrender him upon the "demand of the Governor" of the state from whence the accused fled. This is only a moral duty addressed to the conscience of the state; yet, when the state undertakes to obey the Constitution, and enters upon the performance of the constitutional duty, Congress steps in and punishes individuals who interfere with the agents of the state in the discharge of that duty. For more than a century there has been a statute, now codified as section 5279 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3597], the constitutionality of which has never been doubted, which puts a penalty upon persons who interfere with the agents of the demanding state, though, in the language of the Supreme Court, "they are the mere agents of the state, with authority to receive the fugitive from justice." *Robb v. Connolly*, 111 U. S. 634, 4 Sup. Ct. 544, 28 L. Ed. 542. What difference is there in principle between legislation of Congress which punishes private individuals who rescue a fugitive from justice, in the custody of the agent of the demanding state, to prevent the fugitive's return, as required by the Constitution, and legislation which punishes private persons who take a prisoner from the custody of state officers who are holding him to give him a trial by due process of law on accusation of crime, and murder such prisoner to prevent the performance of the duty which, under the Constitution, is "due to the United States as well as to the state," and as well, also, to the citizen?

No one can deny that the fourteenth amendment conferred upon the citizen the right, privilege, or immunity to have his state afford him due process of law on accusation of crime against him, and that a right or privilege was thereby vested in the citizen, under the Constitution of the United States, to have the state perform this duty. The very words of this clause, by their own unaided force, inevitably utter a command that the state shall afford due process to the citizen. It is therefore a right, privilege, or im-

munity of a citizen of the United States to have the state afford him due process of law. It is a universal rule of law, and common sense as well, that the grant of a right or privilege carries with it every right or privilege necessary to the enjoyment of the right granted, unless withheld by the terms of the grant. The grant here makes no such exception. The constitutional right of the citizen cannot bear fruit, or ripen into the enjoyment of due process at the hands of the state, if lawless outsiders prevent state officers from performing their duty concerning it. The right, privilege, or immunity of a citizen of the United States under this clause, which is to have his state give him the benefit of due process of law, therefore, necessarily carries with it and includes in it the right, privilege, or immunity to enjoy freedom, exemption, from lawless assault, which supervenes between the state and the performance of its duty, and by such violent interference prevents the citizen having, when the state is endeavoring to afford it, due process at the hands of the state.

There is no valid legislation of Congress which protects the enjoyment of this right by criminal penalties, except section 5508 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712]. That statute does not define the right or privilege here considered, or particularize the rights it is designed to protect, but is directed to the punishment of conspiracies to deprive any citizen of the enjoyment of any right or privilege "secured to him by the Constitution or laws of the United States." In considering its application to this case, we must be careful not to overlook what part of the right or privilege is involved and remains to be guarded when the state is endeavoring to afford due process of law, and is assailed, to prevent it from doing so, by private individuals. The privilege or immunity, then, is the right or privilege to freedom or exemption from lawless attacks on the discharge of the duty by the state, which prevent the state, acting through its officers, from administering due process, and thereby frustrate the citizen's enjoyment of the protection which the Constitution intended to effect for him when it gave him the immunity or right to have due process of law at the hands of the state. When the state is endeavoring to do its duty, such lawlessness is the only means by which the enjoyment of the right or privilege can be breached. It is the attack upon the endeavor of the state to perform the duty, and not the crime committed under the state laws against the person of the citizen, which determines whether the enjoyment of the right has been assailed, or the state has been prevented from dispensing due process of law to the citizen in the constitutional sense. The wheels of justice must be stopped by unauthorized force, after they have been put in motion, to bring the offender in a case like this within the grasp of section 5508.

The state, in the first instance, discharges its full constitutional duty, under this clause, of affording due process to every person in the jurisdiction, by passing proper laws for the protection of rights of person and property, and giving proper means of enforcing them. After doing that, it cannot be lacking in the duty of affording due

process to any person, as to any wrong to person or property, until the nature of the case calls for the further administration of due process, which constitutes the second stage of the duty, and in the particular case. Then the duty of affording due process, which in its first stage involved only the exercise of legislative power, in passing laws, or of executive power, when the appointment of officers is put upon the executive, may involve the administration of judicial process in the particular case. So far as the duty of affording due process depends upon legislation, it is a general duty owed alike to everybody, and the right is given, and the duty discharged, and the privilege enjoyed, so long as such laws remain in force and are fairly executed. The second stage of affording due process includes the obligation in many instances to administer judicial procedure in the individual case, and is due to a particular person. The state cannot be said to be prevented from performing the duty of affording due process, where it involves the necessity of administering judicial procedure, unless, after the occasion has arisen for judicial proceedings, the state has been overawed from attempting the duty, or, having begun the performance of it, is subsequently compelled to abandon it. Before the state can be said to have been prevented from discharging the duty of affording due process, where it involves the administration of judicial procedure, some proceeding must have been begun, in some tribunal, regarding the citizen or person, in which some right is asserted against him, or claimed by him, which the state, through its officers, is attempting to afford, and they must have been directly prevented by lawless resistance to their efforts from continuing the effort to administer justice in that case. Hence, when a person is murdered, although his life has been taken in violation of law, and in that sense he has been taken off without due process, the state cannot be said thereby to have been prevented from discharging the duty of affording him due process of law, in the constitutional sense, unless such citizen was in the custody of the authorities of the state for violation of its laws, or some proceeding was being actually attempted or carried on in the courts, for the adjudication and enforcement of some right in which he was concerned, wherein the state was prevented from adjudging and enforcing the right, through judicial procedure, by direct attack made upon its officers, frustrating their endeavors to perform their duties. It is, we repeat, resistance to the efforts of the state's officers to perform their duty, preventing them from doing the things which the law requires them to do, which defeats the state's discharge of the duty of rendering due process of law, and thereby assaults the enjoyment of the privilege or immunity of the citizen to have due process at the hands of the state. The right of the citizen to have the duty performed, which Congress is given power to enforce, necessarily carries with it the right to have protection against lawless acts of outsiders which prevent the state from giving them the benefit of due process of law. The right being given, and duty being put upon Congress to protect it, the duty to protect carries with it, even in the absence of special authorization, the power of protecting the enjoyment of the right, and

authorizes Congress to adopt any legitimate means which is best adapted to attain the object. As said in *Prigg v. Commonwealth*, supra, "the fundamental principle applicable to all cases of this sort would seem to be that, when the end is required, the means are given; when the duty is enjoined, the ability to perform it is contemplated to exist in the functionary to whom it is intrusted." As the thing which the statute punishes here is the attack upon the prisoner's right to have judicial procedure administered at the hands of the state, and the resistance to the state's effort to afford the enjoyment of the citizen's privilege or immunity, rights dependent upon or secured by the Constitution of the United States, there is no force whatever in the suggestion that the principle which justifies the application of section 5508 to this case involves power in Congress to punish ordinary murder, or other mere trespass upon person or property, or invades the domain of state power in any way. *United States v. Moore* (C. C.) 129 Fed. 630.

3. The precise question here was not mooted in either the Civil Rights Cases or in *Harris v. United States*, nor was its decision necessary to the judgment in those cases. The Harris Case involved nothing under the fourteenth amendment, except the inquiry whether private individuals could deprive a citizen of the enjoyment of the "equal protection of the laws" in the constitutional sense, and whether Congress had power to pass laws which constitute the legal system in which consists the equal protection of the laws. The Civil Rights Cases involved the power of Congress to secure rights claimed under the recent amendments, by general legislation, "which steps in the domain of local jurisprudence, and lays down rules for the conduct of individuals in society to each other," without reference to state laws or state action, concerning equal accommodations on carriers and at inns and places of public entertainment. It was decided that the privilege or right to such accommodation was not given or secured by the thirteenth amendment. The court declined to decide whether it was given or secured by the fourteenth amendment, contenting itself with holding that the interference by the particular statute with state laws went beyond the limits of the evil to be remedied, which alone authorized federal interference, and was therefore not "appropriate." It was the plenary power of Congress over state laws and state officers, when the state was not at fault, and not auxiliary power of Congress or its right to punish individuals who prevented the enjoyment of a right secured to the citizen under the Constitution and laws of the United States, which was there involved and decided. The Supreme Court could not have decided against the right of Congress in enforcing a constitutional right, or immunity, to deal with lawless individuals who attack the rights, without overruling, which plainly it did not intend to do, a long line of decisions, beginning with *Prigg v. Commonwealth*, 16 Pet. 539, 10 L. Ed. 1060, whose principles have been frequently reasserted in subsequent cases, coming down to *Motes v. United States*, 178 U. S. 462, 20 Sup. Ct. 993, 44 L. Ed. 1150, which was decided 16 years after the Civil Rights Cases.

4. This opinion might well stop here; but in view of the great importance of the subject, the fullest discussion cannot be out of place. The equal protection clause makes but one demand upon the state, and gives the citizen a single right only. It is that the state must make and execute its laws fairly and impartially. It must not grant rights to one which, under similar circumstances, it denies to another. This command is fully obeyed when the state passes impartial laws, and provides proper officers to execute them, and they endeavor to do so. The constitutional command is only that the state create and enforce a legal status. When that status is created and the state's officers endeavor to maintain it, the state, under this clause, has done its full duty to the citizen. The citizen is thereby put in full possession and actual enjoyment of the right the Constitution confers upon him. No act of a private citizen can defeat the enjoyment of this status, since it can be created only by the exercise of legislative power, and impaired only by acts of officers, those who wield state authority, by refusing to enforce these laws, or enforcing them with uneven hand or vicious purpose. State power, which a private citizen does not possess and cannot wield, alone can impair the enjoyment of the right. When the state, including therein officers who wield its power, has done its duty, the system of the state, the laws for the prevention and punishment of wrongs and enforcement and vindication of rights, in which consists the thing which constitutes "the equal protection of the laws," is wholly and entirely the creation of the state, deriving its origin and force solely from the power of the state. The state may grant what it pleases and withhold what it pleases, doing so impartially; for this clause neither commands the state to give any particular right, nor forbids it to withhold any particular right. Whatever is actually given is a gift of the state, in no wise secured by or dependent upon the Constitution of the United States. Whether these laws are obeyed or resisted by private individuals, it amounts to nothing more than loyalty or disloyalty to state authority. The resistance to these laws by private individuals cannot blot out the fact that the state has passed proper laws and appointed proper officers to execute them, and thereby afforded "the equal protection of the laws"—the status the Constitution commanded it to confer upon the citizen—and that in consequence he has full enjoyment of the right or status.

On the other hand, how is it with the right, privilege, or immunity flowing from the right of the citizen to have the state afford him due process? Is it dependent wholly upon state law? Cannot its enjoyment be defeated in the constitutional sense, by the act of private individuals, although neither the state laws nor officers are at fault? The general duty of the state to afford due process of law to all persons is discharged, in the first instance, as we have seen, by the passage of proper legislation, and providing proper modes for securing the enjoyment of life, liberty, property, and the pursuit of happiness. This, however, is in no wise true of another phase of the duty, such as arises here, when the right to have due process at the hands of the state involves the enjoyment

of the due administration of judicial procedure. When that is the case, there are many things which the state and its officers must do or cause to be done, and in individual cases, by physical and mental operations, as distinguished from the exercise of legislative or political power, before the citizen can have the enjoyment at the hands of the state of due process of law. When the state seeks to punish the citizen for crime, it must not only give the accused a right to appear before a lawful tribunal, but it must afford the opportunity as well. Having put the accused in jail, it must keep him safely and bring him before that tribunal. When it brings him there, it must bring his witnesses there, if they will not come. In Alabama it must confront him with a panel of his peers, from among whom he and the state elect a jury. A judge must be there to give the jury the law, and the prisoner may except and appeal, if dissatisfied with his rulings. The judge and jury must hear counsel in the prisoner's defense. Then the state must cause the jury to retire, where they will be guarded from outside influence, while they deliberate upon the guilt or innocence of the defendant, and then come again in court, in the prisoner's presence, and return a verdict. The prisoner, if dissatisfied, may poll the jury. He has the right to present whatever he can to the judge before sentence is pronounced, if found guilty, and then to have execution of the sentence suspended until his appeal to the Supreme Court can be heard.

Is it not clear that private individuals who overpower state officers, when they are endeavoring to protect a prisoner accused of crime, whom they have confined to the end that both he and the state may exercise their respective functions and rights before a judicial tribunal, and wrest the prisoner from their custody, and then murder him to punish him for the crime, do, in the constitutional sense, as well as in every other sense, deprive the prisoner of the enjoyment of due process at the hands of the state, and prevent the state from affording it? No one can deny that, under the Constitution, it is the prisoner's right to enjoy the workings of such due process, and that it is the duty of the state, under the fourteenth amendment, to dispense such justice to him. These rights cannot be enjoyed, or the duty enjoined upon the state discharged, except from the undisturbed working of the machinery of justice after its power has once been put in motion, until the period arrives in the particular case where it may rightly stop. Until it has done its perfect work, the administration of due process, which in a case like this cannot be enjoyed except by the regular and orderly working of judicial procedure, is not afforded by the state. It may be true the state was not at fault; but that does not obliterate the fact that it was prevented from causing to be done the physical and mental acts which alone constitute the discharge of the duty in this case, and that by means of lawless violence, directed at the state and the prisoner alike, the prisoner has been prevented from enjoying the right to have the state do or cause to be done the physical or mental tasks which alone can afford him due process of law.

It cannot be contended, with any foundation in reason, that the

right, privilege, or immunity of the accused to have due process at the hands of the state is neither derived from nor secured by the Constitution of the United States. The phrase "due process" has had a well-defined meaning for ages. It had been previously employed in the fifth amendment. Putting it in the fourteenth amendment not only granted, but directly defined, certain specific rights which inure to the benefit of every person, alien as well as citizen, and are "derived from, dependent upon, or secured by the Constitution of the United States." The right thus created and defined, in a case like this, involving life and liberty, is the right to enjoy the benefits of all proceedings which constitute a trial according to "the law of the land." But it cuts deeper than this. The law of the land, applying to all persons impartially, might not afford some of the rights which this clause of the Constitution grants and secures to the citizen and compels the state to afford. If, for instance, the state should deprive a person of the benefit of counsel, it would not be due process of law. If it allowed a private person to pass judgment on him for crime, it would not be due process. Within certain limits the state may change its remedies at pleasure, but it must be "with due regard to the landmarks established for the protection of the citizen." It must not exercise "arbitrary power, or depart from the principles of private right and distributive justice." As declared by the Supreme Court, the fourteenth amendment, in its requisition concerning due process, "is not too vague and indefinite to operate as a practical restraint." *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232. As there declared, "due process must, in the language of Mr. Webster, be, according to his familiar definition, the general law, or law which hears before it condemns, and which proceeds upon inquiry and renders judgment."

The amendment, inevitably, compels the state to provide impartial laws, and lawful tribunals in which to enforce them, which proceed upon fixed principles, and not arbitrarily, before which the accused has the opportunity as well as the right to appear, offer evidence, confront his accusers, and defend himself, and then to be punished or freed by that tribunal, as in its opinion he merits. Nothing less than this will satisfy the Constitution. All this it gives or secures. The circumstance that such rights are recognized or given in the Constitution or laws of the state does not take away any right the Constitution gives concerning them, or make them any the less secured by or dependent upon the Constitution of the United States. *Vincennes University v. State of Indiana*, 14 How. 277, 14 L. Ed. 416. Nor is their constitutional consequence in this respect changed in any way because the state, in the exercise of its power in other respects over the right, confers other rights or remedies which, under its jurisdiction, go to make up "its established course of judicial procedure," which things the Constitution of the United States, by force of this provision, also compels the state to afford. The vital, constituent elements of the right, we repeat, are created or secured by the Constitution of the United States. The state may give more, but it cannot give any less. It is apparent, therefore, that there is a marked difference in the sweep of the rights,

privileges, or immunities which flow respectively from these two clauses. Under the first, when there is no improper discrimination, all that is given is the bounty of the state, and it may contract, or expand, or deny rights at pleasure. The system which constitutes the equal protection of the law is, then, wholly the creature of the state. As the things forbidden under the equal protection clause can be effected only by state power, it is impossible, in the nature of things, for a private citizen to impair the citizen's enjoyment of the right. Under the due process clause, the vital essence of the grant, of what it shall consist, flows from the Constitution of the United States itself. It is beyond the power of the state in any way to withhold anything thus granted. From the very nature of the right, whenever the administration of due process involves the administration of judicial procedure, the state must not only pass fair laws, but through its officers must do, or cause to be done, certain physical and mental operations in individual cases, which operate directly upon a particular individual, the benefits of which he cannot enjoy unless the officers of the state are permitted to perform them or cause them to be performed, according to the established course of judicial procedure, when he is present and asserting his rights. Undoubtedly, then, private persons may defeat enjoyment, in the constitutional sense, of the right, privilege, or immunity of the citizen to have the state afford him due process of law in many cases.

5. This class of cases presents, perhaps, the only instance in which Congress has power to protect rights of the citizen under the fourteenth amendment by punishing acts of private individuals which defeat the enjoyment of such rights, when the state is not at fault. The power of Congress rests upon and is vindicated by the consideration that the Constitution commands the state to perform a duty for the benefit of the citizen, thereby creating a constitutional right in that citizen to have the state do that thing for him, and that the resistance to the state's efforts to perform the duty frustrates obedience to the mandate of the Constitution, and thus directly cuts from under the citizen all opportunity to enjoy a right which can be saved in no other way than by performance of the duty by the state. The prohibition put upon the power of the state to deny due process in the administration of justice certainly creates a right in the citizen. The Constitution makes it a matter of national concern that the states perform the duty of affording due process. This much, at least, arises from the very letter of the amendment. The power given Congress to see that the state performs the duty, naturally includes power to protect the right, and remove obstacles which prevent the state's performing the duty. Has it no power to do so? Must the spirit of the amendment be sacrificed to the letter? What is the spirit of the amendment? It goes to this extent at least: that the citizen, when the state undertakes to enforce rights of individuals or society against him, shall have actual enjoyment of the benefits of due process of law at its hands. Lawless acts by private individuals, which snatch such benefits from the citizen, certainly defy and frustrate the purposes of the amendment. Why has not Congress, which is given power "to enforce" the amendment, power to punish such lawlessness, which directly and inevitably defeats the purpose of the amendment?

This is not a case of a prohibition upon the power of Congress. The question is not whether Congress has been prohibited from doing anything in this connection, but whether it has been granted authority to do anything. The prohibition here is against state power. Congress has been granted authority to enforce the prohibition, in order to secure the results intended to be effected by the prohibition. As was forcibly said in *Boyd v. United States*, 116 U. S. 635, 6 Sup. Ct. 524, 29 L. Ed. 746, of prohibitions contained in the Constitution upon the powers of Congress:

"A close, literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it were more in sound than in substance. It is the duty of the courts to be watchful of the constitutional right of the citizen."

It is said, however, that Congress has no power to conserve the otherwise conceded immunity of the citizen, because the state has vainly endeavored to protect its enjoyment. It is admitted, if state officers had participated in mobbing Maples, or conspired in any way to deprive him of the enjoyment of due process of law at the hands of the state, that Congress could legislate against and punish such acts on their part. *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676. But it is urged, because the state was not at fault in these respects, that Congress has no power to punish acts of private individuals which destroy the citizen's right or immunity to enjoy due process of law at the hands of the state. Is it reasonable to suppose, when the protection of the right of the citizen to have due process at the hands of the state was deemed of such paramount importance as to require the adoption of an amendment to the Constitution of the United States, imposing upon Congress the delicate duty of supervising the discharge of the duty by the state, that the framers of the amendment, and the people who adopted it, intended, when the amendment empowered Congress "to enforce" it, that Congress should have no power to punish individuals for doing acts which, if done by state officers, it was within its authority and duty to punish? If the right to be protected here by the effort of state officers depended wholly upon state laws, the general government could not legislate as to it, or concern itself about lawlessness of individuals which assailed a state officer and prevented the performance of his duty, unless called on to lend assistance by the executive or Legislature, under article 4, § 4, of the Constitution. Here, however, the right is secured by the Constitution, and performance of the duty is enjoined upon the state officer by the Constitution, and it is the settled doctrine that Congress may protect such rights by legislation "as it may deem most eligible and best adapted to attain the object." *In re Quarles & Butler*, 158 U. S. 537, 15 Sup. Ct. 959, 39 L. Ed. 1080. It was well known that the enjoyment of the right might be defeated by violence of individuals preventing the state from performing the duty when it attempted to do so, as well as by faults of state officers. It is, however, insisted that no power has been conferred by the amendment upon Congress to protect the right to its full extent by dealing with one of the chief evils which destroy its enjoyment, because such power must be expressly given, else it does not exist. The answer is furnished by the Supreme Court in two leading decisions—*Ex parte Yarborough*,

110 U. S. 658, 4 Sup. Ct. 152, 28 L. Ed. 274, and *United States v. Waddell*, 112 U. S. 80, 5 Sup. Ct. 35, 28 L. Ed. 673. In the former case it is said:

"The proposition that there is no such power is supported by the old argument, often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises, the advocate of the power must be able to place his finger on the words which expressly grant it."

"It destroys at one blow, in construing the Constitution of the United States, the doctrine, universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. The principle, in its application to the Constitution of the United States more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers, a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted, and all other powers vested in the government or any branch of it by the Constitution. Article 1, § 8, cl. 18."

In *United States v. Waddell*, 112 U. S. 80, 5 Sup. Ct. 35, 28 L. Ed. 673, the court, speaking of the enjoyment of a right dependent upon or secured by the Constitution or laws, said:

"Whenever the acts complained of are of a character to prevent this, or throw obstacles in the way of exercising the right, and done for the purpose and with the intent to injure or oppress a person because he has exercised them, then, because it is a right asserted under the law of the United States, and granted by that law, those acts come within the purview of the statute [section 5508], and of the constitutional power of Congress to make such statute. In the language of the court in *Ex parte Yarborough*, supra, the power arises out of the circumstances that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both of these cases it is the duty of the government to see that he may exercise this right freely, and protect him from violence while doing so, or on account of so doing."

When a state officer is endeavoring to protect a person accused of crime, that he may be dealt with according to law, can there be any doubt the officer is engaged in a function which the fourteenth amendment to the Constitution commands him to perform? When lawless violence takes a prisoner from the custody of the officer and puts him to death to prevent the discharge of the duty to protect him, is it not clear that such acts "are of a character to prevent this, or throw obstacles in the way of his exercising this right"? Is it not clear also that such acts by private individuals injure or oppress the prisoner in the exercise of the right accorded to him, by the amendment, to have due process at the hands of the state when held in custody for crime, and be protected while awaiting its further administration?

After anxious deliberation and careful examination of all the authorities, the court cannot resist the conclusion that Congress may protect the enjoyment of rights, privileges, or immunities given or secured by the fourteenth amendment, against impairment by lawless acts of private individuals, although neither state laws nor state officers are at fault, if such lawlessness takes the form of violence, directly preventing the state or its officers from affording due process to a prisoner, when the state is attempting to do so, provided such legislation does not go beyond prevention of that evil, and does not attempt to alter or interfere with state laws or the authority of its officers in executing

them. The argument that Congress has no such power because the amendment is directed against denial of due process by the state, and that there is no denial by the state when neither its laws nor its officers are at fault, ignores the pregnant fact that the amendment creates a right, privilege, or immunity of a citizen of the United States to have enjoyment of the benefit of due process at the hands of the state, at least, when the citizen is in its custody and it is proceeding against him for infraction of its laws, and ignores the further equally important fact that such lawless violence of private individuals, by preventing the state's giving the benefit of due process of law when it is endeavoring to do so, directly and inevitably defeats the enjoyment of his right or privilege, created by the Constitution of the United States, to have enjoyment of the benefit of due process at the hands of the state, and thus fatally impairs enjoyment of the right, privilege, or immunity. It is the settled and unbroken doctrine of the Supreme Court of the United States that a right, "whether created by the Constitution of the United States, or only guaranteed by it, even without any express delegation of power, may be protected by Congress in such manner and form as Congress, in the legitimate exercise of its legislative discretion, shall provide." This doctrine, which was emphatically enunciated in the great case of *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060, has since been constantly adhered to. *Strauder v. West Virginia*, 100 U. S. 311, 25 L. Ed. 664; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *Motes v. United States*, 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150.

The only way to escape the application of this doctrine to this case is to show either that no right, privilege, or immunity is given by the fourteenth amendment to the citizen to enjoy due process at the hands of the state, when it is endeavoring to afford it, or that violence directed against its officers, which prevents them from doing so, does not deprive the citizen of the enjoyment of the benefits of the discharge of the duty by the state. The decisions of the Supreme Court put it beyond the pale of controversy that the prohibitions upon state power in the fourteenth amendment create rights, privileges, and immunities of citizens of the United States. As said in *Strauder v. West Virginia*, *supra*:

"The fourteenth amendment makes no attempt to enumerate the rights it is designed to protect. It speaks in general terms, and these are as comprehensive as possible. Its language is prohibitory, but every prohibition implies the existence of rights and immunities."

The right, privilege, or immunity being thus established, the denial of the right of Congress to protect it must rest upon the false premise that, when a right or privilege is given to the citizen by the Constitution to have the state do certain things for him to secure a particular right for him, and the state is endeavoring to accord the enjoyment of that right, acts of private individuals which directly, violently, and intentionally prevent the state from performing the duty do not prevent the citizen from having the benefit of the performance of that duty at the hands of the state. To state the proposition is to answer it. Who will seriously contend, where the law puts the duty on B. to render a particular service to A., that A. may enjoy a right which the law

intends thereby to secure to him, and which A. can enjoy only by the performance of the duty by B., that violence directed towards B. which prevents his rendering the service to A. does not defeat A.'s enjoyment of that right? The question here, whether enjoyment of any right, privilege, or immunity of the citizen under the fourteenth amendment is violated when the state holds a prisoner on accusation of crime, and is endeavoring to afford him due process of law, and is prevented by violence of private individuals from doing so, has never been before the Supreme Court. That court has been careful to avoid defining the privileges and immunities of citizens of the United States until "some case involving these privileges makes it necessary to do so." *Slaughterhouse Case*, 16 Wall. 79, 21 L. Ed. 394. General expressions in opinions not raising the question here, are not in any wise binding in determining whether the acts charged in the indictment constitute a violation of any right, privilege, or immunity of a citizen of the United States. It suffices to say of those opinions, without citing them, that they combated the power of Congress, under this amendment, to enter upon plenary legislation altering or interfering with state laws, when neither the state nor its officers are at fault, and that they do not touch the power of Congress, by appropriate legislation, to protect any immunities or rights which the amendment gives, although the state is not at fault, against the acts of lawless individuals, if such legislation does not go beyond the cure of that evil. The Supreme Court itself has repeatedly declared "that any opinion given here or elsewhere cannot be relied upon as binding authority, unless the case calls for its expression." *Carroll v. Carroll*, 16 How. 275, 14 L. Ed. 936; *Bardes v. Hawarden*, 178 U. S. 534, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Cohens v. Virginia*, 6 Wheat. 399, 5 L. Ed. 257; *Bryan v. Bernheimer*, 181 U. S. 197, 21 Sup. Ct. 557, 45 L. Ed. 814.

The court does not doubt that Congress has power to punish the acts charged in the indictment, and that sections 5508 and 5509 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712] apply to them, and are "appropriate" legislation to that end. The result is that the writ must be discharged, and the prisoner remanded to the custody of the marshal.

KNIGHT v. SHELTON et al.

(Circuit Court, E. D. Arkansas, W. D. January 7, 1905.)

No. 5,279.

1. FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

An action to recover damages for preventing plaintiff from exercising the right to vote for a member of Congress is one arising under the Constitution of the United States, and, where the requisite amount is involved, is within the jurisdiction of the federal court.

[Ed. Note.—Jurisdiction of federal courts in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.]

2. CONSTITUTIONAL LAW—AMENDMENT OF STATE CONSTITUTION—SUFFICIENCY OF POPULAR VOTE.

Under Const. Ark. 1874, art. 19, § 22, which provides that proposed amendments thereto shall be submitted to the electors of the state for approval or rejection at a general election for senators and representatives, and that, "if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution," the approval of a proposed amendment by a majority of the electors voting on that proposition is not sufficient for its adoption unless they also constitute a majority of all those voting at the election.

3. SAME—CONSTRUCTION OF PROVISIONS—CONTEMPORANEOUS CONSTRUCTION BY EXECUTIVE OFFICERS.

In order to entitle a contemporaneous construction of a constitutional or statutory provision by executive officers to controlling force, such provision must not only be ambiguous, and thus a proper subject for construction, but such construction must have been uniform, and within a reasonable time of the enactment of the provision.

4. FEDERAL COURTS—CONSTRUCTION OF STATE CONSTITUTION—EFFECT OF STATE DECISIONS.

Decisions of the Supreme Court of a state construing and applying an amendment to the state Constitution are not to be construed as determining its validity, or that it was legally adopted, where such question was not raised nor considered; and such decisions do not, therefore, affect the right and duty of a federal court to consider and determine such question in an action in which it is directly presented.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

5. SAME—LEGALITY OF ADOPTION OF AMENDMENT—CONCLUSIVENESS OF DECLARATION OF CANVASSING OFFICER.

The fact that the speaker of the House of Representatives of the state of Arkansas declared a proposed amendment to the state Constitution legally adopted on the canvass of the popular vote of the election at which it was submitted is not conclusive, in the absence of any constitutional, or even statutory, provision so declaring, and it is open to a federal court, equally with a state court, to consider and determine such question when it incidentally arises in a case properly brought in such court under the laws of the United States, and which cannot be disposed of without the determination of such question.

At Law. On demurrer to complaint.

The plaintiff in this action claims \$2,500 damages from the defendants, who, as judges of the election of the Fourth Ward of the city of Little Rock, county of Pulaski, state of Arkansas, held on November 8, 1904, for the election of a member of the House of Representatives of the United States, refused to permit him to cast his vote for such member of Congress. The complaint alleges that the plaintiff is a native-born citizen of the United States, having been born in the state of Wisconsin; that he is 36 years of age, and on said day of election was a resident of the said Fourth Ward in the city of Little Rock, county of Pulaski, state of Arkansas; that he had resided in said county and state for more than two years continuously next prior to said day of election, and in the said Fourth Ward for more than one year continuously next before said date; that by reason of these facts he was a duly qualified elector under the Constitution and laws of the state of Arkansas, and under the Constitution of the United States, entitled to vote for a member of the House of Representatives of the United States from said district and state, but that the defendants, as judges of said election, refused to permit him to cast his vote, upon the sole ground that he had not paid his poll tax for the year preceding, as required by pretended amendment No. 2 to the Constitution of the state of Arkansas. It is then charged that said amendment is no part of the Constitution of the state, not having been adopted as prescribed by the Constitution, it being alleged that at a general election held in 1902 the

same was submitted to the people of the state for adoption, and, although more than 156,293 votes were cast at said election, only 75,740 votes were cast in favor of said amendment, which not being a majority of all the votes cast at said election, was a rejection of said amendment, and the same is no part of the Constitution of the state, although a majority of the votes cast on said amendment at the election at which it was submitted was in favor of its adoption. The present Constitution of the state of Arkansas, in force since October 30, 1874, contains the following provision as to amendments (article 19, § 22):

"Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all the members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for senators and representatives, at which time the same shall be submitted to the electors of the state for approval or rejection; and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution; but no more than three amendments shall be proposed or submitted at the same time. They shall be so submitted as to enable the electors to vote on each amendment separately."

Article 3 of that Constitution, as originally adopted, and which, if the contention of plaintiff that amendment No. 2 to the Constitution was never legally adopted, is still in force, prescribes the following qualifications for electors:

"Section 1. Every male citizen of the United States, or male person who has declared his intention of becoming a citizen of the same, of the age of twenty-one years, who has resided in the state twelve months, and in the county six months, and in the voting precinct or ward one month, next preceding any election, where he may propose to vote, shall be entitled to vote at all elections by the people."

Amendment No. 2 to the Constitution, which it is now claimed by plaintiff was never legally adopted, and for this reason is no part of the Constitution of the state, is as follows:

"Every male citizen of the United States, or male person who has declared his intention of becoming a citizen of the same, of the age of twenty-one years, who has resided in the state twelve months, in the county six months, and in the precinct or ward one month, next preceding any election at which he may propose to vote, except such persons as may for the commission of some felony be deprived of the right to vote by law passed by the General Assembly, and who shall exhibit a poll tax receipt or other evidence that he has paid his poll tax at the time of collecting taxes next preceding such election, shall be allowed to vote at any election in the State of Arkansas. Provided, that persons who make satisfactory proof that they have attained the age of twenty-one years since the time of assessing taxes next preceding said election and possesses the other necessary qualifications, shall be permitted to vote; and provided further, that the said tax receipt shall be so marked by dated stamp or written endorsement by the judges of election to whom it may be first presented as to prevent the holder thereof from voting more than once at any election."

The defendants, with their answer, filed a demurrer to the sufficiency of the complaint, claiming that, admitting all the allegations in the complaint to be true, the plaintiff is entitled to no relief against the defendants.

W. G. Whipple and G. W. Murphy, for plaintiff.

Rose, Hemingway & Rose and Cantrell & Loughborough, for defendants.

TRIEBER, District Judge (after stating the facts). The first question to be determined by the court is that of jurisdiction. As there is no diversity of citizenship between the parties, all of whom are citizens of the state of Arkansas, the jurisdiction of this court must be maintained upon the ground that the plaintiff's cause of action is one arising

under the Constitution or laws of the United States. Whatever doubts may have been entertained on that question at one time have been removed by the later decisions of the Supreme Court of the United States, and it must now be conceded as a settled rule of law "that the right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States." *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *Wiley v. Sinkler*, 179 U. S. 58, 62, 21 Sup. Ct. 17, 45 L. Ed. 84; *Swafford v. Templeton*, 185 U. S. 487, 493, 22 Sup. Ct. 783, 46 L. Ed. 1005. All of these cases were decided by a unanimous court. The damages claimed by the plaintiff being \$2,500, this court clearly has jurisdiction, and it is its duty to determine the question raised by the demurrer—that the facts stated do not constitute a cause of action.

That, in the absence of amendment No. 2 to the Constitution of the state of Arkansas, plaintiff was lawfully entitled to vote at the election complained of is admitted by learned counsel for the defendants. The allegations in the complaint, which by the demurrer are admitted to be true, are that plaintiff possessed all the qualifications prescribed by article 3, § 1, of the Constitution; that he is a native male citizen of the United States over the age of 21 years, and has resided in the state of Arkansas for more than 12 months, in the county of Pulaski more than 6 months, and in the voting precinct where he offered to vote more than 1 month, next preceding said election. The defendants base their objection to the sufficiency of the complaint upon these grounds: First. That amendment No. 2 was legally adopted; that under the provisions of article 19, § 22, of the Constitution, regulating amendments thereto, it is not necessary, for the adoption of an amendment, that it should receive a majority of all the votes cast at such election, but it is sufficient if a majority of the votes cast on the amendment is in favor of such adoption. Second. That the amendment having been declared adopted by the speaker of the House of Representatives, it is not open to collateral attack in a proceeding in any court, and especially not in a federal court.

1. There are certain rules of law which are so well settled that it is unnecessary to refer to authorities to sustain them. Among these are the following: A Constitution can be amended only in the mode therein prescribed. The construction of constitutional provisions is governed by the same rules which apply to the construction of statutes. The language used is to be given the natural signification that the words imply, in the order and grammatical arrangement in which the framers used them, and if, thus regarded, the words convey a definite meaning which involves no absurdity, and no contradiction between parts of the same writing, then the meaning apparent upon the face of the instrument is the one which alone courts are at liberty to say was intended to be conveyed. If there is no ambiguity in the language used, there is nothing to construe, and courts must follow the letter of the Constitution. It is only when the language used is not clear or unambiguous that courts are permitted to resort to the rules of construction which govern courts in ascertaining the intent of the framers. If any of the provisions are unjust, so that their enforcement will work

a hardship to any class of persons, the remedy must come from the people who have adopted them. Construction can furnish no remedy under our system of government. By reference to the constitutional provision regulating amendments, it will be noticed that under that provision an amendment to the Constitution can only be submitted at a general election for senators and representatives, and, if a majority of the electors voting at such election adopt such amendment, the same shall become a part of this Constitution. Learned counsel for both sides have referred the court to a large number of decisions construing constitutional provisions in which the language used is quite different from that found in the Constitution of this state. In most of the Constitutions the language used is, "if a majority of the electors shall ratify the same," or "if ratified by a majority of the qualified electors," and in some states the provision is, "if ratified by a majority of those voting thereon." In many of the states those amendments may be submitted at a general or special election, as may be determined by the lawmaking power of the state. While there is some conflict among the authorities as to the construction of the phrases above quoted, this court is concluded by the decisions of the Supreme Court of the United States, and especially that of the Supreme Court of this state, that a constitutional provision merely providing that an act should be declared adopted if a majority of the electors shall ratify the same or consent thereto is fully complied with when a majority of those voting on that question vote in favor thereof. *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; *Vance v. Austell*, 45 Ark. 400. But neither the Supreme Court of the United States nor the Supreme Court of this state has ever directly passed upon such a provision as is found in the Constitution of this state in relation to amendments. Careful examination of the various Constitutions of the states of the Union shows that the only states which have used language almost identical with that used by the framers of the Constitution of this state are Illinois, Ohio, Mississippi and Nebraska. In Illinois neither the diligence of counsel nor that of the court has been able to find any decision in which that constitutional provision has ever been passed upon by the Supreme Court of that state, although, as will be shown hereafter, similar provisions affecting other matters have been before that court, and the construction thereof uniform. In Nebraska, Mississippi, and Ohio the courts of last resort have passed upon this question, and the conclusions reached by each of these courts are that an amendment to the Constitution under a constitutional provision of this kind must receive not only a majority of the votes cast on the proposition to amend the Constitution, but must receive a majority of all the votes cast at the general election at which the proposed amendment was voted on. The earliest case in Nebraska was *State v. Lancaster*, 6 Neb. 474. The question involved there related to township organizations, and the constitutional provision required, in order to adopt such organization, a majority of all the legal voters voting at the general election at which the question was submitted. The court held that a mere majority of those voting on the subject was not sufficient unless that majority also constituted a majority of all the votes cast at such election.

It next came before that court in *State v. Babcock*, 17 Neb. 188, 22 N. W. 372. In that case the question was—like the one in the case at bar—whether an amendment to the Constitution had been adopted when there were but 51,959 votes cast for the amendment, which was a majority of the votes cast on that subject, although there were 134,000 votes cast for Governor at that election. Maxwell, J., in delivering the opinion of the court, says:

"The language of the Constitution would seem to require a majority of all the votes cast at that election; otherwise the words 'voting at said election' would be entirely without meaning. The words were evidently intended as a restriction upon the right to change the fundamental law, and not permit a minority of the people of the state to incorporate new provisions therein."

The same question came again before that court in *Tecumseh National Bank v. Saunders*, 51 Neb. 801, 71 N. W. 779, and the same conclusion was reached in that case.

The same question came before the Supreme Court of Ohio in *State v. Foraker*, 46 Ohio St. 677, 23 N. E. 491, 6 L. R. A. 422. The constitutional provision there was very much like that of this state, "If a majority of the electors voting at such election should adopt it" it should become a part of the Constitution. There were 780,304 votes cast at the general election, and only 257,662 votes were cast in favor of the amendment, which was a majority of all the votes cast on the amendment, but 112,491 less than a majority of all the votes cast at that election. The court, in a very elaborate opinion, in which it reviewed a large number of cases bearing on that subject, say:

"The plain meaning of this language would seem to indicate but one construction, and that is that an amendment so submitted would require for its adoption a majority of all the electors voting at the election for senators and representatives, as being the election indicated by the language 'such election.' * * * 'Such' is a pronominal adjective, and necessarily defines an 'election' previously mentioned, and the only one found in the context is an 'election for senators and representatives.'"

In Mississippi that question came before the Supreme Court in *State v. Powell*, 77 Miss. 545, 27 South. 927. The Constitution of that state provides (section 273, art. 15):

"And if it shall appear that a majority of the qualified electors voting shall have voted for the proposed change, alteration or amendment, then it shall be inserted by the next succeeding Legislature as a part of the Constitution, and not otherwise."

The chief justice, who spoke for the court, delivered one of the most exhaustive and learned opinions ever written on that subject, in which a large number of the most important cases bearing on that question were thoroughly reviewed, and the conclusions reached by that court were the same as those reached by the Supreme Courts of Nebraska and Ohio.

Great stress has been laid during the argument by learned counsel for the defendants on the decision of the court in *Gillespie v. Palmer*, 20 Wis. 544. That case has not only been most severely criticised by every court of last resort to which it was cited—among others those of Minnesota, Nebraska, Michigan, Indiana, Mississippi, and Ohio—but also by the Supreme Court of Wisconsin. In *Sawyer v. Insurance Company*, 37 Wis. 524, that court, in referring to that case, said:

"It has been subjected to the criticism that the court decided it in accordance with the logic of the war, rather than by the logic of the law."

And in *Bound v. Railway Company*, 45 Wis. 543, 579, the chief justice, in dissenting from the majority of the court in the case before it, expresses the fear that the opinion of the majority in the *Bound Case* would "be a reproach to the court, as is *Gillespie v. Palmer*."

The Supreme Court of Michigan in *Stebbins' Case*, 108 Mich. 695, 66 N. W. 594, treats it as overruled. But, aside from that fact, that case is clearly distinguishable from the case at bar. The Constitution of Wisconsin (article 3, § 1) limited the right of suffrage to white citizens and certain Indians, but contained the following proviso:

"Provided that the Legislature may at any time extend by law the right of suffrage to persons not herein enumerated, but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election and approved by a majority of all the votes cast at such election."

Article 12 of the same Constitution contained the following provision for amending that instrument. After providing how such amendment should be submitted, it says:

"And if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the Constitution."

The court held that a majority of the votes cast in favor of the proposition to extend the franchise to persons of color, although such majority was not a majority of all the votes cast at said election, was sufficient to put such extension of the right of suffrage in force. In the opinion of the judge who delivered it for the court, as well as in the concurring opinion of the chief justice, great stress was laid on the fact that under the provisions of article 12 of the Constitution an amendment thereto only required a majority of the votes cast on that question; and as the object could have been attained by an amendment to the Constitution submitted under article 12, it was unreasonable to presume that the framers of the Constitution intended to adopt a different mode for an extension of the franchise under section 1 of article 3. On page 556 the following language is used:

"According to section 1, art. 12, of the Constitution, the Legislature may propose amendments to it, and, if they are approved by a majority of the voters voting thereon at the time prescribed by the Legislature, the amendment becomes part of the Constitution. The right of suffrage by such amendment could be given to colored persons. Is it probable that the framers of the present Constitution required more votes to extend the right of suffrage in one way than in another, and more votes to approve an act of the Legislature conferring the right when so approved than to make and approve in a law amendments to the Constitution including that conferring suffrage to colored persons? We see no reason for such a conclusion."

The chief justice, in his concurring opinion, speaking on that subject, said:

"If we look to other similar provisions of the Constitution, and especially those which elicited debate, and a careful examination of the language employed, we find this idea strictly adhered to. This is strikingly exemplified in the section which provides for submitting to the voters the question of bank or no bank. The same is also true of the provisions of submitting amendments to the Constitution, for calling a convention to revise or change it,

and some others. All of these provisions, instead of showing or tending to show, as was contended, that an actual voting majority was not to govern upon the question of the extension of suffrage, seem to me to tend very strongly, and almost irresistibly, the other way. They fixed the principle upon which the convention acted and intended to act in all such cases." Page 561.

In Missouri the Constitution required the assent of two-thirds of the qualified voters at a general election to effect a removal of a county seat. In *State v. Sutterfield*, 54 Mo. 392, the court held that two-thirds of the votes cast on that question, but which did not constitute two-thirds of the votes cast at that election, were insufficient. The court held: "There is no doubt of the general rule that usually the result is determined by a majority of the votes actually cast where a majority is required, and that the decision of *Lord Mansfield in Rex v. Forcroft*, 2 Burr. 1017, is rightly followed in many cases in this country, but the decisions in England or in the other states are very unsafe guides where we are called upon to construe a constitutional provision of our own state. If the language is plain and unambiguous, its requirements cannot be set at naught upon the strength of decisions elsewhere on Constitutions essentially variant and couched in very different terms. Our Constitution does not imply an acquiescence or negative sanction or a negative assent inferred from absence, but a positive vote in the affirmative, and the number of votes is specifically named. In *State v. Mayor of St. Louis*, 73 Mo. 435, the Constitution provided that no amendment to the charter of St. Louis should be adopted without submission to a general or special election, and there ratified by three-fifths of the qualified voters voting thereat. In holding that this provision required, for adoption of an amendment to the charter, three-fifths of all those voting at the election, Judge Norton, who delivered the opinion of the court, said:

"The provision of the Constitution is free from ambiguity, and, giving the words employed their natural and usual signification, we think it clear that, before any amendment can be adopted, it must be accepted by three-fifths of the qualified voters voting at either a special or general election. If the framers of the Constitution intended otherwise, they would have used the word 'thereon' instead of 'thereat.'"

In *State v. McGowan*, 138 Mo. 187, 39 S. W. 771, the Constitution required a majority of all the voters voting at any general election to adopt a township organization. The court held that a majority of those voting on the proposition, unless they constituted a majority of all who voted at that election, was not sufficient. Barkley, C. J., in speaking for the court, said:

"The sole question before the court is the true meaning of the clause, 'whenever a majority of the legal voters of such county voting at any general election shall so determine.' But the majority required must be a majority of the legal voters voting at any general election, just as the Constitution declares. We must ascertain whether the Constitution is to be taken to mean exactly what it says on the point of present controversy, or to be taken with the shade of meaning proposed in the able argument for relators."

The court then compares the different parts of the Constitution relating to elections, and adduces a conclusion therefrom in favor of the construction urged by the plaintiff in the case at bar.

In *Bayard v. Klinge*, 16 Minn. 249 (Gil. 221), it was held:

"Where the Constitution provides that a majority of those voting at a general election shall be required to remove a county seat, it is not in the power of the Legislature to alter the rule, and direct that a majority voting on the question shall be sufficient."

To the same effect is *Everett v. Smith*, 22 Minn. 53.

In *People v. Berkeley*, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838, the constitutional provision before the court was:

"Towns might be organized under general laws whenever a majority of the electors voting at a general election should so determine."

The court held that the annual election provided by law for the election of municipal officers was a general election, as there are only two classes of elections, and this was not a special election. The court then proceeded to say:

"The words of the Constitution clearly do not intend that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required. A majority of all the electors voting at the election is necessary to carry the proposition to organize."

In *Stebbins v. Superior Court*, 108 Mich. 693, 66 N. W. 594, a statute of the state authorized the city of Grand Rapids to issue bonds, "if authorized by a majority of the qualified electors at a regular or special election called for that purpose," and it was held that, the matter having been submitted at a general election, it required a majority of all who voted at that election. Merely a majority of those voting on the question was held to be insufficient.

In *Belknap v. Louisville*, 99 Ky. 475, 36 S. W. 1118, 34 L. R. A. 256, 59 Am. St. Rep. 478, the Constitution required the assent of two-thirds of the voters voting at an election to be held for that purpose for the issuing of city bonds. The court, in determining the matter, said:

"Not only is a much larger vote usually brought out on the occasion of a general election, but the people at large are usually better informed of the matters upon which they are entitled to vote by reason of the greater interest and fuller discussion had. * * * There could be but one election a year except in the cases especially provided for. The question was to be submitted to the people at that election. It was one election, though held for the several purposes, and was in no sense a collection of elections held on the same day. * * * Assent implies action, and is not merely a failure to dissent. The words 'qualified voters,' as used in the Constitution, must be taken to mean those qualified and actually voting. To give a different construction would involve an inquiry whether there were other voters who had from any cause abstained from voting, and this would lead to interminable inquiry, and invite contests which would be embarrassing and baneful." (Quoting the above from the decision of the Supreme Court in *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517.)

The court then proceeds:

"But we are met with a very different question when the question is required to be submitted at a general election, and is one of the purposes for which that election is held. It is then required to receive the assent of two-thirds of the voters of the city voting at that election."

In *People v. Warfield*, 20 Ill. 160, where a constitutional provision provided that to remove a county seat required a majority of the voters of the county, it was held that, to give this provision of the Constitu-

tion practical operation, we must presume that it was the intention of the framers of that instrument that the voters would all vote, and that the majority of those voting should determine the question. The reason for this presumption is stated by the court to be that:

"To give it a different construction would involve an inquiry whether there were other voters of the county who had from any cause abstained from voting, and this would lead to interminable inquiry and invite contests in such elections which would be embarrassing and baneful, if it did not destroy all the practical benefits of laws passed under the provisions of the Constitution."

In that case there was no other vote taken at that election except upon the question of removal of the county seat, and that vote was adopted as the means of ascertaining the number of legal voters of the county.

In *People v. Wiant*, 48 Ill. 263, the construction of the same constitutional provision was before the court, with this difference: that at that election the electors also voted for a circuit judge, and the returns of the election showed the number of votes cast for removal, although a majority of those who voted on that question did not constitute a majority of all the votes cast at that election, and this was held insufficient. The court in that case say:

"It is not the votes cast upon that single question that is to govern where it occurs at any other election held at the same time, for it must appear that a majority of all the votes cast at that election were in favor of removal. When there is no other election held at that time, the returns of the officers of the votes on that question will govern"—distinguishing *People v. Warfield*, *supra*.

The same conclusion was reached by that court in *Chestnutwood v. Hood*, 68 Ill. 132.

Without stating the facts of each case, it is sufficient to say that the courts construing statutes or constitutional provisions requiring a majority of the votes cast at the election have almost unanimously held that it required a majority of all the voters who participated at that election, and not merely a majority of those who voted on the particular question submitted. In *Re County Seat of Linn County*, 15 Kan. 500, the court held that under a provision requiring a majority of the electors of the county to justify a removal of the county seat it was sufficient if a majority of the votes cast at the special election held for that purpose was in favor of the removal; but Judge Brewer, now one of the Justices of the Supreme Court of the United States, who delivered the opinion of the court, was careful to distinguish between special and general elections. In his opinion he says:

"As these county seat elections cannot be held on the days of general elections, these considerations do not apply to cases where two or more questions are submitted at the same election, and more votes are cast upon one question than upon another, for there the biggest number of votes cast upon any one question is clear evidence of the number of voters which may not, in view of any such constitutional restriction above quoted, be disregarded in any contest arising as to the decision of other questions. Nor, perhaps, do they apply to cases where two elections are held so near together in time that the courts may fairly say that the difference between the number of votes cast upon the two elections cannot reasonably be accounted for upon the theory of a change in the number of electors."

In *Green v. State Board of Canvassers*, 5 Idaho, 130, 47 Pac. 259, 95 Am. St. Rep. 169, the court was called upon to determine whether an amendment to the Constitution had been adopted. The Constitution provided (article 20, § 1):

"And if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of the Constitution."

Section 3 of the same article referred to the calling of a convention for the purpose of framing a new Constitution, and, after providing for a submission thereof at the next general election, proceeded:

"And if a majority of all the electors voting at said election shall have voted for a convention, the Legislature shall at the next session provide by law for calling the same."

The amendment having received a majority of the votes cast on that question, but not a majority of all the votes cast at the election, the court was called upon to determine whether it had been adopted or not, and the court, in holding that it was adopted, said:

"We confess ourselves unable to appreciate the argument which would make the language of section 1 of article 20 and section 3 of said article synonymous, or expressive of the same intention. If they were, as counsel for the defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way."

The same conclusions were reached by the Supreme Court of Oregon in *State v. Grace*, 20 Or. 154, 25 Pac. 382, and the Court of Appeals of Maryland in *Walker v. Oswald*, 68 Md. 146, 11 Atl. 711.

The principal cases cited and relied on by counsel for the defendants are: *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517, and cases construing constitutional or statutory provisions similar to those construed by the court in those cases and by the Supreme Court of this state in *Vance v. Austell*, 45 Ark. 400. As those provisions are entirely different from the one now under consideration, these authorities are inapplicable, and cannot control the decision herein.

Learned counsel for the defendants have ably argued that contemporaneous construction of a constitutional or statutory provision is entitled to the highest consideration, and should practically be controlling. It is true that contemporaneous construction is of the greatest importance in determining the construction of an act, provided the language used is subject to more than one construction. If there is no ambiguity in the language used, there is nothing to construe, as stated at the beginning of this opinion. But, even if there be some ambiguity, in order to influence courts by contemporaneous construction, that construction must have been uniform, and within a reasonable time of the enactment of the provision thus construed. *Cooley on Con. Lim.* (5th Ed.) p. 67. As stated by that learned author:

"A constitution is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances may have so changed as, perhaps, to make a different rule in the case seem desirable."

In *Swift Co. v. United States*, 105 U. S. 691, 695, 26 L. Ed. 1108, Mr. Justice Matthews said:

"The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt"; citing numerous cases to sustain that rule.

In *United States v. Graham*, 110 U. S. 219, 221, 3 Sup. Ct. 582, 28 L. Ed. 126, Chief Justice Waite thus stated the law:

"Such being the case, it matters not what the practice of the departments may have been, or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid."

In *United States v. Tanner*, 147 U. S. 661, 663, 13 Sup. Ct. 436, 37 L. Ed. 321, it was said by Mr. Justice Brown:

"If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. * * * It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material."

In *United States v. Alger*, 152 U. S. 384, 397, 14 Sup. Ct. 635, 38 L. Ed. 488, Mr. Justice Gray used this language:

"If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect."

In *Webster v. Luther*, 163 U. S. 331, 342, 16 Sup. Ct. 963, 967, 41 L. Ed. 179, Mr. Justice Harlan stated the rule in these words:

"The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. * * * But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute."

In *Fairbank v. United States*, 181 U. S. 283, 311, 21 Sup. Ct. 648, 959, 45 L. Ed. 862, Mr. Justice Brewer said:

"We have no disposition to belittle the significance of this matter [meaning contemporaneous construction]. It is always entitled to careful consideration, and in doubtful cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear it cannot be overthrown by legislative action, although several times repeated, and never before challenged."

In the last-cited case the question involved was the constitutionality of an act of Congress, and the contemporaneous construction insisted on was several acts of Congress.

Counsel for defendants, in order to establish contemporaneous construction in favor of their view, refer to the facts that the speaker of the House of Representatives had declared this and another amendment open to the same objection to have been properly ratified; that the Legislature, in amending the election laws of the state at its session

of 1893 (the same session at which this amendment was declared adopted), recognized it as having been legally ratified at the preceding election; that the Governor of the state has, under another amendment to the Constitution, declared to have been adopted under the same conditions as amendment No. 2, filled many vacancies in offices; and that the Supreme Court of the state has in two cases recognized the validity of these two amendments. So far as the construction by the legislative and executive departments is concerned, it can hardly be claimed that such construction has been uniform. The first time this constitutional provision came before these two departments of the state for construction was in 1880—only six years after the adoption of the Constitution. In 1879 the General Assembly of the state submitted to the people the amendment generally known as the "First Fishback Amendment." This was voted on by the people at the general election held in 1880, and of the votes cast on that amendment a large majority was in its favor, but it failed to receive a majority of all the votes cast at that election. At that time the returns of elections on amendments were by statute required to be made to and canvassed by a state board composed of the Governor, Attorney General, and Secretary of State. That board, after giving the matter the most careful consideration, unanimously held that the amendment had not been ratified. This view of the board was approved by the leading jurists of the state, many of them prominent members of the convention which framed the Constitution. Hon. A. H. Garland, the first Governor of the state under this Constitution, then one of the United States Senators from this state, and later Attorney General of the United States, who was generally recognized as one of the greatest constitutional lawyers not only of this state, but of the nation, published a very able opinion on that subject, holding that under that provision of the Constitution a majority of all the electors voting at that election was necessary to secure the adoption of an amendment. This construction was acquiesced in by all parties and departments of the state, and in 1883 the General Assembly resubmitted the same amendment to the people, and, having been at the general election held in 1884 approved by a majority of all the electors voting at that election, it was declared duly ratified. When the General Assembly in 1891 amended the statutes regulating the submission and adoption of amendments, it used the following language:

"If it shall appear that a majority of the electors voting at such election adopted such amendment, then," etc. Section 718, Kirby's Digest.

At the same session the statute regulating to whom the returns of the votes cast on an amendment were to be sent was changed so as to require them to be made to the speaker of the House of Representatives. That act provided:

"When all the returns have been received by the Secretary of State said secretary shall keep such returns in the original envelopes with the seals unbroken until the General Assembly shall convene, when he shall send such returns to the speaker of the House of Representatives at the same time and in the same manner as is now provided by law for sending in the election returns for Governor and other state officers, and said returns shall be opened and counted in the presence of the General Assembly in joint convention assembled." Section 717, Kirby's Digest.

"The manner provided by law for sending in the election returns for Governor and other state officers" mentioned in the above section was regulated by section 3, art. 6, of the Constitution, and the act of 1875 (Acts 1874-75, p. 104), digested as section 2852, Kirby's Digest, and is as follows:

"The speaker of the House of Representatives, during the first week of the session after each election for Governor, Secretary of State, Treasurer of State, Auditor of State and Attorney-General, shall, in the presence of both houses of the General Assembly, open and publish the votes cast and given for each of the respective officers hereinbefore mentioned. The person having the highest number of votes for each of the respective offices shall be declared duly elected thereto; but if two or more shall be equal and highest in votes for the same office, one of them shall be chosen by a joint vote of both houses of the General Assembly, and a majority of all the members elected shall be necessary to a choice. The president of the Senate and the speaker of the House of Representatives shall make and deposit in the office of the Secretary of State a certificate declaring what persons have been elected to any offices named."

What was the object of the Legislature in requiring the returns on proposed amendments to the Constitution to be sent to the speaker? There could have been but one. As the speaker would at that time and place have before him the returns of the election for the principal officers of the state, he could easily determine whether the votes cast in favor of an amendment were a majority of all the votes cast at said election. All the returns were before him and the two houses of the General Assembly, and it was a simple matter of calculation to determine the result.

Reference to the journal of the House (page 146) will show that the joint session for that purpose was held on January 12, 1893; that from the returns made and before that body it appeared that 75,940 votes were cast for amendment No. 2 and 56,601 votes against it; that there were cast at that same election for Governor 156,292 votes, for Secretary of State 155,996 votes, for Auditor 154,604 votes, for Treasurer 155,335 votes, and for Attorney General 156,293 votes. It is true that amendment No. 3, which was declared adopted in 1895, has been acquiesced in by the Governor of the state, who has uniformly filled all vacancies in offices as they occurred by virtue of the provisions of that amendment. But it is also a well-known fact that the Attorney General of the state, the only member of the executive department of the state required to be learned in the law, has uniformly held that these amendments were not legally adopted, and were no part of the Constitution. Thus we find that the only Attorneys General of the state—the one filling the office in 1880 and the one in office for the last four years—who have been called upon to construe or to determine that question officially have reached conclusions different from those acted on by some of the speakers of the House of Representatives and some of the Governors. Does that show a uniform construction?

The declarations in favor of the validity of these amendments alleged to have been made by the Supreme Court are claimed to be found in the opinions of that court in *Dunn v. Lott*, 67 Ark. 591, 58 S. W. 375, and *Childers v. Duvall*, 69 Ark. 336, 63 S. W. 802; the first case confirming, it is claimed, the validity of amendment No. 2, and the last case that of amendment No. 3. But neither the reports of

these cases nor the original records thereof, including the briefs of counsel, which the court has carefully examined, show that these questions were either raised, argued by counsel, or in any manner, directly or indirectly, brought to the attention of the court in either of the cases. Under such circumstances, to contend that these cases are decisions of the court on that subject is against all reason, and without any authority. The rule of stare decisis has been often before the courts, and none of them has ever carried it to the extent now claimed by counsel for the defendants. The court knows of no clearer expression on that subject than that delivered by the Supreme Court of the United States in *Boyd v. Alabama*, 94 U. S. 645, 648, 24 L. Ed. 302. Mr. Justice Field, who delivered the unanimous opinion of the court in that case, says:

"It is true that in a former case against the same defendant upon an indictment of a similar kind, for a previous offense of setting up and carrying on a lottery, the Supreme Court of the state held that the statute in question constituted a contract, and that the repealing act was for that reason void. But in that case the only subject before the court was the meaning of the statute—whether its provisions in their terms amounted to a contract which a subsequent enactment could not impair. The constitutionality of the act was not drawn in question. That was not denied. Courts seldom undertake in any case to pass upon the validity of legislation where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The facts that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the act, because that point might have been raised and determined in the first instance."

It will be noticed that in that case the action was between the same parties, involving the same act.

This court, while it would unhesitatingly follow any construction of a statute or constitutional provision of the state made by the Supreme Court of this state, not only owing to the high regard it has for the learning and ability of every one of its members, but for the further reason that the construction of a state constitution or statute by the highest court of that state is absolutely conclusive upon the federal judiciary, has no hesitation in expressing the opinion that in neither of these cases did that court pass upon the question involved in this cause, and for this reason these decisions are neither binding on this court nor precedents for any other court.

Even were the constitutional provision now under consideration less clear than it is, a careful examination of the entire instrument and the provision on that subject in the Constitution in force prior thereto would remove any doubt on the subject. Comparing the various clauses in that instrument on the subject of elections and majorities required, it will clearly appear that the framers thereof intended to establish a different rule for different elections. Referring to the Constitution in force at that time—that of 1868—we find the following language used in relation to amendments:

"And if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the General As-

sembly voting thereon, such amendment or amendments shall become a part of the Constitution of this state." Article 13, § 1.

If the intention of the framers of the present Constitution had been to require only a majority of those voting thereon in order to amend the Constitution, how natural it would have been to use the same language found in the Constitution then in force. The majority of that convention was composed of some of the ablest lawyers in the state, men who were thoroughly familiar with every provision of the Constitution which was about to be replaced; and when they saw proper to change the wording of that particular article it is but reasonable to suppose that it was done for a purpose. Referring to the present Constitution, we find article 6, § 3, provides that the persons receiving the highest number of votes for Governor and other officers shall be declared elected. Here only a plurality is required. Article 6, § 3, provides that in case of tie an election shall be by joint vote of both houses, and "a majority of all the members elected" shall be necessary to a choice. Here the criterion is the majority of all the members elected to the two houses of the General Assembly, and not merely a majority of those members who see proper to vote on that subject. Article 13, § 3, provides that county seats shall not be established or changed without the consent of "a majority of the qualified voters of the county" to be affected by such change. Here the criterion is a majority of all the qualified voters of the county, and this had been construed at that time by Lord Mansfield and many of the courts of the different states of the Union to mean a majority of the votes actually cast thereon. Article 15, § 2, provides that no person shall be convicted upon impeachment without the concurrence of two-thirds of the members of the Senate. Section 17 of the schedule prescribes that, to ratify the Constitution, when submitted to the people for that purpose, a majority of all votes cast must be in favor thereof.

The framers of the Constitution evidently did not believe that there should be frequent amendments to the Constitution. They thought that, before any changes should be made, there should be a full opportunity given to the people to inform themselves fully on the subject, and for this reason they required that amendments should only be voted on at a general election when all state, county, and township officers are elected, and the people generally participate in them. They thought that it would be best to require the positive assent of a majority of those who voted at the election, and not merely a negative consent.

As it is admitted, and is conclusively shown by the official journals of the House, that amendment No. 2 did not receive a majority of all the votes cast at the election at which it was submitted to the people, it failed to become a part of the Constitution of the state within the meaning of article 19, § 22.

2. Is the fact that the speaker of the House of Representatives declared that the amendment was duly ratified conclusive, and not subject to an attack in an action of this kind; and, if subject to collateral attack, can it be made in a federal court? The only cases relied upon as to the first part of the proposition by learned counsel for the defendants was *Knox County v. Aspinwall*, 21 How. 539, 16 L. Ed. 208, and

the cases following the rule there established that, where municipal bonds negotiable under the law merchant are authorized to be issued upon a majority vote of the electors, the decision of the commissioners that this condition has been complied with is conclusive after the rights of innocent holders have attached. The court is somewhat at a loss to understand how the law merchant, or any other law governing negotiable instruments, can be applied to a question of this kind. No cases have been cited in which it has ever been held that, in the absence of a provision in the Constitution making some board or tribunal the sole judge to determine the adoption of an amendment to the Constitution, the declaration of the officer or board designated by law to canvass the vote is conclusive, and not subject to review in a court of justice. It may be conceded that the Constitution may provide for some tribunal whose determination of that question shall be conclusive, but the framers of the Constitution of this state have not seen proper to vest in any person or board such powers. This matter was left solely to the wisdom of the General Assembly. The only elections the returns of which the Constitution requires to be made to the speaker of the House and contests thereon determined by the Legislature are those for Governor, Secretary of State, Treasurer of State, Auditor of State, and Attorney General. The election returns for these officers are required to be made to the speaker of the House, and by him canvassed and the result declared at a joint session of both houses of the General Assembly. Article 6, §§ 3, 4, Const.

In 1879—the session of the General Assembly at which the first amendment to the Constitution of 1874 was proposed—an act was passed to regulate the mode of proposing and voting upon amendments to the Constitution. Acts 1879, p. 128. By the provisions of that act (section 11) the Governor, Attorney General, and Secretary of State were constituted as a board of canvassers to ascertain the result. In 1883 this act was amended, and the speaker of the House of Representatives designated as the person to canvass the vote on amendments. Acts 1883, p. 70. In neither of these acts did the Legislature attempt to make the decision of the canvassing board conclusive, and for this reason it is unnecessary to determine whether it possessed such power, which, in view of the fact that the Constitution established three departments—the legislative, executive, and judicial—and vested all judicial powers in the judicial department except jurisdiction to determine contests for certain state officers hereinbefore mentioned, is at least doubtful. To hold, in the absence of any express provision in the Constitution depriving the judicial department of the state of any of the functions which naturally belong to that department, that the Legislature could take away that power would be violative of the spirit which pervades not only the Constitution of this state, but that of every other state of this Union. It would, in effect, make that department an inferior, and not a co-ordinate, branch of the government. The independence of the courts in unhesitatingly declaring acts in conflict with the Constitution void, and thus reviewing the acts of the legislative department of the state, has done more to preserve the blessings of liberty which we now enjoy than any other act of any department of the government.

The numerous cases hereinbefore cited, and many others in which the courts were called upon to determine the question whether an amendment to the constitution had been legally adopted or not, but which are not cited in this opinion because the provisions of the constitutions under which they were submitted were different from those of this state, and therefore inapplicable, show that there are but few courts of last resort in the Union who have not at some time or other assumed jurisdiction to determine that question. One of the ablest cases in which that question is directly determined, and in which a large number of the authorities are reviewed, is *State v. Powell*, 77 Miss. 545, 27 South. 927. Many other authorities on that question will be found collated in 6 Am. & Eng. Ency. (2d Ed.) 908. To cite all of these cases in this opinion would merely add to the length of it, and the court feels that it is lengthy enough. The only excuse for this is the importance of the questions involved.

It may be proper in this connection to refer to the fact that in *Eason v. State*, 11 Ark. 481, the Supreme Court of this state did not hesitate to declare an amendment to the Constitution void upon the ground that the bill of rights could not be amended. Are federal courts precluded from passing upon such a question when it incidentally arises in a case pending therein, which cannot be disposed of without determining it? Merely to state the proposition is to answer it. The acts of Congress enacted under the powers granted to that body by the Constitution of the United States have conferred upon federal courts jurisdiction in certain causes concurrent with the courts of the states. Every citizen coming within these acts of Congress is guaranteed by the Constitution of the United States the privilege of selecting that forum in preference to any other, if he so desires. Any act of a state seeking to deprive any one of that right is absolutely null and void, as being in conflict with the national Constitution. *Home Insurance Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365; *Kern v. Huidekoper*, 103 U. S. 485, 26 L. Ed. 354; *Martin v. Railway Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; *Goldney v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. A citizen thus invoking the jurisdiction of a federal court has a right to demand that every legal question at issue in that cause, and which might have been determined if the action had been instituted in a state court, should be decided by the federal court. But, if the contention of the learned counsel for the defendants is correct, this court will find itself powerless to determine this cause, be cause indirectly the question whether an amendment to the Constitution has been adopted in conformity with the Constitution of the state has been raised by the pleadings of the parties, although under the law it has jurisdiction of the parties as well as of the subject-matter. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, is the principal case relied upon to maintain this proposition, but the facts in that case are quite different from those involved in the case at bar. That cause grew out of the Dorr rebellion in Rhode Island. There were two conflicting governments in that state, each claiming to be the lawful government. One of them succeeded, and became the only established government, having absolute control of every department of the state, executive, legislative, and judicial. The senators and representatives in Congress

were elected by the Legislature of that government and recognized by Congress. The court held that upon that state of facts the courts would follow the decisions of the political department. No such facts are before the court in the case at bar. There are no dual governments in this state. No department authorized by the Constitution of the state to decide this question has ever determined it, and, if this court now declines to pass upon it, would it not deprive the plaintiff of a privilege, granted to him by the Constitution of the United States, to make his own selection in what tribunal he wants his rights, claimed to arise under the Constitution of the United States, determined? In *Smith v. Good* (C. C.) 34 Fed. 204, the court did hold that a federal court has no power to pass upon a question of this kind, but the reasoning of the learned judge is not convincing, nor do the authorities cited by him sustain his conclusion. With the highest regard for the learned judge who decided that case, this court is unable to follow that decision.

The demurrer to the complaint will be overruled.

BEDFORD-BOWLING GREEN STONE CO. v. OMAN et al.*

(Circuit Court, W. D. Kentucky. June 10, 1904.)

1. JUDGMENTS—RES ADJUDICATA—SCOPE OF DECISION—SUBSEQUENT CHANGE OF CIRCUMSTANCES.

A decision of a state Court of Appeals that certain parties had no property rights in a railroad switch over another's land, but were entitled to car service during the continuance of a certain contract between the railroad and that other, because the switch was operated by the railroad as a common carrier, was *res adjudicata* in a subsequent suit between the parties or their privies on the question of their property rights in the switch, but did not preclude inquiry into the rights of the parties in the use of the switch, where subsequently to the decision the contract relied on by the decision was abrogated, and the railroad had sold the switch to the owner of the land over which it was laid.

2. RAILROADS—PRIVATE SWITCHES—USE FOR PUBLIC BUSINESS.

Persons who have no property rights in a private switch over another's land cannot compel the latter to permit the railroad to receive and ship their freight over the switch to the railroad's own track.

3. SAME—SALE OF SWITCH—RIGHT OF STRANGER TO COMPLAIN.

A contract by which a railroad operates, in its capacity as common carrier, a switch over private property, may be abrogated at will by the railroad and the owner of the property, and the switch may be sold to the latter, regardless of the motives of the parties to the contract in so doing; and a stranger to the contract, who is interested in the maintenance of the switch by the railroad as a carrier, cannot complain of the contract as fraudulent merely because the purchase price was not paid in cash, but promissory notes were given therefor.

4. SAME—FRAUDULENT TRANSACTIONS—BURDEN OF PROOF.

The burden is on a stranger to a transaction whereby a railroad sold a switch to the owner of the land over which it ran to prove that the transaction was merely a pretended sale.

5. CARRIERS—DUTY TO RECEIVE FREIGHT—PRIVATE SWITCHES.

A common carrier cannot be required to receive freight on or along a private switch, but its duty in that regard is confined and limited to its own depots or shipping and receiving points.

* For opinion of Circuit Court of Appeals, see 134 Fed. 64.

6. EASEMENTS — RIGHTS OF INGRESS AND EGRESS — USE OF ARTIFICIAL APPLIANCES.

While the owners of cutting-stone rights have the right of ingress and egress for their stone, yet such right does not entitle them to the use of structures and facilities, such as a railroad track, erected by the owner of the servient estate for his own use, unless they acquire such right by private negotiations or by proper condemnation proceedings.

7. SAME—USE OF ANOTHER'S APPLIANCES—ABSENCE OF INCONVENIENCE.

The fact that the owner of cutting-stone rights could use a private side track constructed on the land of the owner of the servient estate without any inconvenience to the latter does not give him any legal or equitable right to require the latter to afford him such use.

8. INJUNCTIONS—PROCEEDINGS IN STATE COURTS—INTERFERENCE BY FEDERAL COURTS.

A decree of the Circuit Court enjoining a party from setting up any claim to the right to use a railroad switch which the state court had held that he was entitled to use is not an injunction of proceedings in the state court, in violation of Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], where, since the decision of the state court was made, the railroad had sold the switch to a private owner, at whose instance the injunction was obtained.

[Ed. Note.—Federal courts enjoining proceedings in state courts, see notes to *Garner v. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

9. JUDGMENTS—RES ADJUDICATA.

A judgment rendered on the merits by a court of competent jurisdiction in any proceeding at law or in equity precludes and bars subsequent litigation between the same parties or their privies on the same cause of action.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1242-1253.]

10. SAME—SCOPE—ISSUES DETERMINED.

A judgment is conclusive between the parties and their privies not only as to the issues actually involved and determined, but also as to such issues as might have been raised upon the cause of action set up in the suit in which it was rendered.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1241.]

11. SAME—AFTER-OCCURRING FACTS.

A judgment is conclusive only as to the matters capable of being controverted between the parties at the time and as to the conditions then existing, and cannot operate as an estoppel as to after-occurring facts not involved in the suit in which the judgment was rendered.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1267.]

12. QUIETING TITLE—REMOVAL OF CLOUD—DECREE—SCOPE.

An unfounded claim by an owner of cutting-stone rights to the right to use a side track built by the owner of the land constitutes a cloud on the latter's title, which he may have removed by a decree quieting the title, and enjoining the claimant from ever again making the claim; but the decree should clearly and explicitly exempt from its operation the right of the claimant to exercise his cutting-stone rights and his right to the use of the surface of the land in all such reasonable ways as may be necessary to make such right effective.

Bodley, Baskin & Flexner, for complainant.

Lewis McQuown and Wright & McElroy, for defendants.

EVANS, District Judge. Through the medium of certain conveyances, the complainant became the owner in fee of part of all of a certain tract of land in Warren county, Ky., known in this and a former litigation as the "Loving Tract." Some years previous the defendants or their ancestor had purchased an easement therein described as the

undivided one-third of the cutting-stone rights in the land. In a proceeding in the Warren circuit court a division was had between the co-owners of the cutting-stone rights, and the share of the defendants therein according to the division thereafter made was confined to certain portions of the lands described in the plat of it as Nos. 2 and 4, though a small part (150 feet) on the eastern front of No. 4 was yielded to the complainant. Other parts of the land—especially a lot known as No. 1—were not included in the portion allotted to the defendants. The order of the Warren circuit court directing the division by the commissioners, which order was made December 22, 1900, contained a clause in this language:

"In dividing the knob land said commissioners shall take into consideration the accessibility of those portions allotted to each party to the railroad running from Memphis Junction to the White Stone Quarry, and shall, as far as possible, so divide said land as to render each portion thereof into which it is divided equally accessible to said railroad."

The deed of the commissioners who made the division contained this clause:

"It is especially understood and agreed in the foregoing conveyances, that only the cutting-stone right or interest in said land is conveyed to said parties, and no right or claim therein other than the cutting stone is conveyed. Each of said parties takes the cutting stone in the land described above as conveyed to it or her, and no other right or interest in the land is conveyed or waived by either party, but each holds and maintains its ownership except as to the cutting stone therein as is now vested, or may hereafter be vested in said parties."

A certain agreement, without date, but probably made in 1901, between the parties in interest, in respect to the division, contains the following clause:

"In this agreement and division it is distinctly understood that nothing is granted save the cutting stone in the lands above described. So far as other rights and interests are concerned each party holds and maintains its ownership therein as is now vested in said parties respectively."

Under certain other agreements between various persons previously interested, a railroad track was laid many years ago by the Louisville & Nashville Railroad Company, extending from its main line, near Memphis Junction, to the quarries now owned by the complainant. This track, up to a few months ago, was owned by the railroad company, and was operated by it under certain agreements found in the record; but the railroad company only owned the superstructure, and not the land on which it was erected. This track extended over lot No. 1, and nearly across lot No. 4. The defendants opened a quarry on lot No. 2, not far from the end of the railroad track on No. 4, and claimed that they had the right, upon the facts disclosed by the record, to bring their stone to the railroad track on that lot, and that it was the duty of the railroad company to give them facilities for its transportation equal to those afforded to the complainant. In this situation the complainant brought a suit in equity in the Warren circuit court against the defendants in the present suit and others to secure an adjudication of its rights. The result of that suit, as finally settled in the fore part of 1903, was a judgment to the effect, first, that the defendants did not own, nor have any interest in, the railroad, either on lot No. 1 or

lot No. 4, or anywhere else, notwithstanding the clauses above recited as having been contained in the commissioners' deed, and in the agreement without date, and in the order of the Warren circuit court directing the division of the cutting-stone rights; second, that the railroad company, being a common carrier, was, as such, bound to furnish to the defendants facilities for the transportation of their stone upon an equality with the complainant; but, third, though not expressly, it was necessarily, and in the nature of the case, confined to the time when the railroad company should own or operate the track. The judgment unquestionably adjudicated and settled the rights and duties of the litigants in that suit up to July, 1903, and would have settled them for all time to come if the then existing status had continued. But it did not continue. Some time after that judgment was made final, the complainant and the railroad company abrogated the agreement referred to in the opinion of the Court of Appeals as to the track on lots Nos. 1 and 4, as unquestionably they had the right to do, and the complainant purchased from the railroad company all those portions of the track, and became thenceforward the sole owner thereof; leaving in the railroad company neither ownership in it, nor management or control over it. Nor after that date did the railroad company operate or manage that portion of the track, nor claim or exercise the right to do so. The defendants, however, continued to insist that they had the right to have their stone and other freight transported over the track on lots Nos. 1 and 4, and the complainant brought this action to obtain the relief asked in the prayer of the bill of complaint as amended.

The complainant, on such partial presentation of the case as could be made by *ex parte* affidavits, asked a temporary injunction *pendente lite*. After a most painstaking consideration, the court on January 26, 1904, delivered an opinion dealing with the case as then developed.

To that opinion it fully adheres, after a further and very industrious reinvestigation of the case. That opinion, as far as it goes, expresses our view upon the questions then presented, and makes it unnecessary again to go into details upon the propositions then discussed, though some others have risen at the final trial which must also be dealt with.

1. In the suit in the state court the defendants Oman filed an answer which they made a cross-petition against the Louisville & Nashville Railroad Company and others; and upon the issues raised on that pleading the state circuit court, *inter alia*, adjudged that:

"The defendant the Louisville & Nashville Railroad Company is ordered and enjoined to haul and carry for said defendants Oman such supplies and other stores as said defendants may demand, from the Memphis Junction of the Louisville & Nashville Railroad Company to said Omans' quarry land on the railroad as now constructed into the land allotted to said Omans in the division between the said Omans and the Bowling Green Stone Company, and to haul and carry for said Omans the product of their said quarry over said road to Memphis Junction."

The judgment upon those issues was affirmed by the Court of Appeals (115 Ky. 369, 73 S. W. 1038), and Judge Barker, in delivering its opinion, said:

"We think, under his right to the cutting stone, as now fixed by contract, appellee is entitled to ship and receive freight at any reasonable point along the road as now constructed, which lies upon any part of the Loving tract,

which was set apart and conveyed to him in the settlement had between him and the Columbia Finance & Trust Company."

Upon this the defendants base one of their chief arguments against the relief sought by the complainant's bill. As said in my former opinion, if this were all, and if there had been no change of contract or of property rights, the matter would be closed against complainant by adjudication at the outset. But the Court of Appeals, when we consider its whole opinion, evidently regarded its general language as applicable only to the exact case before it, and expressly recognized the possibility of a change of the contract between the complainant and the railroad company. It will be observed that no time limit is fixed in the order, and it is open to the fair construction that, when such a change should be made, new relations and new rights would arise, and put an end to that extent to the operation of the injunction. In the present case, as pointed out in the former opinion, no relief is sought against the railroad company, nor will any attempt be made by this court to interfere with the state court's injunction now resting upon the railroad company. That is a matter with which the state court alone is concerned, and must be settled by it. But I may be permitted to renew an expression of doubt as to whether the state court will not itself feel that a new situation has arisen by the sale of the track on lots Nos. 1 and 4, and by the abrogation of the contract between complainant and the railroad company, which will cause that court to limit the general language above copied from its judgment, and confine the enforcement of its injunction within limits to be determined by the new situation, wherein the railroad company may have no right or power to use or operate the switch on lots Nos. 1 and 4 because of the abrogation of the contract which gave it the right to do so, and because it has sold the switch.

That the railroad company and the complainant were not bound to keep their contract in force for the benefit of the defendants is a conclusion sound of itself, and one that must follow from the ruling by the Court of Appeals that the defendants have no legal interest in the switch, emphasized by the fact that the court bases all the rights it gave to defendants, and all the duties it imposed on the railroad company, upon the fact that the latter was a common carrier operating the switch on those lots as part of its system. This was the only ground upon which the duty of the railroad company could be based, but when it ceased to own or operate the switch it had neither right nor power to use it. The right and power to use the switch had passed to another, and whether the state court will attempt to compel the carrier to use property to which it has no title or right, for the benefit of the defendants, is an important question for that court, and not for this. We have no part in it. But while these matters are exclusively for the state court to settle, so far as they may affect the railroad company, this court has been asked by the bill of complaint in this case to act upon the defendants, and compel them to desist from making certain claims to complainant's property. It is therefore the defendants, and not the railroad company, which this case may affect, and it is only the questions between the actual parties to this suit which we have endeavored to ascertain and determine.

The essential question may, we think, be thus stated: Whatever may be their rights as between themselves and the railroad company alone, have the defendants any right whatever to use or to compel the complainant to submit to the use by the common carrier for defendants' benefit of complainant's property, viz., its switch on lots Nos. 1 and 4? If the railroad company hauls freight for defendants, it must be allowed to collect tolls therefor; and thus we should have the carrier getting compensation for the use of the complainant's property not only without the latter's consent, but over its protest, and without a judicial proceeding of condemnation. This, we think, cannot be the law.

2. In the former opinion it was held that the defendants had no property interests in the railroad switch. This was *res adjudicata* in the suit in the state courts, and binding upon all parties and all courts. Judge Barker, in delivering the opinion of the Court of Appeals in the state court case in 1903, said:

"John Oman, having opened a quarry on the Loving tract, set apart to him, very near the quarry operated by the Bedford-Bowling Green Stone Company, is naturally very anxious to use the switch in transporting his machinery to his quarry, and in transporting his stone to the main line of the Louisville & Nashville Railroad; it being impracticable to haul such heavy freight for so long a distance in any other way. We do not think, however, he has any interest in the switch in question. It was built by the White Stone Quarry Company, a remote vendor of appellants, under the lease of 1870, and that instrument contains no covenant for its conveyance to the lessors at its expiration, at which time, being part of the realty, in the absence of any stipulation governing the matter it became the property of the owners of the soil to which it was affixed. In order for appellee Oman to prove himself entitled to an interest in the railroad switch involved in this litigation, it was incumbent upon him to exhibit some muniment of title by which he acquired an interest in it. This he has wholly failed to do. Even should it be held that his remote vendor, B. C. Sanders, acquired an interest by the terms of the lease of 1870, it would still be necessary for him to show transmission of that right to him. He purchased the interest he holds at a judicial sale in the settlement of Milton Feland's estate, and the deed of the commissioner of the court in that case to him, after describing the land containing the cutting stone to be conveyed, contains this stipulation: 'That which is conveyed is the interest of M. C. Feland, in the cutting stone on the land aforesaid, being one-third interest.' So that all he purchased was an interest in the cutting stone, and not an interest in the railroad switch."

3. The Louisville & Nashville Railroad Company is so obviously a common carrier that the proposition needs no remark, but it had built, and, up to the final decision in the state court case, had owned and operated, the track on lots Nos. 1 and 4, under certain contracts exhibited in the record. And so Judge Barker, in the opinion referred to, said:

"This contract, and other evidence in the record bearing upon the question, shows that the Louisville & Nashville Railroad Company, during the continuance of this last contract, has the control and management of the railroad switch. It owns, controls, and operates the engines and other rolling stock which pass over the line. It keeps the roadbed in repair, and owns all of the material which goes into it. So far as this record shows, it exercises the same control and dominion over this line that it does over any other part of its system, and we think, by the terms of the contract in question, the switch, during the continuance of the contract, at least, became a part of the general system of the Louisville & Nashville Railroad Company. This being so, it

cannot lawfully refuse to receive and transport freight belonging to appellees to and from such reasonable points along the line at which they may lawfully ship or receive it. * * * While it is the duty of the railroad company thus to receive and transfer freight for the appellee, this can be done only at points along the line of the railroad switch in question at which appellee may lawfully receive or ship it. He has no right to trespass upon the private property of appellants in order to reach the road."

Here the exact grounds of the court's ruling on this proposition are stated, and, as already observed, if that status had remained, there would have been no room for the pending suit. Every question in it would have been settled by final adjudication. But it will be observed that the learned judge appears to limit the then existing status by the language "during the existence of the contract." This was an unavoidable result. This contract was abrogated in June or July, 1903, and, of course, ended the status, unless something legally similar took its place. The court now finds, from the preponderance of the testimony, that nothing substantially or legally similar did take its place. It seems to us now, upon the fact shown by the testimony, that the railroad track on lots Nos. 1 and 2 is nothing more or less than a private switch belonging to the complainant, and that it is used only as such in the ordinary way of such switches, and that it is not owned, operated, controlled, or managed by the railroad company. If this be true, then it follows that the questions involved in the pending litigation, viz., those arising out of the ownership of the track on lots Nos. 1 and 4, by the complainant by its purchase from the railroad company, were neither litigated nor determined, and could not have been litigated or determined, in the suit in the state court, and consequently that they are entirely open for contestation in this suit. I can see no reason for doubting this, inasmuch as the ownership of the property changed after the conclusion of the former litigation, and the rights now in contention arise out of that subsequent sale. Having sold the switch, the railroad company has no power or right, for its own profit, to use it as it pleases, either as a carrier or otherwise.

4. If, as we have found to be a fact, the track on lots Nos. 1 and 4 is a private switch, and the sole property of the complainant, in which the railroad company has no interest, and over which it exercises no control or management, then, as the Court of Appeals has determined that the defendants have no property interests therein, it follows that they have no right, after hauling their stone on lots Nos. 1 and 4, to demand that the railroad company shall then have the right to take it from them on either of said lots, and transport it over the complainant track to that of the railroad company at the eastern line of lot No. 1. The court finds from the testimony that the railroad company's line now terminates at the point last mentioned, to wit, the eastern line of lot No. 1, or, rather, at the southeastern corner of that lot, and that it does not own or operate any railroad beyond that point, or over any part of lots Nos. 1 and 4. That the defendants cannot compel either the complainant or the railroad company to transport the defendants' stone or other freight over the track on lots Nos. 1 and 4 must necessarily be the result, unless the defendants have some rights, legal or equitable, to compel the complainant and the railroad company to keep alive their contract for the benefit of the defendants, although the parties

thereto themselves wish to abrogate that contract. In the former opinion delivered herein, we endeavored to show that the defendants have no right to insist that that contract should be kept alive for their benefit. We adhere to the views then expressed, especially where it was said:

"If the defendants had any legal or equitable title to the switch, or any part of it: if they had paid any part of the cost of constructing the same; if they had done anything more meritorious in the premises than to cherish a desire to use the switch for their own benefit, without contributing to the expense of its construction and maintenance—I should be inclined to overrule the motion for an injunction, as in that event they would then have what now they have not, namely, an equitable interest in the switch. But as the defendants have no title to the switch, and have paid no part of the costs thereof, there seems to be little or no merit in any claim they may make to a right to use another person's property."

5. By the provisions of the contract between the complainant and the railroad company dated February 28, 1901, there might be a cancellation thereof, and in that event it was provided:

"In case this contract should be canceled in the manner above provided the said Bedford-Bowling Green Stone Company is hereby given the right to purchase the material in said track by paying in cash to the Louisville & Nashville Railroad Company within sixty days from the receipt of notice of cancellation the value of said material, and should the Bedford-Bowling Green Stone Company fail to exercise its option to purchase said material, then the said Louisville & Nashville Railroad Company hereby reserves and is given the right to take up and remove said material without let or hindrance on the part of said Bedford-Bowling Green Stone Company, or any other person."

On the 29th day of June, 1903, that contract was canceled by mutual written agreement of the parties, and all the material in the track on lots Nos. 1 and 4 was purchased by the complainant from the railroad company. The question of whether the sale to the complainant by the railroad company was a real or a pretended transaction may be easily disposed of. It is hardly a badge of fraud that the purchase price was not paid in cash. The parties, being *sui juris*, had the right and power to arrange this to suit themselves, even if it did change the terms mentioned in the contract of 1901. That it was intended to be so paid is evident. But if the parties agreed to an extension, and to a promissory note for the price, it is no concern of the defendants. We cannot properly say that the preponderance of the evidence overcomes the presumption of fairness, or supports the suspicions of the defendants. They charge and they must prove the characteristics they impute to the sale. The burden upon this phase of the case is upon the defendants, and we are clearly of opinion that they have not sustained their view. As the complainant and the railroad company had the right to make the contract of sale, their exercise of that right cannot be successfully questioned by an outsider, unless upon the clearest grounds. And if the right to make the contract existed, the motives of the parties became immaterial. *McDonald v. Smally*, 1 Pet. 620, 7 L. Ed. 287; *South Dakota v. North Carolina*, 192 U. S. 310, 311, 24 Sup. Ct. 269, 48 L. Ed. 448. Of course, if the railroad company had had no right to abrogate its contract with the complainant, and if the parties thereto did not have the right to abrogate that contract, and if the complainant had no right to buy the track on those lots from the railroad company, then different results might follow; but if the railroad

company had the right to sell the material in the switch, and the right to abrogate the then existing contract, we cannot say from the evidence that there was in fact no sale made, or that there was no abrogation of the contract existing between the parties, and which, on its face, plainly stipulated for such abrogation.

6. A common carrier cannot be required to receive freight on or along a private switch. Its duty in that regard is confined and limited to its own depots or shipping or receiving points. Hence the reasonableness of the expressions in the opinion of the Court of Appeals above copied, wherein it is said, first, that the railroad company "cannot lawfully refuse to receive and transport freight belonging to appellees to and from such reasonable points along the line at which they may lawfully ship or receive it"; and, second, "while it is the duty of the railroad company thus to receive and transport freight for appellee, this can be done only at points along the line of the railroad switch in question at which appellee may lawfully receive and ship it. He has no right to trespass upon the private property of appellants in order to reach the road."

7. But the Court of Appeals, in its opinion, said:

"Although the part of the Loving tract upon which the railroad switch lies (being No. 4 on plat) is now owned in fee by appellants Bedford-Bowling Green Stone Company, the right to take the cutting stone which belongs to appellee necessarily carries with it such reasonable use of the surface over the stone, as is necessary to make appellee's interest in the land available."

It doubtless goes without saying that the defendants, as owners of the cutting-stone rights on lots Nos. 2 and 4, ex necessitate rei have the right of ingress and egress. That right is essential to the enjoyment of their grant, and, besides being finally adjudicated by the Court of Appeals, is per se obvious. Furthermore, and upon the same grounds, the defendants are entitled to such reasonable use of the surface over the stone on lot No. 4 as may be necessary to the same ends. All of this, however, refers to the surface over the stone. The rights referred to might, in this advanced day and generation, be regarded as necessarily including the right to build railroad tracks, tramways, roads, or bridges, within the meaning of the phrase "reasonable use of the surface over the stone." But if such structures are allowable or necessary for the purpose of making the cutting-stone rights available, the defendants must build and equip them at their own charges. Their right is to use the "surface over the stone." No court has held, and this court will not hold, as at present advised, that the defendants have the right to use the structures put upon that surface by others, or those purchased by others at their own expense, and for their own uses and purposes. I hold that the right to use the surface over the stone, and the right to ingress and egress, as to lots Nos. 1 and 4, do not give or include the right to use "structures" and facilities erected on that surface, and now owned by another, who is entitled to it for its own purposes. If the defendants require those structures in order to reach their quarry and enable them to ship their stone, they must either acquire a right to use those structures by private negotiation, or by a proper proceeding of condemnation. While it may, therefore, possibly be admissible for the defendants, if necessary to the enjoyment of their

grants, to construct a railroad, tramway, road, or other means of making their grant available or profitable, it is wholly inadmissible for them to claim the right to use for their own purposes the structures now belonging to another, except upon condition that they purchase the right by agreement, or condemn and pay for it under section 815, Ky. St. 1903.

8. Much of the defendants' testimony bears upon an effort to show that there could easily be an extension of the track on lot No. 4 to the defendants' quarry, and that the track on that lot, without inconvenience to the complainant, could be used at least half of the time for defendants. But all of this is evidently immaterial, unless the defendants have some legal right to the track or to its use. The fact, if it be such, that the defendants could use complainant's property without injury or inconvenience to complainant, might appeal to the courtesy or generosity of the complainant; but surely it does not, under our imperfect system of laws, give to the defendants any legal or equitable rights which the courts can recognize or enforce.

9. Much proof was also introduced by defendants to show that the railroad company uses the track on lots Nos. 1 and 4 precisely as it did for many years prior to June, 1903. In a certain very superficial sense, this is true, because at times the railroad company, when requested by complainant, still sends its engines, with freight cars, along and over the track on those lots. But as already stated, the use of the track in that way is only very superficially similar to the previous use. The difference, in reality, is very great. The sending of engines and cars over a railroad track is practically the only use to which such a track is ever put, whether it be a railroad line, proper, or a mere private switch, and all such use is practically the same, especially to the view of a mere outside observer; but in this case the railroad track was owned by the railroad company previous to July, 1903. That company could repair, raise, lower, change, or remove it at will. Now it can do none of those things. Before that time it had the exclusive right and power to send its engines and cars over the track, either on a regular schedule or otherwise, as it might determine. Now it has no such right. Before that time it had the complete control and management of the track, and this is the very essence of "operating" a railroad, and in this sense we use that word in the connection in which it is found in the opinion of the Court of Appeals. Now the railroad company does not control or manage the track on lots Nos. 1 and 2, and has no authority over it. Consequently it does not "operate" it, and has not done so since a time antedating the commencement of this suit.

10. The railroad company does not, as we have seen, now "own," and cannot in any fair or legal sense be said to "operate"—that is to say, authoritatively control or manage—what we have concluded to be the private switch on lots Nos. 1 and 4. As is no doubt the case in respect to other private switches, the carrier, when informed by the owner of the switch that it has freight to ship, and when requested to furnish cars for the purpose, does so by sending empty ones, which, after being loaded, are hauled away. This is a desirable business arrangement, suggested by prudence and foresight. Such arrangements require expensive structures. The switch in this case is obviously necessary to

complainant's business. It was bought by complainant for use in that business, and, while the court sees the difficulties of defendants' position, it finds no law which imposes either a legal or equitable obligation upon the complainant to furnish the use of that switch to the defendants free of cost. As already stated, the expenses for furnishing the use of the switch to the defendants must be settled by agreement of the parties, or through the medium of a condemnation proceeding. These results necessarily follow from the complainant's ownership of the switch.

11. Upon the question of *res adjudicata*, it may specially be remarked that in the suit in the state court one question was whether the railroad company, a common carrier, should devote its track on lots Nos. 1 and 4 to the uses of the shipping public—the defendants equally with others. That question was adjudicated in the affirmative. The ratio decidendi was the carrier's ownership and operation of the line. When, as here, that reason ceases, the rule ceases, of course. In this suit the entirely different question is, shall the railroad company be compelled or permitted to use as its own, for the benefit of the defendants and itself, as a common carrier, certain property which it has sold to the complainant, and which the railroad company no longer either owns, controls, or operates. That question, as we have seen, was neither raised nor adjudicated in the suit in the state court, and could not have been raised. It is therefore open for adjudication here, and must be determined. Under the mandatory injunction from the state court, the railroad company must receive freight from defendants for shipment at all points on its line where it may lawfully receive or ship freight. That injunction is still in full force, as against the railroad company, to whatever extent the state court may adjudge; but we hold, under the entirely new case now presented, that the defendants have no right to use, or to claim the right to use, or have used for their benefit, the switch on lots Nos. 1 and 4. This ruling in no way conflicts with that of the state court in the case actually before it, for the railroad company then owned the switch, which has since become the complainant's property, with all that this implies. Nor can either the defendants or the railroad company lawfully trespass on what is now complainant's property in order to ship defendants' stone.

12. It is still vigorously insisted that to grant the relief prayed for, so far, at least, as an injunction is concerned, would violate section 720, Rev. St. U. S. [U. S. Comp. St. 1901, p. 581], by enjoining proceedings in a state court. We endeavored to state with clearness our views on this proposition in the previous opinion, and will not repeat what was then said. While it is true that the defendants could not claim the right to use the railroad track on lots Nos. 1 and 4 if the injunction in this case should be permanently continued, and would thus be unable to ship freight over it, this would not result from enjoining any proceeding in the state court, but would come from enjoining the defendants personally from interfering with the rights of the complainant by using or causing to be used its property acquired after the judgment in the state court; such requirement being in no way contrary to the judgment of that court, and in no way being in conflict therewith. If the state court had, in substance or form, enjoined the railroad company

from ceasing to operate or from selling the track on lots Nos. 1 and 4, the case would be different; but the state court certainly did nothing of that sort, and left the complainant and the railroad company free to make the contracts entered into by them in June or July, 1903. To the utmost extent that the railroad company "operates" or "owns" a railway in the direction of the defendants' quarries, it is bound to afford defendants facilities for transporting freight equal to those furnished complainant. The judgment in the state court did not go further and require the railroad company to continue to operate any part of its lines.

13. The learned counsel for defendants, in their very able arguments, seek to base defendants' right to the use of the railroad track on lots Nos. 1 and 4 upon the clause contained in the order made in 1900 by the state court in the division suit, and upon the clause in the commissioner's deed made thereunder, and upon the clause in the unsigned stipulation, which have been set out in full in the opening portions of this opinion. Those matters were before the Court of Appeals, but, notwithstanding their terms, that court adjudged that the defendants had no legal interest whatever in the railroad track, and thus foreclosed that claim of the defendants. The duty of the railroad company was ascertained and fixed upon the general principles of law applicable to common carriers, as supplemented by the provision of the Kentucky Constitution and laws. Those duties relate only to the lines of railway which the railroad company owns or operates, and thus, as ever, we are brought back to the question of fact, viz., does the railroad company operate—that is, authoritatively control and manage—the track on lots Nos. 1 and 4?

14. The general rules of law applicable to this case are so well settled as in many respects to have become elementary. They may be stated as follows:

(1) The judgment of a court of competent jurisdiction in any proceeding at law or in equity precludes and bars all subsequent litigation between the same parties or their privies upon the same cause of action, provided the judgment was upon the merits of the controversy.

(2) The rule extends not only to the issues actually involved and determined, but also to such as might have been made upon the cause of action set up in the first suit.

(3) But in the language of the authors, found on page 777, vol. 24 (2d Ed.), of the American & English Encyclopædia of Law, these general principles are modified "by changes of condition." They say:

"And an adjudication is conclusive only as to those matters capable of being controverted between the parties at the time, and as to conditions then existing, and cannot operate as an estoppel to another action or proceeding, which, though involving the same rights passed upon, is yet predicated upon facts that have arisen subsequent to the former adjudication."

(4) In 2 Black on Judgments, in section 617, is found this language:

"Of course, a judgment being conclusive only upon matters within the issues, it is not an estoppel as to after-occurring facts, not involved in the suit in which the judgment was rendered."

(5) In the case of Third National Bank v. Stone, 174 U. S. 434, 19 Sup. Ct. 759, 43 L. Ed. 1035, it was held that a question cannot be held

to have been adjudged before an issue on the subject could possibly have arisen.

(6) The following cases decided by the Supreme Court of the United States and the Court of Appeals of Kentucky establish indubitably the proposition that in a case like this the adjudication in the state court in the first suit can operate as an estoppel only to the extent that it decided questions that may to some extent, at least, be involved in this suit. They seem to the court fully to sustain the position it has taken in this opinion: *Jones v. Commercial Bank*, 78 Ky. 423, 424; *Cromwell v. Sac County*, 94 U. S. 353, 24 L. Ed. 175; *Wilmington R. Co. v. Alsbrough*, 146 U. S. 302, 13 Sup. Ct. 72, 36 L. Ed. 972; *Dennison v. United States*, 168 U. S. 249, 18 Sup. Ct. 57, 42 L. Ed. 453; *Nesbit v. Riverside Independent District*, 144 U. S. 618, 12 Sup. Ct. 746, 36 L. Ed. 562; *Davis v. Brown*, 94 U. S. 428, 24 L. Ed. 204; *Roberts v. Northern Pacific R. R.*, 158 U. S. 27, 15 Sup. Ct. 756, 39 L. Ed. 873. Many cases to the same effect are collected in *Rose's Notes on United States Reports*.

15. We have considered fully all the contentions of the defendants, and find ourselves somewhat unwillingly brought to the conclusions we have stated. It only remains to be seen what relief is to be given under the bill. The complainant has the legal title to the lands embraced in lots Nos. 1 and 4, subject to a stone-cutting easement in the greater part of lot No. 4. It has the actual possession of both lots. The legal title and possession referred to include the railroad track constructed on those lots, that track having become by the sale to complainant a part of the freehold. It is quite clear from the pleadings and contentions of the parties that defendants claim the right to have the use of the railroad track on the two lots, although John Oman, in his deposition, attempts to disguise it by claiming it over the shoulders of the railroad company as a carrier. But however attempted to be disguised, the fact is clear that defendants do claim the right to have the railroad track now on lots Nos. 1 and 4 subjected to their uses for the transportation of the stone quarried by them from the Loving land. To this we think they have no just right, as against the complainant; and the unfounded claim is a cloud on complainant's title, which it has the right to have removed, and its title quieted in respect thereto. If the defendants do not make the claim we have described, there was no necessity or propriety in the vigorous defense and elaborate preparation shown by the large record in this case. The complainant is entitled, as we conceive, to a decree quieting its title and removing the cloud referred to, and to an injunction perpetually restraining the defendants, and each of them, from ever again making said claim. But the judgment should clearly and explicitly exempt from its operation and from the operation of the injunction the right of the defendants, and each of them, to reasonably excavate for and cut and remove the stone from those portions of lot No. 4 in which they have the exclusive cutting-stone rights; also the defendants' right to full and free ingress thereto for those purposes at all times, and to full and free egress therefrom, and the right to use the surface over the stone in said land in which they own the cutting-stone rights in all such reasonable ways as may be necessary to make those rights effective. All of these things as to

lot No. 4 should be explicitly secured to the defendants and reserved to them in the judgment. The judgment should also explicitly disclaim any right or purpose of this court in any wise to interfere with the injunction against the Louisville & Nashville Railroad Company covered by the judgment of the state court.

As the defendants did not disavow nor attempt to disavow in their answer their said claim to have said railroad track on lots Nos. 1 and 4 used for their benefit in the way indicated, they must be charged with the costs of the action.

Judgment accordingly may be prepared and submitted.

GRAHAM v. OREGON R. & NAV. CO.

(District Court, S. D. New York. December 16, 1904.)

1. ADMIRALTY—JURISDICTION—MARITIME CONTRACT.

A traffic agreement between a railroad company and the owner of certain steamships, which were to be used in connection with the railroad of the first party as a part of a through line of transportation, by which agreement the parties were to co-operate in the operation of such line and divide the receipts as connecting carriers, as therein specified in detail, is not maritime in its nature, and a court of admiralty is without jurisdiction of a suit for its breach.

In Admiralty. On exceptions to libel.

Thomas D. Rambaut and J. Parker Kirlin, for libellant.

Maxwell Evarts and Robert D. Benedict, for respondent.

ADAMS, District Judge. This is a controversy which arises upon exceptions to the libel, as follows:

"I. That it appears upon the face of the libel herein that this Court is without jurisdiction of the cause of action set forth in said libel.

II. That the contract and agreement alleged in said libel is not a contract and agreement civil and maritime, and that an action of damages for the breach thereof is not within the admiralty and maritime jurisdiction of this Court."

The libel alleges as follows:

"FIRST.—The libellant, Robert A. Graham, is a resident of the State of New York, and of this District. At all the times hereinafter mentioned the respondent, the Oregon Railroad & Navigation Co., was and still is a corporation organized and existing under and by virtue of the laws of the State of Oregon, but it has property, credits and moneys in this District, to wit, in the Central Trust Company of New York, whose address is 54 Wall Street, New York City.

SECOND.—On or about October 1st, 1900, at Portland, Oregon, the libellant and the respondent, acting through its duly authorized agents, entered into an agreement by which it was agreed between the parties that the libellant should furnish steam vessels to run monthly between Portland, Oregon, and ports in China and Japan, and to carry cargoes to be furnished by the respondent in trade between points in the United States, Canada and Europe and ports of China and Japan, and that the respondent should furnish cargoes to be carried by the vessels.

It was further agreed that the steamships should be capable of carrying 4,000 tons of measurement cargo, and that the through rate of freight on the cargoes carried by steamship and railroad should be divided equally between

the libelant and the respondent, subject to certain provisions with regard to minimum payments, in certain contingencies, to both parties to the agreement.

It was further agreed that should it become necessary or advisable to accept through rates lower than a basis which should yield freight to the libelant at the rate of thirty-five cents per hundred pounds on cargo carried, such lower rates should be first agreed on between the parties to the said agreement, and after deducting from this rate such arbitraries as would be demanded by the connections of the respondent, the balance of the said rate should be pro-rated in the proportion of fifty cents to the respondent and thirty-five cents to the libelant.

It was further agreed that if it should become necessary, in order to meet the competition of another transportation line, the minimum rate accruing to the libelant on certain specific kinds of the cargo might be reduced by the respondent to the rate of twenty-five cents per hundred pounds.

It was further agreed that all traffic between the Pacific Coast and Asiatic ports, should be for the sole benefit of the libelant, and that the libelant should, wherever possible, forward such cargoes by the railroad of the respondent, or by the railroad or steamship lines controlled by the respondent, at rates to be agreed on, but not to exceed 25% of the through rate, according to the steamship freight list, and with a specified minimum payment to the respondent or its connections.

It was further agreed that the respondent should assist the libelant in obtaining low rates between Pacific Coast points on cargo handled at Portland, to or from connecting lines, and that on cargo from which the respondent received no benefit, the libelant should pay to the respondent the actual cost of labor service at Portland, not in excess of twenty-five cents per ton.

It was further agreed that on cargo of not less than carload lots of 24,000 pounds gross weight or 25 tons of forty cubic feet measurement, from Asiatic ports to points on the respondent's line between Portland and Omaha, the libelant might issue through bills of lading at the current rate of freight on similar goods to parallel points on competing lines, but that for cargo in less than carload lots to points above mentioned the libelant should not issue bills of lading beyond Portland, and the respondent should have the right to charge thereon its local rate of freight from Portland to destination.

It was further agreed that the libelant should have exclusive right to appoint agents in Asiatic ports who should be duly authorized to act as agents for both parties to the agreement, and to have power to issue bills of lading and passenger tickets and to make and name freight on all traffic to points in the United States, Canada and Europe, subject to certain provisions in the agreement as to rates of freight, and subject also to certain provisions in the agreement which permitted the respondent to establish through its agents in the United States, Canada and Europe, rates on traffic for Asiatic points.

It was further agreed that the libelant should have the right, if it should be deemed advisable, or necessary, to appoint, at its own expense, agents in Portland, Oregon, and/or Victoria, British Columbia, for the management of the steamships at the port of call, and to procure traffic from the Pacific Coast, and for the purpose of assisting and advising the respondent in all matters pertaining to the steamship service, and it was also agreed that the libelant should have the right, should it be deemed advisable or necessary, to appoint an agent at its own expense, in New York, whose duty should be to assist in procuring traffic for the steamships of the libelant, and who should be under the control of the respondent in regard thereto.

It was also agreed that subject to the above mentioned exceptions the respondent should have the exclusive right to appoint agents in all points in the United States, Canada and Europe, who were thereby authorized by the libelant to act as his agents, also, and these agents were to have authority to issue through bills of lading and passenger tickets, and establish rates on all traffic for Asiatic points served by the libelant's steamships.

It was also agreed that the respondent should pay to the agents of the libelant a commission of five per cent. on its earnings on all Asiatic traffic procured by them, and that the libelant should pay to the respondent for its

agents five per cent. on his earnings on all traffic for Asiatic ports, obtained by the agents of the respondent.

It was also agreed that on the arrival of the vessels at Portland, the cargo carried should be tallied out by officers of the steamship in conjunction with officials of the respondent, and that damaged packages should be set aside, and for claims thereon the libelant should be responsible, and it was also agreed that the respondent should give a receipt for all cargo received at Portland, and the responsibility of the libelant as to cargo to be carried over the lines of the respondent should cease on correct delivery at Portland.

It was also agreed that on cargo destined for Asiatic ports and delivered to the libelant's steamships at Portland a tally should be kept by the officers of the steamship, in conjunction with officials of the respondent, and that damaged packages should be set aside, and for claims thereon the respondent should be responsible. It was also agreed that the steamship officials should give a receipt for all cargo taken on board at Portland, and that such receipt should absolve the respondent from further responsibility as to the cargo included therein.

It was also agreed that the respondent should do all it could to assist the libelant in obtaining quick despatch in discharging and loading the steamships at Portland, and to assist in making contracts for coal, provisions and labor required by the vessels, and to authorize and permit the respondent's agents everywhere actively to solicit all and any traffic that might be required for the return voyages of the steamships to Japan and China.

It was also agreed that the respondent should provide wharfage on all traffic passing over the railroads of the respondent, and that on cargo to or from Portland locally, and Asiatic points, the respondent might make a charge to the shippers or consignees of twenty-five cents per ton per steamship's freight list.

It was further agreed that the respondent should render to the agent of the libelant, at Portland, within two weeks after the departure of the steamship from Portland, or sooner, if possible, an account showing the earnings of the steamship, inwards and outwards, on that voyage and that the balance should be paid at once by the party owing, and it was further agreed that each round trip, inwards and outwards, should be kept separate.

It was further agreed that the aforesaid contract between the parties should be binding on both parties for the term of three years from October 1, 1900, but that the libelant should have the option of withdrawing his steamships and terminating the agreement at the end of the second year, or at the end of each succeeding second year, on giving to the respondent one year's notice, in writing, of his intention to withdraw his vessels, and to terminate the agreement.

It was also agreed that the respondent might call for arbitration to determine its right to cancel contracts on giving one year's notice to the libelant of its desire to do so, provided the Steamship Line should not be kept up to the standard that would permit of its being fairly worked in competition with other trans-Pacific lines.

It was also agreed that any disputes arising out of the terms of this agreement should be settled by arbitration, one arbitrator to be selected by each party, and the two so selected to choose a third, the decision of a majority of the arbitrators to be final and conclusive on the parties thereto.

A statement of the terms of the aforesaid agreement between the libelant and the respondent is hereto annexed, marked 'Appendix A,' and made a part of this libel.

THIRD.—Thereafter, pursuant to the terms of the aforesaid agreement between the libelant and the respondent, the libelant furnished to the respondent five steamers, capable of carrying 4,000 tons of measurement cargo, for the establishment of a steamship service between Portland, Oregon, and ports in China and Japan, to be operated in connection with the respondent's railroad, and cargoes were furnished for the said steamships by the respondent, in pursuance of said agreement, for several months thereafter, and until about the 10th of April, 1901, and in doing so delivered, under joint bills of lading, cargoes and merchandise from its railway cars to the libelant at Portland for transportation by his said line of steamships, and received at

said port cargoes from said steamships which had been brought from Asiatic ports and transported the same to their destination over the said railroad and its connections, and also paid and received commissions on earnings on said traffic and conferred and co-operated with the libelant in preparing joint bills of lading, in arranging for voyages of the said steamships, in advertising for traffic, in employing competent agents and in soliciting business. The name of the line under which the steamers were operated, in pursuance of the agreement between the parties, was the Oregon & Oriental Steamship Company.

FOURTH.—Subsequently to the date of the aforesaid agreement between the libelant and the respondent, of October 1st, 1900, the libelant expended large sums of money in connection with the carrying out of the terms of the aforesaid agreement between the libelant and the respondent; in providing and chartering vessels for the service; in renting offices; employing agents and servants; advertising sailings; endeavoring to obtain business; in making such alterations and changes in the arrangement and equipment of the steamships as was reasonably deemed necessary for the carrying out of the purposes of the aforesaid agreement between the parties; in altering and repairing docks and providing coal for the steamships, and generally in doing things suitable and necessary for the proper carrying out of the terms of the aforesaid agreement between the libelant and the respondent, according to its true intent and meaning.

FIFTH.—Thereafter and on or about March 9th, 1901, the respondent wrongfully and improperly, by a notice in writing, signed by its duly authorized agent and representative therefor, notified the libelant that it would wholly abandon, on its part, the performance of the aforesaid agreement, and cancel the contract theretofore existing between the libelant and the respondent, at the expiration of thirty days from that date, and on or about the tenth day of April, 1901, and subsequently thereto, and ever since that date, the respondent has wrongfully and improperly refused and failed to carry out its part of the aforesaid agreement of October 1, 1900, between the libelant and the respondent, by refusing to furnish or deliver eastbound cargoes to the steamers at Portland, by refusing to permit libelant to engage westbound cargoes for shipment over respondent's railroad, under through bills of lading, or for through rates in pursuance of the contract; by preventing libelant's steamships from docking at its dock in Portland, Oregon; by establishing and operating a rival steamship line in the same service, and for the purposes covered by the agreement with the libelant, and generally by wrongfully and improperly refusing to carry out the obligations resting on it under and by virtue of the aforesaid agreement between the libelant and the respondent.

SIXTH.—The libelant has duly performed all the obligations resting on him under and pursuant to the aforesaid agreement between the libelant and the respondent. The respondent has not carried out the obligations resting on it under and pursuant to the aforesaid agreement between it and the libelant, but in violation of the terms of the aforesaid agreement the respondent, during the time that it was furnishing cargoes to the steamships, which the libelant furnished under the aforesaid agreement, itself established and operated a line of steamships for trade between the Pacific Coast and Asiatic ports; during the same period, and in violation of the terms of the aforesaid agreement between it and the libelant, the respondent wrongfully and improperly sent an agent to Asiatic ports, where the libelant's steamships had previously obtained cargoes, and there issued circulars to shippers of trans-Pacific freight and otherwise advised the public that the traffic agreement between the libelant and the respondent would be withdrawn early in the spring of 1901, and that the libelant could not furnish through bills of lading for cargo from Asiatic ports to points in the Eastern States of the United States; and generally in violation of the terms of the said agreement between it and the libelant, the respondent took measures and performed acts with the intent, on its part, and the natural and probable consequences of which were to deprive the libelant of the benefits accruing to him under and by virtue of the aforesaid agreement between him and the respondent. During the period covered by the aforesaid agreement between the libelant and

the respondent, and throughout the period since October 1, 1900, the respondent had cargoes at Portland, Oregon, for Asiatic ports, and these cargoes were sent forward by steamers chartered, or operated by the respondent, or by a subsidiary company, or corporation, acting in agreement with the respondent or as its representatives and agents, and these cargoes were not furnished to nor sent forward on the libelant's vessels. During the same period there were cargoes at Asiatic ports that could have been obtained by the libelant for transportation on his vessels to Portland, Oregon, and thence to points in the Eastern States of the United States, under the terms and conditions of the aforesaid agreement with the respondent, and these cargoes could have been carried by the libelant on his vessels with profit, but the libelant was prevented from obtaining the cargoes, or issuing through bills of lading therefor, as had been agreed, by the acts of the respondent and its servants and agents hereinbefore referred to, and by the refusal of the respondent to perform its part of the agreement between it and the libelant of October 1, 1900.

SEVENTH.—By reason of the premises the respondent has become liable to pay to the libelant the damages resulting to him by reason of the failure of the respondent to carry out the terms of the aforesaid agreement between the libelant and the respondent. These damages, so far as they can reasonably be measured and ascertained, amount to the sum of \$683,931.00, and consist of expenses incurred in the establishment, equipment, maintenance and operation of the said steamship line; in the charter hire paid by the libelant to the owners of the said steamships; in the liability incurred by the libelant to the owners of the said vessels, by reason of the charter parties necessarily and reasonably made by the libelant of vessels for the purpose of carrying out the terms of the agreement between the libelant and the respondent; of expenses incurred in refitting and altering the said steamships so as properly to carry out the purposes of the said agreement between the libelant and the respondent; the expenses incurred in repairing and improving docking facilities in Asiatic ports which were necessary, reasonable and proper for the carrying out of the purposes of the aforesaid agreement between the libelant and the respondent, and of the reasonable profits that directly and proximately would have accrued to the libelant if the respondent had carried out on his part the duties and obligations resting on it under and by virtue of the aforesaid agreement between it and the libelant.

EIGHTH.—Subsequently to the 9th day of March, 1901, and after the receipt by the libelant of the above-mentioned notice from the respondent that thirty days from that date the respondent would decline to carry out the terms of the agreement between it and the libelant, the libelant sought to arbitrate with the respondent in Oregon, and subsequently in the City of New York, where the libelant had been referred by the duly constituted agent and representative of the respondent in Oregon, the difference in dispute that had arisen between the libelant and the respondent as to whether or not the respondent had the right to refuse to carry out its part of the aforesaid agreement. The respondent at New York, by its duly authorized agent and representative, requested the libelant to submit to the respondent his papers relating to his claim, and thereafter the libelant did deliver to the respondent's agent and representative at New York certain papers relating to the libelant's claim against the respondent, including the aforesaid written notice from the respondent to the libelant of March 9, 1901. Subsequently thereto the respondent wholly refused and declined to arbitrate the matters in dispute between it and the libelant, and although duly required and requested by the libelant to return to him all the papers he had submitted to it, has wrongfully and improperly refused and failed to do so.

NINTH.—All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court."

The agreement mentioned was as follows.

"APPENDIX A.

MEMORANDUM OF AGREEMENT made and entered into at Portland, Oregon, United States of America, this first (1st) day of October, 1900, between the

Oregon Railroad & Navigation Company, first party, and R. A. Graham, second party.

That whereas, the second party desires to establish a line of steamships between Hong Kong and the ports of China and Japan, and the City of Portland, Oregon, United States of America, said steamships to be suitable for the intended trade between the ports of China and Japan, and other Asiatic ports, and points in the United States of America and Canada and Europe; and

Whereas, the first party is engaged in operating a railroad in the northern portion of the United States of America, and is desirous of forming an alliance for the purpose of controlling passenger and freight traffic and other business between the above-mentioned points,

Now, therefore, it is hereby mutually covenanted and agreed between the parties hereto as follows:

1. ESTABLISHMENT OF STEAMSHIP LINE.

(A.) The second party shall procure, establish, and commence to run a monthly line of steamships between Hong Kong and the ports of China and Japan and the port of Portland, Oregon, within one month from the date hereof. Said steamships shall be capable of carrying four thousand (4,000) tons of measurement cargo.

(B.) The second party shall have the right, should there be insufficient traffic offering during the slack season (January to April, inclusive), to run one steamship every two months in place of monthly.

(C.) If the traffic offered shall increase so that it is practicable to run more steamers than provided for by this agreement, either by shortening schedule time or running extra steamers, the second party shall supply them.

(D.) The second party shall have the right, should it be deemed advisable or become expedient in order to meet competition, to call at Honolulu in Victoria, B. C., on the voyage to and from Portland, Oregon, and also to send its steamships on to San Francisco after leaving Portland on the inward voyage, returning to Portland before leaving upon the outward trip.

2. DIVISION OF THROUGH RATES ON OVERLAND CARGO.

(A.) The through rate by steamship and rail shall be divided equally between the parties hereto, provided that:

(B.) The first party shall receive a minimum of seventy-five (75) cents per hundred (100) pounds to and from points east of Chicago, which are ordinarily termed Eastern Common points and which include in the main: New York, Troy, Albany, Schenectady, Buffalo (New York); Boston, Fitchburg, Gloucester, Lawrence, Salem, Springfield, Worcester (Mass); Hartford, New Haven (Conn.); Baltimore (Md.); Philadelphia, Harrisburg, Pittsburgh (Penn.); Cleveland, Cincinnati, Toledo (Ohio); Indianapolis (Ind.); Detroit, Port Huron (Mich.); Paterson (N. J.); Concord, Manchester, Nashua (N. H.); Providence (R. I.); New Orleans (La.); Memphis (Tenn.); Toronto, Brockville, Kingston, Ottawa, Cornwall, Hamilton, London, Prescott (Ontario); Montreal, Quebec (Que.).

(C.) The first party shall receive a minimum of fifty (50) cents per hundred (100) pounds to and from points ordinarily termed Western Common points, and which include in the main: Chicago (Ill.); Minneapolis, St. Paul, Duluth (Minn.); Omaha (Neb.); Council Bluffs, Sioux City, Dubuque, Keokuk (Iowa); Leavenworth, Atchison (Kansas); Kansas City, St. Joseph, St. Louis (Mo.); Milwaukee (Wis.); Winnipeg (Man.).

(D.) Any reduction in the through rate from the above basis shall be borne by the second party until the minimum accruing to the steamships shall reach thirty-five (35) cents per hundred (100) pounds. Should it become necessary or advisable to accept through rates lower than on above basis, such lower rates shall first be agreed upon between the two parties hereto, and after deducting from the agreed through rate such arbitraries as are demanded by the connections of the first party, the balance of the through rate shall be pro-rated in the proportion of: to the first party fifty (50) cents, and to the second party thirty-five (35) cents.

(E.) Should it become necessary in order to meet the competition of the Canadian Pacific Railway and Steamship Line, or other competing lines in

the transportation of raw cotton or cotton piece goods (Domestics) destined to Asiatic ports, the first party is hereby authorized to reduce the minimum accruing to the second party to a basis of twenty-five (25) cents per hundred pounds to meet such competition.

(F.) On raw silk and silk piece goods and other valuable cargo requiring equal to passenger train service, there shall first be deducted from the through rate one dollar (\$1.00) per hundred pounds to be allowed the first party for such expedited service and the remainder of the through rate to be divided as provided in Article 2nd, and paragraphs A. and B.

3. TRAFFIC (CARGO AND PASSENGER) BETWEEN ASIATIC AND PACIFIC COAST PORTS.

(A.) All traffic between the Pacific Coast and Asiatic ports shall be for the sole benefit of the second party.

(B.) The second party wherever possible shall forward such cargo by the Railroad of the first party, or by the railroad or steamship lines controlled by the first party, at rates to be agreed on, which shall not exceed twenty-five (25) per cent. of the through rate per steamship freight list, and with a minimum to the first party or its connections of one dollar (\$1.00) gold per ton per steamship freight list.

(C.) The first party shall assist the second party in obtaining low rates between Portland and other Pacific Coast points on cargo handled at Portland to or from connecting lines.

(D.) On cargo from which the first party receives no benefit the second party will pay to the first party the actual cost of labor service at Portland, which shall not exceed twenty-five (25) cents per ton.

4. ASIATIC CARGO TO WESTERN LOCAL POINTS.

(A.) For cargo in not less than carload lots of 24,000 lbs. gross weight or tons measurement (25) of forty (40) cubic feet, from Asiatic ports to points on the line of the first party between Portland, and Omaha, the second party may issue through bills of lading at the current rate of freight on similar goods to parallel points on competing lines.

(B.) For cargo in less than carload lots to the local points above mentioned the second party shall not issue bills of lading beyond Portland and the first party shall have the right to charge thereon its local rate from Portland to destination.

5. AGENCIES.

(A.) The second party shall have the exclusive right to appoint agents in Asiatic ports, who shall be duly authorized to act as agents for both parties hereto and who shall have power to issue bills of lading and passenger tickets and to make and name rates on all traffic to points in the United States, Canada and Europe, subject to clauses two and five (2) and (5).

(B.) The second party shall have the right, should it be deemed advisable or necessary, to appoint, at its own expense, agents in Portland, Oregon, and/or Victoria, B. C., for the Management of the steamships at the port of call and to procure traffic from the Pacific Coast and for the purpose of assisting and advising the first party in all matters pertaining to the steamship service.

(C.) The second party shall have the right, should it be deemed advisable or necessary, to appoint an agent at its own expense, in New York, United States of America, whose duties shall be to assist in procuring traffic for the steamships of the second party and who shall be under the control of the first party as regards thereto.

(D.) The first party shall have the exclusive right, with the exception above (Paragraphs 'B' and 'C') to appoint agents in all points of the United States, Canada and Europe, and the second party hereby authorizes the first party and its appointed agents to act as agents for the second party and to issue bills of lading and passenger tickets and to make and name rates on all traffic for the Asiatic points served by the steamships of the second party, subject to clause two (2).

6. COMMISSION TO AGENTS AS REMUNERATION FOR PROCURING TRAFFIC.

The first party shall pay the agents of the second party a commission of five (5) per cent. on its earnings on all Asiatic traffic procured by them; and

the second party shall pay the first party for its agents a consideration of five (5) per cent. on its earnings on all traffic for Asiatic ports obtained by the agents of the first party.

7. TALLYING OF CARGO.

(A.) On arrival of the steamships at Portland, the cargo shall be carefully tallied out by the officers of the steamships in conjunction with the officials of the first party—all damaged packages shall be set aside and a full and correct list thereof made, and for claims on such damaged packages the second party shall and hereby agrees to be responsible. The first party shall give to the steamship a receipt for all cargo received at Portland and as regards cargo to be carried over the lines of the first party, the responsibility of the second party shall cease, on correct delivery at Portland.

(B.) On cargo destined for Asiatic ports and delivered to the steamships at Portland, a careful tally shall be kept by the officers of the steamship in conjunction with the officials of the first party. All damaged packages shall be set aside and a full and correct list thereof made—and for claims on such damaged packages the first party shall and hereby agrees to be responsible. The steamship officers shall give a receipt for all cargo taken on board at Portland which shall absolve the first party from all further responsibility.

8. QUICK DISPATCH OF VESSELS—COALS, &C.—RETURN CARGOES.

The first party agrees to do all it can to assist the second party in obtaining quick dispatch in discharging and loading its steamships at Portland to assist in making contracts for coal, provisions and labor required by its vessels; and authorize and permit its agents everywhere (saving as specified in clause 6, paragraphs 'B' and 'C') to actively solicit all and any traffic that may be required for the return voyages of the steamships to Japan and China.

9. WHARFAGE.

(A.) First party agrees to provide wharfage at Portland free of expense to the second party on all traffic passing over the railroads of the first party.

(B.) On the cargo to or from Portland locally and Asiatic points, the first party may make a charge to the shippers or consignees of twenty-five cents per ton per steamship's freight list.

10. COST OF ADVERTISING—TELEGRAPHING—STATIONERY.

The cost of stationery (printing forms, etc.) and of advertising and telegraphing in and from China and Japan shall be the expense of the second party, and the cost for like services in and from the United States shall be borne by the first party, provided such advertising and telegraphing is done with its consent.

11. ACCOUNTS.

(A.) The first party shall render to the agent of the second party at Portland within two weeks after the departure of the steamship from Portland, or sooner if possible, an account showing the earnings of the steamship inwards and outwards on that voyage and the balance shall be paid at once by the party owing. Each round trip (inwards and outwards) shall be kept separate; accounts for passenger traffic shall be settled through the general office at Portland, as promptly as possible.

(B.) An account for commissions due to the agent of the parties hereto under clause 7, shall be made by the first party as promptly as practicable after the steamers' departure from Portland, and the same shall be paid at once by the party owing.

(C.) All accounts shall be rendered in triplicate.

12. ALLIANCE WITH OTHER LINES.

During the period of this agreement the second party shall not enter into an alliance with any other transcontinental railway company, and the first party shall not form an alliance with any other Asiatic steamship line to or from Portland.

13. DETENTION OF STEAMSHIPS.

Unavoidable delay arising from breakdown or loss of the steamships or from excessive bad weather shall not be deemed a breach of this contract.

14. TRANSFER OF CONTRACT.

Either party shall have authority to transfer this contract to another responsible firm or company with the consent of the other party.

15. DURATION OF AGREEMENT.

(A.) This agreement shall be binding on both parties for the term of three (3) years from the date hereof; but the second party shall have the option of withdrawing its steamships and of terminating this agreement at the end of the second year or at the end of each succeeding second year of the above period, provided the second party gives to the first party one year's notice in writing of its intention to withdraw his steamships and to terminate this agreement.

(B.) The first party may call for arbitration to determine its right to cancel contracts upon giving one year's notice of its desire to do so, provided that the line is not kept up to the standard that will permit of its being fairly worked in competition with other trans-Pacific lines.

16. INTERSTATE COMMERCE LAW.

Nothing in this agreement shall be permitted to conflict with the provisions of the Interstate Commerce Act, a law passed by the Government of the United States. It is, therefore, agreed and understood that this agreement shall be at all times subservient to the requirements of that law and shall be modified arbitrarily to conform with its provisions should it become necessary to do so.

17. SETTLEMENT BY ARBITRATION.

Any disputes arising out of the terms of this agreement shall be settled by arbitration. One arbitrator to be selected by each party and the two so selected to choose a third, the decision of a majority of the arbitrators to be final and conclusive by the parties hereto.

In witness whereof, these presents have been executed by the parties hereto."

The cause of action stated in the libel is based upon the breach of a contract alleged to have been made between the parties. This contract is referred to in the complaint at the end of the second paragraph, as follows:

"A statement of the terms of the aforesaid agreement between the libelant and the respondent is hereto annexed, marked 'Appendix A' and made a part of this libel."

In support of the jurisdiction, it is contended that the libel does not aver that Appendix A constitutes the entire agreement between the parties and, furthermore, that there is no conflict between the averments of the libel and the provisions of the contract, referred to in Exhibit A, the former being merely a fuller statement of the effect and import of what was embodied substantially and in general terms in the contract referred to.

There are a great many provisions in the contract which admittedly are not maritime but that is immaterial. If the contract is maritime, the admiralty will proceed to enquire into all its breaches, and all the damages suffered thereby, however peculiar they may be and whatever issue they may involve. *The Electron* (D. C.) 48 Fed. 689.

It is necessary, however, that the main contract should be maritime. An examination of the agreement as averred and contained in Exhibit A, shows it to be a traffic agreement which could as well have been made between two railroads in the pursuit of their ordinary business of furnishing transportation upon land, to which a carriage by water is often an incident but a minor one. Here the parties have described the arrangement desired by the railroad company an "alliance for the purpose of controlling passenger and freight traffic and other business"

between certain points and on the part of the libellant "to establish a line of steamships between Hong Kong and the ports of China and Japan and the City of Portland, Oregon" (fols. 65-67). The agreement there provides for a division of through rates, with an arrangement for a reduction of rates to meet competition, for the appointment of agents in Asiatic ports for both parties and for their own agents in particular places, and for the payment of the agents and other expenses of the enterprise, generally by the parties themselves, but all on land. Under the rule adverted to, *supra*, all these seem to be minor matters and the jurisdiction must be determined by a proper answer to the question, was the contract itself a maritime one, that is, the main contract, which provided for an arrangement between the parties for the establishment of a steamship line, in connection with the operation of a railroad. A somewhat similar question was passed upon in *The Yankee Blade*, *Vandewater v. Mills*, 19 How. 82, 15 L. Ed. 554, where the contract provided:

"This agreement, made this twenty-fourth day of September, 1853, at the city of New York, between Edward Mills, as agent for owners of steamship *Uncle Sam*, and William H. Brown, as agent for the owners of steamship *America*, witnesseth, that said Mills and Brown hereby agree with each other, as agents for the owners of said ships before named, to run the two ships in connection for one voyage, on terms as follows, viz.:

'Of all moneys received from passengers, and for freight contracted through, between New York and San Francisco, both ways, the *Uncle Sam* shall receive seventy-five per cent., and the *America* shall receive twenty-five per cent. The money to be received here, by said E. Mills, and the share of the *America* to be paid over to William H. Brown, or to his order (before the sailing of the ship,) and the share due the *America*, of moneys received on the Pacific side, to be paid over to said Brown, or to his order, immediately on the arrival of the passengers in New York, by E. Mills, who guaranties, as agent aforesaid, the true and honest return of all funds received by his agents on the Pacific. It is understood that this trip is to be made by the *Uncle Sam*, leaving San Francisco on or about the 15th of October, and the *America* leaving New York on or about the 20th of October next.

'Each ship is to pay all expenses of her running and outfits, and to be responsible for her own acts in every respect. Each ship is to retain all the money received for local freight or passengers; that is, for such freight and passengers as only pay to the ports the individual ship runs to, without any division with the other ship.

'No commissions are to be charged anywhere on any receipts for the *America*, by said Mills, in division, but the expense of advertising and the amount paid out for runners, at all points, are to be borne by each ship in the same proportion as receipts are divided between them.

'In consideration of all the above well and truly performed in good faith, Edward Mills, as agent for the steamship *Yankee Blade*, hereby agrees, that when the *America* arrives at Panama, on her voyage hence for the Pacific ocean, said ship *Yankee Blade* shall leave New York at such time as to connect with the *America*, conveying passengers and freight on the same terms as is hereinbefore agreed, (say 25 per cent. to the *Yankee Blade*, and 75 per cent. to the *America*.) Provided, only, that said connection shall be made at a time that will not prevent the *Yankee Blade* from making her connection with the *Uncle Sam*, at her regular time.'"

Mr. Justice Grier, in delivering the opinion of the court, said: (pages 91, 92, 19 How., 15 L. Ed. 554).

"Now, by this agreement, the libellant has not hired the *Yankee Blade*, or any portion of the vessel; nor have the master or owners of the ship covenanted to convey any merchandise for the libellant, nor has he agreed to

furnish them any. But the agent for the Yankee Blade 'agrees that when the America arrives at Panama, the Yankee Blade shall leave New York, conveying passengers and freight,' which were afterwards to be received by the America, and transported to San Francisco; the passage money and freight earned was to be divided between them—25 per cent. to the Yankee Blade, and 75 to the America.

This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common-law courts."

The libellant contends that The Yankee Blade is practically overruled by *Insurance Company v. Dunham*, 11 Wall. 1, 20 L. Ed. 90. The question there determined was that the admiralty courts had jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover for a loss. But The Yankee Blade is found cited, though not on the question of jurisdiction, in several recent cases, viz.: in 1892, in *The J. E. Rumbell*, 148 U. S. 1, 9, 13 Sup. Ct. 498, 37 L. Ed. 345; in 1896, in *The Glide*, 167 U. S. 606, 612, 17 Sup. Ct. 930, 42 L. Ed. 296; in 1897, in *The John G. Stevens*, 170 U. S. 113, 117, 18 Sup. Ct. 544, 42 L. Ed. 969, and evidently is regarded by the Supreme Court as authoritative. It seems to me to be binding upon the question of maritime jurisdiction of this court.

It is urged by the libellant that the libel contains the allegation "that the respondent should furnish cargoes to be carried by the vessels" which makes the case one of admiralty jurisdiction. The difficulty with the contention is, that, as shown above, the libel contains the averment that the contract, as found in Appendix A "is a statement of the terms of the agreement." That being alleged, and admitted by the exceptions, there is no room for an inconsistent allegation, which possibly might extend the libel to cover an admiralty cause of action. Reading the libel as a whole, it seems to allege that the contract relied upon is found in Appendix A. If that is not so, it should, if the facts permit, be differently alleged.

The exceptions must be sustained, but with leave to the libellant to amend within twenty days.

RICE v. STANDARD OIL CO.

(Circuit Court, D. New Jersey. January 6, 1905.)

1. MONOPOLIES—ACTION FOR VIOLATION OF ANTI-TRUST ACT—PLEADING.

Section 1 of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations," makes a distinction between a contract and a combination or conspiracy in restraint of trade, and a declaration in a suit based on section 7 (26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]) to recover damages resulting to plaintiff from a violation of such provision, which alleges in a single count that defendant entered into a "contract, combination, and conspiracy" in restraint of trade, is bad for duplicity.

2. SAME.

A declaration in an action brought under section 7 of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]) to recover damages for a violation of section 1 of the act, construed, and *held* bad for indefiniteness and uncertainty in describing the alleged combination and conspiracy entered into by defendant and the acts done which resulted in damage to plaintiff.

At Law. On motion to strike out declaration.

Charles W. Fuller and R. V. Lindabury, for the motion.

Charles E. Hendrickson, Jr., and John Griffin, opposed.

LANNING, District Judge. This matter comes before the court on a motion to strike out the plaintiff's declaration on the ground that it is irregular and defective, and so framed as to prejudice, embarrass, and delay a fair trial of the action. Such procedure is warranted by section 110 of the New Jersey practice act (P. L. 1903, p. 569). The cause of action set forth in the declaration is supposed to be created by section 7 of the Sherman anti-trust act, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]. That section is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

Amongst the things by the act declared to be unlawful are those mentioned in its first section (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which is as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It is apparent that mere proof that the defendant has entered into a contract or engaged in a combination or conspiracy in restraint of trade or commerce among the several states will not be sufficient to support a cause of action under the seventh section, for there must, in addition thereto, be proof that the plaintiff has, by reason thereof, sustained damage. In his declaration, therefore, the plaintiff must aver not only facts showing such a contract or combination or conspiracy as is declared by the act to be unlawful, but facts showing that by reason of such unlawful thing he has been injured in his business or property.

It is further apparent that the act makes a distinction between a contract and a combination or conspiracy. In his dissenting opinion in *Northern Securities Co. v. United States*, 193 U. S. 197, Mr. Justice Holmes, after quoting the words of the first section of the act, at page

403, 24 Sup. Ct. 436, page 469, 48 L. Ed. 679, said: "The words hit two classes of cases, and only two—contracts in restraint of trade, and combinations or conspiracies in restraint of trade." Each of these things the act condemns as an unlawful thing. They are not confused in the act, but are mentioned as distinct offenses. Good pleading, whether it be in an indictment in a criminal proceeding or in a declaration in a civil suit, requires the same distinction to be observed. If in a single count in an indictment the charge should be that the defendant entered into a contract, combination, and conspiracy in restraint of trade or commerce among the several states, it would be bad for duplicity. Compare *United States v. Cadwallader* (D. C.) 59 Fed. 677. So, in a declaration in a civil suit the confusion of the two condemned things in one count must likewise be irregular and defective for duplicity. In one count there may be a charge of an unlawful contract, and in another a charge of an unlawful combination or conspiracy, but the two unlawful things cannot be declared upon as synonymous terms and charged in a single count.

In the declaration now before me the plaintiff sets forth by way of inducement that from 1876 to 1904 he was a refiner of crude petroleum, and a manufacturer of the refined products of crude petroleum; was engaged in trade and commerce among the several states of the United States, selling his manufactured products refined by him from crude petroleum to the citizens of Mississippi and Louisiana, and a large number of other states specifically named, at prices profitable to him, and shipping the same to his customers in those states from his refinery at Marietta, Ohio, by certain common carriers, namely, the Cincinnati, Washington & Baltimore Railroad Company, and a large number of other railroad companies specifically named, and was lawfully entitled to ship and deliver his products to his customers over the railroads of these common carriers for a reasonable fee or reward to be paid by him or his customers to these common carriers; that More, Cox & Lee, of Columbus, Miss., and Richard M. Ong, of New Orleans, La., and 4,000 other persons in the various states named, became and were his customers of products shipped over the railroads of the common carriers specifically named, and that he had made contracts with his customers yielding him a profit of \$50,000 per year, which they would have continued except for the wrongful acts and misconduct of the defendant and its associates; that he was possessed of a plant, refinery, and business of the value of seven hundred and fifty thousand dollars; that on January 2, 1882, the individuals, firms, and corporations mentioned in a certain written contract annexed to the declaration, and forming part thereof, and marked "Schedule A," were engaged in lawful competition with the plaintiff and among themselves in the same line of business as that carried on by the plaintiff; that, in order that a combination of these individuals, firms, and corporations might be formed to put an end to competition and injure and destroy the plaintiff's business and the business of others engaged in the same line throughout the United States, and drive the plaintiff and others out of competition with them, and unlawfully secure for themselves the customers who theretofore had traded or might thereafter trade with the plaintiff and others, those individuals, firms, and corporations en-

tered into the above-mentioned contract; and that on January 4, 1882, they entered into a further written contract supplemental to the contract of January 2, 1882, which supplemental contract is also annexed to the declaration as a part thereof, and marked "Schedule B." The plaintiff then avers that in pursuance of these two contracts, and as a part of the scheme of the individuals, firms, and corporations mentioned in them, the defendant, on August 1, 1882, was incorporated under the laws of the state of New Jersey with a capital of \$3,000,000. under the name "Standard Oil Company of New Jersey"; that on June 14, 1899, the name of the company was changed to "Standard Oil Company," and its capital stock increased to \$110,000,000; and that the defendant, from the date of its said incorporation down to the time of the commencement of this suit, joined and co-operated with the several individuals, firms, and corporations mentioned in the two contracts in a general plan or scheme to destroy the plaintiff's business, to render his plant worthless, to secure for themselves his customers, and to destroy competition and create a monopoly "by the actings and doings and in manner and form as hereinafter stated."

The first series of averments concerning these "actings and doings," which, for convenience of reference, I have designated by numbers, is as follows:

"(1) On the 4th day of August, 1882, at Trenton, in said district, the defendant entered into and became a party to said two contracts aforesaid, which said contracts were and are in restraint of trade and commerce among the several states of the United States; and (2) likewise, to wit, on the day and year last aforesaid, at Trenton, aforesaid, entered into a combination in the form of a trust and conspiracy in restraint of trade and commerce among the several states of the United States with respect to business of the character of the plaintiff's aforesaid; and (3) pursuant to the true intent and purpose of said contracts, combination and conspiracy, together with the other persons, parties to said agreement, from the day and year last aforesaid, continuously, day by day, down to the day of the commencement of this suit, did, together with other persons, parties to said agreements hereto annexed as Schedules A and B, conspire with, coerce, intimidate, and induce the above-named common carriers (4) to discriminate against the plaintiff in the matter of freight or carriage charges, (5) and to charge the said plaintiff and his customers unreasonable, excessive, and exorbitant sums of money as fee or reward for the carriage and delivery of the plaintiff's products aforesaid to the customers of the plaintiff aforesaid, to wit, from fifty per cent. to three hundred and thirty-three per cent. more than reasonable fee or reward for such carriage and delivery, and to discriminate in favor of defendant and its associates aforesaid by charging said defendant and associates for like carriage and delivery unreasonably small sums, considerably less than proper charges as fees or rewards to be paid in that behalf by the said defendant and its associates aforesaid to the common carriers aforesaid, (6) and to charge the said plaintiff from fifty per cent. to three hundred and thirty-three per cent. more for freight or carriage charges for transporting the same amount of the plaintiff's refined oils the same distance to the same points and under the same conditions as charged the said defendant and its associates aforesaid; and (7) in many cases causing and compelling [grammatically, the language should evidently be "to cause and compel"] said common carriers to pay to said defendant and its associates aforesaid the excess of freight charges charged the plaintiff over and above the rate charged the defendant and associates aforesaid, or some part thereof, thereby taking from the plaintiff his money to enable said defendant to oppress and injure the plaintiff in other ways, and to enable the said defendant and its associates aforesaid to recoup the losses, or some part thereof, sustained by it and them by reason of its and their selling oil like the

plaintiff's at prices netting a loss for the purpose of destroying the plaintiff's market for his oils and the value of oil in the plaintiff's market as herein-after stated."

These averments, in my judgment, are bad for duplicity and uncertainty. The first clause relates exclusively to the two contracts, copies of which are annexed to the declaration. The second clause relates to what is called "a combination in the form of a trust and conspiracy." In the third clause it is averred that "pursuant to the true intent and purpose of said contracts, combination, and conspiracy" the defendant did certain things to the injury of the plaintiff. Here the pleader makes the two distinct offenses condemned by the act the basis of his complaint. This contravenes the rule which forbids duplicity in pleading. But the averments are also bad for indefiniteness and uncertainty. The third clause, particularly, is badly framed. It avers that the defendant, with other persons, did "conspire with, coerce, intimidate, and induce the above-named common carriers" to do the acts mentioned in the fourth, fifth, sixth, and seventh clauses. As the conspiracy, coercion, intimidation, and inducement are declared to have been pursuant to the true intent and purpose of the contracts, combination, and conspiracy mentioned in the first and second clauses, the fourth, fifth, sixth, and seventh clauses must be held to relate, not to an additional conspiracy, but to acts done to give effect to the contracts, combination, and conspiracy mentioned in the first and second clauses, and thus to injure the plaintiff in his business or property. When so read, we find that we have no information concerning the combination and conspiracy mentioned in the second clause, except that the combination is in the form of a trust, and that the combination and conspiracy are in restraint of trade. When they were formed, or how, or by whom, or for what purpose, is not stated. The defendant cannot be required to plead to averments that are so general and indefinite. The fourth clause is to the effect that one of the acts done was "to discriminate against the plaintiff in the matter of freight or carriage charges." This also is too general and indefinite to comply with the rules of good pleading. The fifth clause, which relates to alleged unreasonable freight rates charged against the plaintiff and his customers, is necessarily defective because of its connection with the preceding clauses. Whether it is further defective because it states none of the customers of the plaintiff against whom unreasonable charges were made, or because no facts are stated tending to show what would be reasonable rates, are questions that need not now be considered. The great difficulty, if not impossibility, of formulating a rule which shall govern in the matter of determining what are reasonable rates for transportation was commented on in *United States v. Freight Association*, 166 U. S., at pages 331 and 332, 17 Sup. Ct. 540, 41 L. Ed. 1007. Possibly, the sixth clause might stand if the clauses with which it is connected were not defective. The seventh clause is too indefinite, because it relates to "many cases" in which it is said that common carriers were compelled to pay to the defendant and its associates the excess of freight charges collected from the plaintiff, without the averment of any fact tending to show when, where, with whom, or in what circumstances any such case arose. The next averment in the declaration is as follows:

"And the said defendant and its associates aforesaid did also conspire with, cause and compel the railroads and other common carriers aforesaid and their employes to harass the plaintiff in his business by delaying to furnish cars and to promptly ship the plaintiff's oil sold by the plaintiff to his customers."

This averment deals with a conspiracy separate and distinct from that alleged in the preceding averments. There is no mention of any time when the alleged conspiracy was entered into, or when the alleged acts were done. The defendant's counsel have argued that it should be read in connection with the preceding averments, and that it must be understood to relate to the time which in the preceding averment is said to have been "from the day and year last aforesaid continuously, day by day, down to the day of the commencement of this suit." But the language employed will not permit such a reading. The same thing is true of each of the succeeding averments concerning alleged conspiracies. Other defects appear in the conspiracy averments. For example, it is said that the defendant conspired with the other persons, parties to the two agreements above mentioned, to cause the plaintiff's customers to cease purchasing his oil by furnishing oil like the plaintiff's product "to other dealers in localities where the plaintiff was selling oil to his customers at prices netting a loss to said defendant and its associates." But no dealer or locality is named where oil was thus supplied by the defendant, notwithstanding, if the averment be true, the plaintiff must have knowledge as to who the dealers were and as to the localities in which those dealers carried on their business. Another averment is that:

"The said defendant and its associates aforesaid also, in pursuance of said conspiracy, sought out and sold oil to the plaintiff's customers at prices less than cost, while keeping the price of oil to the defendant's and its said associates' customers in the same localities up to prices showing large net profits on sales, which facts were unknown to the customers of defendant and its associates aforesaid, thereby causing the plaintiff's customers to leave the plaintiff, and trade with the defendant and its associates aforesaid."

But the plaintiff fails to name any of his customers who were thus sought out or to whom oil was sold at prices less than cost. Another averment is that in further pursuance of the alleged conspiracy the defendant did "intimidate the customers of the plaintiff by threatening to boycott them in their business if they purchased oil of the plaintiff." But the plaintiff fails to name any of his customers who were thus intimidated. The next two averments are to the effect that the defendant and its associates "did also operate retail stores for the sale of groceries, oil, and other commodities in localities where retailers banded together and agreed to purchase and did purchase oil of the plaintiff, for the purpose of injuring such retailers and customers of the plaintiff by destroying their grocery or other business so long as they should buy oil of the plaintiff," and that they also sold groceries and merchandise "to the customers of the plaintiff's customers at such ruinous prices as to threaten ruin and loss to the plaintiff's customers." But the plaintiff fails to name any of his customers who were thus affected. Another averment is that the defendant and its associates "bribed and bought out the plaintiff's sales agents, and caused the plaintiff's agents

and employes to betray the trust confided to them by the plaintiff in his said business, and to wrongfully abandon the plaintiff's service and disregard their duty to the plaintiff in the course of his business." But none of the plaintiff's agents thus alleged to have been bribed or to have betrayed their trust is named. The next averment is that the "defendant and its associates intimidated merchants and others engaged in the business of selling oil in various markets, and thus prevented such merchants and others from purchasing and dealing in oil manufactured by the plaintiff." The plaintiff has failed to name any merchant or other person thus intimidated, or what the acts of intimidation were, or any of the markets in which such practice was carried on. The last averment is that the defendant and its associates "hampered the plaintiff in getting the necessary supplies of crude oil, and made the said crude oil more expensive to the plaintiff, and hampered, delayed, and made more expensive the work of the plaintiff in the construction of the pipe line for his use." But there is no averment as to the manner in which the defendant and its associates thus hampered, delayed, or injured the plaintiff.

It seems to me clear that the averments in the declaration are too vague to give to the defendant the information to which it is entitled before being required to plead. A declaration which was much less indefinite than the one before me was, in the case of *Minnuci v. Philadelphia & Reading R. R. Co.*, 68 N. J. Law, 432, 53 Atl. 229, declared to be one which would have been stricken out on motion for that purpose. The same thing was true of the declaration in the case of *Race v. Easton & Amboy R. R. Co.*, 62 N. J. Law, 536, 41 Atl. 710. See, also, *Ackerman v. Shelp*, 8 N. J. Law, 125; *Stephens & Condit Transp. Co. v. Central R. R. Co.*, 34 N. J. Law, 280.

In my opinion, the motion to strike out the declaration must be granted, and an order to that effect will be signed.

BROADWELL v. BANKS.

(Circuit Court, D. Missouri, S. W. D. January 10, 1905.)

No. 8.

1. LANDLORD AND TENANT—RENTS—DEVOLUTION AT LESSOR'S DEATH—CHARACTER AS REAL OR PERSONAL ESTATE.

In the absence of statute, rents which accrued during the lifetime of the lessor, or which have accrued at the time of his decease, are personal property, and pass to his personal representatives as assets of the estate, and not to his heirs at law or a legatee under his will; and, in the absence of any contrary statute or testamentary provision, the rents accruing after the lessor's death go to his heirs or devisees, and are not assets in the hands of his personal representative.

2. EXECUTORS AND ADMINISTRATORS—POWERS—ASSIGNMENT OF CLAIMS.

While at common law an administrator or executor may assign, sell, and transfer the choses in action of the estate, yet by statute in Ohio this power is taken away, except as to the sale of desperate claims, and bonds and stocks necessary to be sold to pay debts; and under that statute a purported transfer to the residuary legatee by the executor, on his

own motion, and before final settlement and distribution by the court of probate, of a claim for rentals accruing during testator's lifetime, when not within any of the statutory exceptions, is unauthorized, and confers on the transferee no right of action.

3. LAND—CHATTEL INTERESTS—WHAT LAW GOVERNS.

The *lex loci rei sitæ* governs chattel interests in land and real estate.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Property, § 3.]

4. CONTRACTS—WHAT LAW GOVERNS—LEASES OF REAL PROPERTY.

Where demised premises were located in Ohio, and the lessor and the lessee resided there at the time of the execution of the lease and at the time of their death, the contract of lease was an Ohio contract, and the right of a legatee and devisee of the lessor to sue an administrator of the lessee for rents was determinable by the law of Ohio.

5. LANDLORD AND TENANT—CHARACTER OF LESSEE'S ESTATE—DEVOLUTION ON ADMINISTRATOR—STATUTE MODIFICATIONS.

At common law an estate for years in lands, even though the term is for a longer period than the tenant's life, is personal property, and on the death of the tenant goes to his administrator and executor; but by a statute of Ohio personal leasehold estates renewable forever are made subject to the law of descents governing estates in fee, and therefore descend to the heirs at law of the lessee.

6. SAME—PERPETUAL TERMS—LIABILITY FOR RENT.

Where a lease, renewable forever, contained an express covenant on the part of the lessee to pay rentals during the term, the death of the lessee did not, under the Ohio statute, subjecting leasehold estates renewable forever to the law of descents and distributions governing estates in fee, convert the term into a life estate, and the lessor could pursue the estate of the deceased lessee for recovery of accruing rentals so long as there could be found assets of the estate subject thereto.

7. COVENANTS—BREACH—ACTIONS—SUITS BY ASSIGNEES.

At common law an assignee of the covenantee could not maintain an action of covenant, as privity of contract does not exist, and privity of estate alone is not sufficient to sustain the action. This rule was changed in England by St. 32 Henry VIII, c. 10, and in Ohio, while the statute of Henry VIII has not been adopted, yet the same object is accomplished by the Code of Civil Procedure, which authorizes suit by the party beneficially interested, and hence empowers the assignee of a covenant to sue in his own name.

8. SAME—COVENANTS RUNNING WITH LAND.

A covenant, on the part of a lessee in a lease renewable forever, to pay rent, runs with the land.

9. SAME—ASSIGNEES—DEVISEES OF LAND.

A devisee of land, subject to a perpetual lease, is an assignee of the lessor in respect to a covenant on the part of the lessee to pay rent, and as such may, under the Ohio Code of Civil Procedure, sue the lessee or his representatives for a breach of the covenant.

10. JUDGMENTS—RES JUDICATA—RES INTER ALIOS.

A judgment rendered in a suit by the assignee of the lessor against an assignee of the lessee, in order to enforce the lien given by the lease for the payment of rentals, is, as to the original lessee and his representatives, none of whom were parties to the suit in which the judgment was rendered, *res inter alios acta*, and inadmissible for any binding purpose in a suit by the assignee of the lessor against the original lessee to recover on the covenants of the lease.

11. COVENANTS—PAYMENT OF TAXES—ACTION BY ASSIGNEE.

A covenant on the part of the lessee in a perpetual lease to pay taxes is not a collateral covenant, but adheres to the enjoyment of the thing demised, and a devisee of the lessor may, under the Ohio Code of Civil Procedure, sue thereon in his own name.

12. SAME—BREACH.

A covenant on the part of the lessee to pay taxes is not one of indemnity, and the cause of action to recover the same accrues to the lessor or his assigns upon breach of the covenant, caused by the mere failure to pay the taxes.

13. SAME—REPRESENTATIVES OF COVENANTOR—LIABILITY.

The fact that covenants in a lease do not contain the words "assign or assigns," in reference to the obligations of the covenantor, does not make the lease any the less obligatory upon the heirs or administrator of the covenantor.

On Demurrer to Petition.

On the 2d day of March, 1867, Samuel J. Broadwell and wife made a lease of certain real estate in the city of Cincinnati, Ohio, to one William W. Dawson for a term of 99 years, renewable forever; the rentals payable at specified periods during each year. The lessor and the lessee were both citizens of Hamilton county, Ohio, at the time of the execution of said lease, and so resided there until their respective deaths. Said Samuel J. Broadwell died in July, 1893, testate, and the Union Savings Bank & Trust Company of said city was duly appointed and qualified as his executor. By the terms of his last will, and codicil thereto, he devised the leased premises to the plaintiff, his wife, together with all his personal property remaining after the payment of debts and certain legacies. The plaintiff, pursuant to the laws of said state, elected to take under the said will. Said William W. Dawson entered into possession of said premises under said lease, and so continued until his death, on the 16th day of February, 1893. Thereafter his heirs at law continued in possession of said premises until the 12th day of November, 1896. Upon his death one Joshua M. Dawson was appointed administrator of his estate by the probate court of said county of Hamilton, and qualified and acted as such. At the time of the decease of said William W. Dawson he was possessed of certain property in the county of Barton, state of Missouri; and on the 20th day of November, 1900, the defendant William R. Banks was by the probate court of said Barton county appointed administrator of the estate of said William W. Dawson in the state of Missouri, and said Banks duly qualified and is acting as such administrator. Said Joshua M. Dawson, as administrator, paid to the plaintiff \$2,140 upon account of rents and interest, and the said Joshua M. Dawson, as administrator, instituted proceedings in the probate court of said Hamilton county against the heirs at law of said William W. Dawson, and obtained an order of sale from said court to sell certain parcels of real estate belonging to said Joshua M. Dawson for the payment of the debts of the estate, and on the 11th day of November, 1896, said court confirmed the sale, which had been made by said Joshua M. Dawson, as such administrator, to one William W. Thomas, of said leasehold estate, who received in due form a deed therefor, and the said Thomas entered into possession thereof until the 1st day of April, 1902. Neither the said Thomas nor the heirs of said William W. Dawson having fully paid the rentals which accrued during said Thomas' tenure of the premises, the plaintiff, on the 14th day of February, 1901, brought suit in the superior court of Cincinnati, in said county of Hamilton, against said Thomas and others, to enforce the lien given by said lease to secure the payment of rentals reserved thereby, and under the proceedings had therein a receiver was appointed to collect and hold the rents, subject to the order of the court. On the 11th day of December, 1901, a decree was entered in said cause directing the appraisal and sale, at public auction, by the sheriff of said county, of said premises, at which sale the plaintiff became the purchaser of all the interest of said Thomas under said lease, on the 21st day of February, 1902, for the sum of \$333.34. The said contract of lease obligated the lessee to pay the taxes on the leasehold premises. The first count of the petition is to recover the balance of rentals which had accrued up to the time of the lessor's death. The second count is to recover rentals which had accrued from October,

1899, to April 1, 1902, which accrued after the death of the lessor and the lessee. The third count is predicated of the failure to pay the taxes assessed for the years 1899 and 1900. To this petition the defendant has demurred.

Thurman, Wray & Timmonds, for plaintiff.

Cole, Burnett & Williams, for defendant.

PHILIPS, District Judge (after stating the facts). In the first count of the petition the plaintiff seeks to recover of the defendant administrator the rentals which accrued and were unpaid at the death of the lessor. In the absence of any statutory provision to the contrary, it is elementary that the rents which accrued during the lifetime of the owner of the leased premises are personal property, and go to his personal representative as assets of the estate, and that, in the absence of any contrary statutory provision or testamentary direction, the rents of real estate which accrue after the death of the owner go to his heirs or devisees, and are not assets in the hands of his personal representative. It is equally elementary law, universally recognized in most of the states of the Union, that the rentals which had accrued at the time of the lessor's decease were choses in action of the testator's estate, and as such they passed on his death absolutely to his executor, and not to the heirs at law or to the legatee or beneficiary under the will. *Scruggs v. Scruggs* (C. C.) 105 Fed. 28, loc. cit. This is the law of the state of Ohio. "If rent has accrued [at the death of the lessor] it goes to the administrator or executor as personal estate." *Crawford v. Chapman*, 17 Ohio, 449.

The petition discloses the fact that letters testamentary were duly granted by the probate court of Hamilton county, Ohio, the domicile of the testator, on his estate. The cause of action, therefore, for the recovery of rentals due and unpaid at the time of the lessor's death, became, on the qualification of the executor, vested by operation of law in the executor, to the exclusion of the heir or legatee. This rule of law was evidently recognized by the pleader in drawing the petition, as he seeks to confer on the plaintiff a right of action by averring that on the 15th day of December, 1893, "the said savings bank assigned and transferred all of said overdue rents to this plaintiff upon account of the bequest made to her by said will as residuary legatee." There is no question but that at common law the administrator or executor may assign, sell, and transfer the choses in action of the estate held by him. *Woerner's American Law of Administrators*, § 331. But this common-law right in many of the American states has been taken away by statute, as in the state of Ohio. In *Jelke v. Goldsmith*, 52 Ohio St. 499, 40 N. E. 167, 49 Am. St. Rep. 730, the court said:

"The common law is in force in this state, except as modified by statute. At common law an executor or administrator has full power to sell and dispose of the estate without an order of court, when the sale is in good faith and for the purposes of the estate. * * * Under our statute an executor or administrator may sell the personal property of the estate at public sale without an order of court. Section 6076, Rev. St. By section 6074, the power of an executor or administrator to sell promissory notes,

claims, demands, rights of action, etc., belonging to the decedent at his death, is taken away, except as to sale of desperate claims, and bonds and stocks necessary to be sold to pay debts, as provided in sections 6077, 6080, Rev. St."

As the petition does not bring the alleged transfer of the claim for rentals within either of the exceptions, the act of the executor in transferring sua sponte this claim to the plaintiff was unauthorized and conferred no right of action on her. The petition disclosing the fact that there were debts owing by the estate, the executor held this asset in trust for the payment of such debts; and not until final settlement and an order of distribution by the court of probate pursuant to the testator's will did the executor have the authority to transfer this claim to the plaintiff as residuary legatee. It follows that the demurrer to this count of the petition must be sustained.

Second Count. This count is predicated of the rentals which accrued after the death of the lessor, and presents a more interesting question of law and procedure. The *lex loci rei sitæ* governs chattel interests in land and real estate property. *Tiedeman's Real Property*, § 873. As the demised premises are located in the state of Ohio, the domicile of the lessor and lessee at the time of the execution of the lease and at the time of their death, the contract of lease was essentially an Ohio contract, and the right of the plaintiff to maintain this action is determinable by the law of that state. *Story, Conflict of Laws*, § 424. "Nothing is better settled than that the law of the state where the real and immovable property is situated exclusively governs in respect to the rights of the parties and the modes of transfer and distribution." *Smith v. Smith*, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403. At common law an estate for years in lands is personal property, and on the death of the tenant goes to his administrator or executor. *Washburn on Real Property*, § 17. This is likewise true of terms for a longer period than the tenant's life. *Id.* §§ 60-310. But this rule of the common law was changed by the act of the Legislature of Ohio, adopted in 1839 (*Swan's St.* 1841, p. 289, § 1), which declared that:

"Permanent leasehold estates, renewable forever, shall be subject to the same law of descents and distributions as estates in fee are or may be subject to."

Therefore the estate of the lessee, Dawson, on his death, descended to his heirs at law as real estate. *Worthington v. Hewes*, 19 Ohio St. 66; *Northern Bank of Kentucky v. Roosa*, 13 Ohio, 335; *Taylor v. De Bus*, 31 Ohio St. 468. As the lease in question contains an express covenant on the part of the lessee to pay the specified rentals during the period of the term, the death of the lessee did not have the effect to convert the term into a life estate; and the lessor could pursue the estate of the deceased lessee for recovery of the accruing rentals so long as there could be found assets of the estate subject thereto. *Northern Bank of Kentucky v. Roosa*, *supra*. The question, then arises: can the plaintiff, as devisee under the will of the lessor, maintain this action? It is well settled that at common law the assignee of the covenantee cannot

maintain the action of covenant, for the reason that privity of contract does not exist, and privity of estate alone is not sufficient to sustain the action. To remedy this rule of the common law in England, Parliament enacted St. 32 Henry VIII, c. 10. In *Crawford v. Chapman*, 17 Ohio, 449, it was held that:

"The grantee of the reversioner cannot maintain the action of covenant in his own name against a lessee upon an express covenant in the lease for the payment of rent."

This for the reason, above stated, that the common-law rule forbade it, and the statute of 32 Henry VIII had not been adopted in the state of Ohio. But in *Masury v. Southworth*, 9 Ohio St. 340, the court held that:

"An assignee of a reversion, having also assigned to him by the terms of his contract of conveyance the benefit of the covenants in a lease, may bring an action in his own name for a breach of such covenants, as the party beneficially interested, under the Code of Civil Procedure, which in this respect supplies St. 32 Henry VIII, c. 34."

The court observed in this case that:

"It has been decided by this court that St. 32 Hen. VIII, c. 34, is not in force in this state, and that an assignee of the reversion cannot maintain an action upon the covenants in the lease. But if the covenant be assignable in equity, so that an action might have been maintained in the name of the assignor, or relief obtained by suit in equity, our Code of Civil Procedure operates upon the remedy even more extensively than St. 32 Hen. VIII, c. 34. For whether the covenant be collateral, or inhere in the land, if it be assigned, the assignee not only may, but, as the party beneficially interested, must, sue in his own name. For example, if there be a contract by a lessee to build a house or a wall upon the land at any time, and whether to be used by the lessee or not, the lessor, in selling the reversion, may also assign the benefit of such a contract, and the action of the assignee for a breach would, under the Code, be in his own name."

The covenant to pay rent in this case is one that adheres to and runs with the land. Some confusion, it is to be conceded, arises touching this question by reason of a recurrence to the ruling in *Crawford v. Chapman*, *supra*, in the later cases of *Sutliff v. Atwood*, 15 Ohio St. 192, and in the case of *Taylor v. De Bus*, 31 Ohio St. 473. But it is quite evident to my mind that the statement made in the later cases was rather *arguendo*, in discussing the common-law rule, without any purpose whatever, in the mind of the writer of the opinion, to disregard, much less to overrule, the express ruling in *Masury v. Southworth*, *supra*.

The plaintiff, as devisee and legatee under the will, is an assignee within the meaning of the law. "A will," says Tiedeman, § 872, "is an instrument of conveyance by which the testator undertakes to direct the disposition of his property after his death." Such disposition of real estate, known as a "devise" at common law, is "considered not so much in the nature of a testament as a conveyance by way of appointment of particular lands to a particular devisee." 13 Am. & Eng. Enc. Law, p. 9, § 1. The plaintiff's legal status, as respects this action, is as much that of an assignee as if the lessor in his lifetime had assigned to her the reversionary interest in the land by deed of conveyance. An assign, or assignee,

"comprehends all those who take immediately or remotely from or under an assignor, whether by conveyance, devise, descent, or act of the law." *Anderson's Law Dict.*; *Brown v. Crookston Agr. Ass'n*, 34 Minn. 547, 26 N. W. 907; *Baily v. De Crispigny*, L. R. 4 Q. B. 186. It results that the demurrer to the second count must be overruled.

Third Count. This count is for recovery of the amount of taxes alleged to have been assessed against the land for the years 1899 and 1900, which were suffered to become delinquent and remain unpaid. The petition alleges that the premises were sold under proceedings by the tax collector for the collection of said taxes, and that one Wilsie bought the same in at said sale for the amount of the taxes and penalties, amounting to the sum of \$483.58. The petition then sets out certain judicial proceedings had in the superior court of Cincinnati, Hamilton county, Ohio, wherein she was complainant and said W. W. Thomas and said Wilsie and others were defendants; the purpose of which seems to have been to have determined the validity or invalidity of said tax sale, and the existence or nonexistence of any lien against said land on account of said tax sale, in which proceeding it was adjudged that said tax sale was irregular and voidable; but the court declared in favor of said Wilsie a lien on the premises for the amount paid by him at said tax sale, and directed the enforcement thereof within a specified time, unless the plaintiff therein should pay the amount so found to be equitably due to said Wilsie. It does not appear from the petition that the plaintiff paid said amount in conformity to said judgment. In respect of this proceeding and the judgment therein, it is sufficient to say that they were clearly *res inter alios acta*, to which the defendant herein or any legal representative of the estate of William Dawson was not a party, and therefore said judgment is inadmissible for any binding purpose in this litigation. Outside of the allegation respecting said judgment, the cause of action in this count is distinctively for a breach of the alleged covenant on the part of the lessee, William Dawson, to keep the taxes paid during the term. As the plaintiff acquired by purchase the interest of said Thomas in said term, she cannot maintain the action for breach of covenant committed by her assignor; and her right of action depends alone upon her attitude as devisee and legatee under the will of the lessor, conveying to her the reversionary interest in the land. As the covenant to pay these taxes was not collateral, but adhered to the enjoyment of the freehold estate granted by the demise, the case comes clearly within the principle of the ruling in *Masury v. Southworth*, *supra*, and is controlled thereby. And as the covenant to pay the taxes is not one of indemnity, the cause of action to recover the same accrued to the covenantee or his assigns upon the breach of the covenant caused by the failure to pay the taxes, without more. *Ham v. Hill*, 29 Mo. 275; *Rowsey v. Lynch*, 61 Mo. 560; *Fontaine v. Lumber Co.*, 109 Mo. 59, 18 S. W. 1147, 32 Am. St. Rep. 648; *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752; *Wilson v. Stilwell*, 9 Ohio St. 467, 75 Am. Dec. 477; *Martin v. Bolenbaugh*, 42 Ohio St. 508.

In respect of the contention of defendant's counsel that the covenants in the deed of lease do not contain the words "assign" or "assigns," so as to make it obligatory upon the heirs or administrator of the covenantor, it is sufficient to say that this objection is also answered by the discussion and ruling of the Ohio court in *Masury v. Southworth*, supra.

The demurrer to the third count is overruled.

In re ALPHIN & LAKE COTTON CO.

(District Court, E. D. Arkansas, W. D. January 23, 1905.)

1. **BANKRUPTCY—PROPERTY BELONGING TO BANKRUPT—RECOVERY BY TRUSTEE—NATURE OF PROCEEDING.**

A proceeding by a bankrupt's trustee to recover assets alleged to belong to the bankrupt from a third person is not criminal in its nature because the person proceeded against may be punished for contempt in case he fails to comply with the court's order, and hence the trustee is only bound to establish defendant's possession of assets belonging to the bankrupt by evidence plain and convincing beyond reasonable controversy.

2. **SAME—BURDEN OF PROOF.**

Where, in a suit by a bankrupt's trustee to recover assets alleged to belong to the bankrupt, the fund is traced into the hands of the defendant, the burden is on him to make some reasonable explanation of its disposition in order to avoid a decree for the surrender thereof.

3. **SAME—EVIDENCE.**

In a proceeding by the trustee of a bankrupt corporation, organized by defendant for the furtherance of fraudulent cotton transactions, to charge the latter with funds received by him and alleged to belong to the corporation, evidence held to require a finding in favor of the trustee.

In Bankruptcy.

See 131 Fed. 824.

John M. Moore and W. B. Smith, for trustee.

Campbell & Stevenson, Smead & Powell, and W. D. Chew, for E. H. Lake.

TRIEBER, District Judge. In January, 1903, the above-named corporation, which, for convenience, will be referred to as the "Cotton Company," was adjudicated a bankrupt in this court. After the examination of E. H. Lake, who was the practical owner and in absolute control of the entire management of the cotton company, the trustee in bankruptcy of the cotton company filed a petition, duly verified, charging that the said Lake and Alphin, another of the officers of the corporation, had large sums of money and other property of the assets of the bankrupt corporation, amounting to over \$250,000, in their possession or under their control, and asking that they be required to turn it over to the trustee. After due notice, testimony was taken before the referee in bankruptcy, to whom the cause had been referred, and he made findings that J. S. Alphin had no moneys or property in his possession or under his control, but that E. H. Lake, the respondent herein, had large sums of money, amounting to over \$100,000, in his possession or

under his control, belonging to the bankrupt corporation, which he should be required to pay over. No exceptions were taken to the findings made by the referee in favor of Alphin, but a petition for review by this court was filed on behalf of Lake. At the hearing on the petition for review before the court objections to the admission of the testimony of one Smith, which had been made before the referee, but by him overruled, were sustained by the court, and leave was granted to the trustee to retake the testimony thus excluded (a report of which will be found in 131 Fed. 824), which was done, and by consent of parties the entire cause, instead of being rereferred to the referee, was brought before the court for final determination. The testimony is very voluminous, and shows a remarkable state of affairs. It seems that the cotton company was organized as a corporation the first part of September, 1902, although it commenced doing business on the 26th day of August, 1902, succeeding the same business theretofore carried on by E. H. Lake. The failure of the cotton company, which resulted in the bankruptcy proceedings, took place in January, 1903. The liabilities, without counting some small debts, amount to \$381,636.93, the nominal assets to \$23,910.66, and the real assets to less than \$500. The corporation existed less than five months, and during that time handled nearly \$2,000,000 in money. No books were kept, except memoranda, drafts drawn on them, and stubs of the check-books; and these were incomplete, as large sums of money were drawn on checks not in the regular checkbook and by drafts on the Bank of El Dorado, Ark., of which no account was kept by the cotton company. In order to ascertain the transactions of the corporation it was necessary to have expert accountants construct a set of books from these memoranda, and the accounts of the corporation as they appear on the books of the different banks with which it did business during that time, and the copies of bills of lading issued by the railroad company for shipments of cotton. The trustee and Lake each employed a different accountant for the purpose of constructing a new set of books, and, as is usual in all cases when there are two or more accountants employed on different sides of the case, each reached a different conclusion. As each of the accountants was examined, and thus given an opportunity to explain how he reached his conclusions, the court has been able, after a thorough examination of their accounts and their testimony and the testimony of other witnesses, to reach a conclusion which, if not absolutely correct, will do substantial justice, and in no event do any injustice to the respondent, as all doubts have been resolved in his favor.

The liabilities of the cotton company about which there is no dispute are \$381,636.93. How this large indebtedness could have been incurred within so short a time seems incredible but for the fact that the evidence conclusively establishes that the entire business was conceived in fraud, and was carried on for no other purpose. At the time of the organization respondent owed over \$118,000 to banks in Little Rock, secured by fraudulent warehouse receipts for cotton which he did not own, and which had no existence,

and this debt was paid off by the cotton company. Most of the cotton seems to have been purchased in El Dorado, Ark., where the respondent Lake and one Smith, cashier of the bank at El Dorado, owned a cotton compress built with the money furnished by the cotton company. Drafts would be drawn by Lake on the bank at El Dorado, not only for business purposes, but also for every other purpose requiring money, including his individual expenses, and for any other purpose that he might want it. The cashier of the bank at El Dorado would draw on the corporation, and in most instances specify that these drafts were for cotton purchased, attaching thereto warehouse receipts issued by the compress company. Upon depositing these warehouse receipts with the banks in Little Rock as security, they would advance him the money to pay these drafts. The warehouse receipts for about 8,000 bales of cotton thus issued by the compress company and hypothecated with the banks in Little Rock during that season were fraudulent, and represented no cotton whatever. These warehouse receipts would be delivered to the railroad companies as cotton on hand in the compress, and the agents of the railroad company would issue to Lake bills of lading therefor, which bills of lading would be attached to drafts drawn on mills in the East to whom cotton had been sold by the cotton company, and these would be deposited in the bank at Little Rock as credits. As the warehouse receipts represented no actual cotton, but were fraudulently issued, of course no cotton was actually delivered.

The questions of law which will govern the court in determining the facts are well settled. On behalf of the respondent it is urged that, to warrant a finding against respondent, the evidence must be beyond a reasonable doubt; that in view of the fact that, if an order is made requiring the respondent to pay over money, and he fails to comply with it, he will be imprisoned for contempt of court, it is urged that the proceeding must be treated as a criminal proceeding, and be governed by the same rules. This court cannot assent to this proposition. If the fact that a failure to comply with the order of the court may result in imprisonment of the respondent for contempt makes it a criminal case, many proceedings, and especially proceedings in courts of equity, would have to be treated as criminal proceedings. The failure on the part of a defendant to execute a conveyance decreed by a court of equity in a proceeding for specific performance may be enforced by imprisonment as for contempt. Refusal to answer interrogatories in a bill of discovery, refusal to pay alimony in a divorce suit, disobedience to a writ of mandamus, or violation of an injunction may result in such punishment; but no one will contend that for this reason such proceedings are in the nature of criminal actions. The punishment for contempt in bankruptcy proceedings is simply for disobedience of the judgment of the court after it is found that the respondent has money or property belonging to the bankrupt estate in his possession or under his control, and, although able to comply with the order of the court, willfully refuses to do so. These provisions in the bankruptcy act, authorizing courts of bankruptcy to enforce

obedience to their orders by punishment as for contempt are neither novel nor unusual. They were included in every bankruptcy act, and similar provisions have been enacted by almost every state in the Union, including the state of Arkansas. In proceedings supplemental to or in aid of executions courts are authorized by these statutes to enforce the surrender of assets subject to execution, and for this purpose may commit to jail any person refusing to comply with such order. In this state section 3312, Kirby's Dig. St. Ark., contains such a provision. And by sections 61 and 62, Kirby's Dig., probate courts are authorized to enforce their orders for the surrender of property belonging to the estate of a deceased person by attachment. These statutes have been uniformly sustained as civil proceedings. Without citing the numerous decisions to that effect, it is sufficient to refer to the decisions of those courts whose judgments are binding on this court. *Ex parte Boyd*, 105 U. S. 647, 26 L. Ed. 1200; *Schweer v. Brown*, 130 Fed. 328 (Cir. Ct. App., 8th Circuit); *Welsh v. Lloyd*, 5 Ark. 367; *Senter v. Mitchell* (C. C.) 16 Fed. 206—the latter decided by this court, Judge Caldwell delivering the opinion. The true rule to govern courts in proceedings of this kind is that laid down by Judge Sanborn in *Thallmann v. Thomas*, 111 Fed. 277, 49 C. C. A. 317, in relation to reformation of instruments, that the relief will not be granted for mistakes "unless the mistakes are established by evidence that is plain and convincing beyond a reasonable controversy." So in the case at bar, if the court is satisfied from the evidence which is "plain and convincing beyond a reasonable controversy" that the respondent, as the managing officer of the cotton company, has in his possession or under his control moneys belonging to the bankrupt estate, it is its duty to require him to pay it over to the trustee, and, if he fails or refuses to do so, to punish him as for any other contempt. The evidence in this case is, to the mind of this court, conclusive that there are large sums of money belonging to the estate which came to the hands of the respondent, and which have not been accounted for. If the money is once traced into the hands of a respondent, the burden is upon him to make some reasonable explanation of what became of it, or at least that it has ceased to be in his possession or under his control at the time the order to turn it over is made. *In re Schlesinger* (D. C.) 97 Fed. 930, affirmed in 102 Fed. 117, 42 C. C. A. 207; *In re Finkelstein* (D. C.) 101 Fed. 418; *In re Meyers* (D. C.) 96 Fed. 408; *Ripon Knitting Works v. Schreiber* (D. C.) 101 Fed. 810. The opportunity of the respondent to make all necessary explanations was given to him in an examination had before the court, which was begun on January 28, 1903, immediately after the bankruptcy proceedings had been instituted, and within a very short time after these transactions had taken place. All the facts were then fresh in his memory, and his failure to make the necessary explanations showing what had become of the large sums of money which had been traced into his possession must be accepted as conclusive that he was either unwilling or unable to do so. When asked in relation to transactions involving thousands of dollars, which had taken place only a few weeks before the examination,

his stereotyped answer was, "I can't remember." The remarks of Judge Brown in *Re Schlesinger* (D. C.) 97 Fed. 930, are peculiarly applicable to the case at bar.

Guided by these rules, the court finds that he should be charged with the indebtedness of the concern, less such sums of money as may have been accounted for by some evidence. Taking the items which are charged as debits or appear as credits on the statements prepared by the two accountants, we find some conflict, but a careful examination of all the testimony induces the court to make the following findings as to the different items: The accountant for the trustee charges respondent with capital stock paid in \$11,538.05. Respondent's accountant makes no such charge. There were some memoranda which would indicate that there was some money paid in by respondent on the capital stock of the corporation, but, in view of the peculiar conditions surrounding this case, the court does not believe that there was ever one dollar of the capital stock paid in, and for this reason will not charge respondent with that sum. The credits to which he will be entitled are, first, old debts which had been contracted by the respondent when he was in the cotton business for himself, and before the corporation was formed. This amount is found by the accountant for the trustee to have been \$118,194.41, while, on the other hand, the accountant employed by the respondent makes that item \$156,708.53. While some of the items credited in the last-stated account are somewhat doubtful, yet the court, acting upon the principle that every doubt should be resolved in favor of the respondent, will adopt the latter amount, and credit respondent with that sum. This includes every item claimed by respondent or shown by the testimony of Smith, the cashier of the El Dorado bank, or found from any other source, to have been paid out on debts contracted prior to the organization of the cotton company. As to losses sustained during the short period of the existence of the cotton company, after careful examination of the testimony the court adopts the amounts found by the accountant for the trustee, \$79,108.30. That account includes all interest and exchange paid out, the salaries of all employés, and other expenses connected with the business, and also \$8,028.50 losses sustained in dealing in futures, and \$8,006.50 drawn by respondent for personal expenses in less than five months. Of the assets of the concern it appears that the sum of \$20,293.45 is due from the Union Compress Company, a corporation practically owned by respondent and the cashier of the El Dorado bank. There is evidence tending to show that some of the items charged to this account were not properly chargeable to the compress, but were really connected with the cotton business, but the court will treat the entire claim as one of the assets, and credit it accordingly. Another of the assets is an indebtedness due the cotton company from the Union Dry Goods Company, amounting to \$2,248.32. This was a concern which was practically owned by the respondent. It is hardly necessary to say that neither of these items is of any value; in fact, they are absolutely worthless. The other assets amount to \$1,368.89, of which one item of nearly \$800, amount due from a

bank, is shown to have been erroneous; but in view of the fact that the evidence on that subject is not convincing the court will permit that to stand. Thus we find the account to be as follows:

| | |
|--------------------------------------|--------------|
| Dr. | |
| To debts..... | \$381,636 93 |
| Cr. | |
| By old debts paid..... | \$156,708 53 |
| Losses in business..... | 79,108 30 |
| Compress | 20,293 45 |
| Dry Goods Company..... | 2,248 32 |
| Other assets..... | 1,368 89 |
| | 259,727 49 |
| Leaving the balance unaccounted..... | \$121,909 44 |

The only explanation of this deficiency that has been advanced is that the drafts for cotton drawn by the cashier of the El Dorado bank and clerks employed in buying cotton were paid by respondent in good faith, believing that the cotton was actually bought, when in fact no cotton was bought, and the warehouse receipts were fraudulently issued. If this is true, it would certainly relieve respondent of all liability in this proceeding. The mere fact that he was guilty of negligence in paying drafts for such large sums, without making any investigation whether the cotton was actually purchased, would not justify the court in finding that he had possession or control of this money. But do the facts warrant the court in adopting this explanation? The cotton company carried on its business at El Dorado, Ark., and the city of Little Rock, Ark. Respondent was most of the time in the city of Little Rock, where probably 40 per cent. of the cotton handled by the company was purchased, but visited quite frequently the town of El Dorado. As stated before, he was practically the owner of the compress company which issued those warehouse receipts. The town of El Dorado has about 3,000 inhabitants. Is it reasonable to suppose that respondent, when at El Dorado, spending there several days on some of the visits and a day or two on every visit, would not go to the compress for the purpose of examining it and making some examination of the cotton supposed to be on hand? A deficiency of nearly 8,000 bales would be apparent at once. That number of bales would cover at least an acre of ground. How, then, could he have helped notice, after having paid for so much cotton, that there was something wrong? But, if there were any doubt in the mind of the court on that subject, it would be removed by the fact that the same frauds had been perpetrated by respondent the preceding year, before the corporation had been organized as heretofore stated. That the cotton represented by the warehouse receipts carried by the banks of Little Rock for moneys loaned during the cotton season of 1901-02 was not in the warehouse at El Dorado certainly was known to respondent, for, if there was no cotton there when nearly 4,000 bales should have been, a man who visited the warehouse, as it is shown respondent did in the summer of 1902, could not help but notice it.

Taking all the circumstances surrounding this case into consideration, the court cannot avoid reaching the conclusion that respondent well knew that when these drafts were drawn on him and the warehouse receipts sent to him they were fraudulently issued, and did not represent actual cotton. The clerk who was in charge of the compress, and who drew some of the drafts, has disappeared, and cannot be found, although strong efforts have been made to find him, not only for the purpose of having him testify in this case, but also for the purpose of having him appear as a witness in criminal proceedings pending in this court against the respondent, arising out of these transactions. The cashier of the El Dorado bank has testified, but his testimony does not impress the court strongly. He admits that the books of the bank were not correctly kept, and do not show all the transactions between it and the cotton company. In addition to that, the respondent and Smith testify that respondent would draw at Little Rock for large sums of money on the Bank of El Dorado with which to pay personal expenses, many of the business expenses, and also freight bills on cotton received and shipped; that these drafts, when paid by the Bank of El Dorado, would be included in drafts that they would draw for cotton. In many instances, involving very large sums, no entries would be made on the books of the bank. The court has no doubt that for every draft thus drawn by the Bank of El Dorado the cotton warehouse receipts would be attached to it, in order to make it appear that the drafts were drawn in payment of cotton, instead of for moneys advanced to respondent, and thus enable him to secure the money to pay them from the banks, or bills of lading from the railroad company.

It also appears in evidence that on the 24th of December, 1902, a short time before the failure, and when respondent himself must have known that it was only a question of a short time before the railroad companies would discover that the bills of lading which they had issued for cotton had been fraudulently obtained from them, and which would result in an exposure of all the frauds, he visited El Dorado, and on that day the books of the bank show the cotton company was debited with cash \$11,845.17. There is no satisfactory explanation of that item. Respondent denies that he obtained that money. The cashier of the bank thinks that there were some drafts paid by him or remittances made for the cotton company amounting to that sum, and he is positive that no money was paid to respondent by the bank, but the evidence is anything but satisfactory. Another peculiar circumstance connected with this item is that the payment of this sum of money balanced the account of the cotton company with that bank. According to the books of the bank, the cotton company had on that day a credit of \$11,844.17, which would indicate that the payment of this item overdraw the account \$1, but immediately below there is an entry by which the cotton company is credited "by error" \$1, thus balancing the account to a cent. To review all the testimony would prolong this opinion unnecessarily.

There is only one other matter which the court thinks should be taken into consideration. Although there is no evidence to show that any of this money went to any other person or persons than the respondent, it is but reasonable to indulge in the presumption that those who aided him in these frauds, and without whose assistance he could not have perpetrated them, obtained some part of the fruits thereof. The fact that John Turrentine, the clerk of the compress, who issued these false warehouse receipts and drew many of the drafts on the cotton company, has disappeared, would indicate that he received some considerable part of the missing funds. The cashier of the bank at El Dorado, who manipulated everything at that place, who must have been cognizant of the fact that these warehouse receipts were fraudulent, if he did not himself cause them to be issued, who kept the account of the cotton company on the books of the bank in such manner that it is impossible to get a correct statement of the transactions between the cotton company and the bank, who was respondent's partner in the compress, probably insisted on a share of the moneys thus obtained, or appropriated a part thereof. For these reasons the court, although there is no direct testimony on the point, will assume that respondent, although in a plenary suit liable for the entire deficiency, has only one-half the money unaccounted for in his possession or under his control.

An order will be entered that the respondent pay into the registry of this court the sum of \$60,954.72, being one-half of the amount found by the court to be due from respondent, and, unless said sum of money is paid within 30 days, that he be committed to the Pulaski county jail until the further order of the court, or until discharged by due process of law.

SEIBEL v. PURCHASE.

(Circuit Court, D. New Jersey. December 17, 1904.)

1. VENDOR AND PURCHASER—CONTRACT FOR SALE OF REAL ESTATE—FAILURE OF VENDOR TO PERFORM—RECOVERY BY VENDEE OF CONSIDERATION PAID.

Where a vendee under an unexecuted contract for the sale of real estate has paid a part of the purchase money, and the vendor fails to complete his engagement, the vendee may disaffirm the contract and bring an action for money had and received.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 973, 982.]

2. SAME—AD DIEM PERFORMANCE—TIME—WHEN ESSENTIAL—DISAFFIRMANCE BY VENDEE.

When the vendor is in no default, but, on the contrary, is ready and willing to perform on his part, the vendee cannot recover the consideration paid. But the time fixed for performance by the vendor is deemed of the essence of the contract, so that, if he is not able to perform on that day, the vendee may elect to consider the contract at an end and sue.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 973, 981.]

3. SAME.

Where, therefore, defendant sold plaintiff an option for the purchase of certain real estate, which was to be exercised by a specified date, and contracted to procure a conveyance of the property to plaintiff on that date, free from incumbrance, and plaintiff made a payment down, and agreed to pay a further sum, together with the purchase price of the property, on the delivery of such conveyance, and it was afterwards discovered by the parties that there was a mortgage on the property, which was not due, and, on the day when the option expired, defendant surrendered the same, and took a new one from the owner of the property, by which it was to be conveyed subject to the mortgage, which was to be assumed by the grantee, as part of the purchase price, and such a conveyance was tendered to plaintiff and refused by him, *held*, that time was of the essence of the contract; that plaintiff was not bound to accept the conveyance offered, but, on the failure of defendant to obtain the conveyance stipulated for, on the day named, he was entitled to rescind the contract, and recover the amount paid thereon, in an action for money had and received.

4. SAME—NECESSITY OF TENDER OF PERFORMANCE.

Where one party to an executory contract has placed it out of his power to perform in accordance with its terms, a tender of performance by the other party is not necessary to entitle him to rescind, and recover a payment made thereon, when the time for performance by the other has expired.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1236.]

5. SAME—CONSTRUCTION—CONTINGENCY NOT PROVIDED FOR.

A provision in a contract that a partial payment made thereon shall be returned in a certain contingency does not preclude its recovery by the party making it, on the happening of another contingency, not provided for, which prevents performance of the contract by the other party.

Action on Contract. Trial to the court without a jury.

Harvey F. Carr, for plaintiff.

George A. Bourgeois and Eli H. Chandler, for defendant.

ARCHBALD, District Judge.* The material facts of the case are as follows:

(1) On May 4, 1901, the defendant, Selina A. Purchase, by agreement in writing, sold to the plaintiff, Henry J. Seibel, Jr., and he, on his part, agreed to purchase, for the sum of \$7,000, an option or right to buy two certain houses and lots at Atlantic City, N. J., for the price of \$40,000, which she had obtained from Mary B. Walton, the owner. This option was to be exercised by July 1, 1901, with the privilege of doing so, however, at any time during July, August, or September, provided no other purchaser was procured.

(2) On the date of the agreement with Mrs. Purchase, the plaintiff paid her \$2,000 down; the remaining \$5,000, by the terms of the agreement, being payable "at the time of settlement and upon the delivery to him of a deed in fee simple for said premises clear of all encumbrances whatsoever." As a further assurance, it was covenanted by Mrs. Purchase that there should be conveyed to Mr. Seibel on or before July 1, 1901, "a good and valid title in fee simple free of all encumbrances," provided he, on his part, should pay the purchase price stipulated for the property, and that, if Mrs. Walton should contest

*Specially assigned.

the validity of the option, "or refuse to make title to the property upon the tender of the consideration money," the \$2,000 which he had paid should be returned. It is for the recovery of this money that the present action is brought, for which the defendant not only denies any liability, but claims by way of set-off a judgment against the plaintiff for the \$5,000 additional which he was to pay.

(3) At the time of the agreement between the plaintiff and defendant with regard to the sale of the option, there was upon the property a mortgage of \$17,500, which had been given by Mrs. Walton, April 24, 1900, to the executors of Henry Gerstley, deceased, and which was made payable by its terms at the expiration of three years, with interest semiannually at the rate of 5 per cent. per annum. Upon a search of the title the plaintiff discovered this mortgage, and, as it was his purpose to improve the property by putting up an apartment house, and to obtain the money to do so by an advance-money mortgage upon it, the existing mortgage was a serious obstacle from his standpoint, to the completion of the purchase. To try and obviate the difficulty, he made to Mrs. Walton, through her attorney, Mr. Townsend, a tentative proposition that, subject to the Gerstley mortgage of \$17,500, she should take \$23,000 for the property, of which \$5,000 was to be paid in cash on or before July 1, 1901—the date to which the option was in the first instance limited—and the balance, \$18,000, on or before October 1st following, with certain adjustments as to interest, taxes, water rates, and insurance for the interim. On submission of this to Mrs. Walton, she signified that such an arrangement would be acceptable; but, so far as Mr. Seibel was concerned, the matter went no further. It will be noted that by it she would get \$40,500 for the property, or \$500 more than by the outstanding option with Mrs. Purchase.

(4) The same day, at an interview with Mrs. Purchase at the office of Mr. Seibel's attorneys, in Philadelphia, her attention was called to the existing incumbrance on the property, and the effort which had been made to overcome it; and it was stated that Mr. Seibel was ready to carry out the arrangement which had been submitted to Mrs. Walton, and of which she had expressed her approval, provided this would be satisfactory to Mrs. Purchase. Upon learning, however, that the \$5,000 which she was still to get from Mr. Seibel for the transfer of the option would have to wait until there was a final settlement, and a clear deed given for the premises, and could not be definitely secured to her meanwhile, she said she would think it over, and subsequently declined to accede to the proposition. The plaintiff thereupon notified her by letter of June 25th that he would hold her strictly to the terms of her contract; calling her attention to the fact that she had agreed to deliver the property on July 1st free and clear of incumbrances, although there was a mortgage of \$17,500 on it, which the mortgagees refused to satisfy, and stating that he was willing to cancel his contract with her on return of the \$2,000 which he had paid, or, if not, that he should protect his rights in whatever way was necessary, by arrangements with Mrs. Walton or otherwise. To this Mrs. Purchase replied by letter the same day that she would be ready to keep her part of the contract, and deliver the property free

of incumbrances at the time appointed, and should expect, in return, that he would adhere to his part.

(5) On June 29th, a few days later, the parties met again at the office of Mr. Townsend, in Atlantic City; Mr. Seibel being accompanied by his attorneys, and Mrs. Purchase by hers, and Mr. Townsend representing Mrs. Walton, who, though not present, was in communication with him in the building. After a general discussion of the situation, and the complication brought about by the existence of the \$17,500 mortgage, it was declared by Mrs. Purchase's attorney, while admitting that it could not be got out of the way, that Mrs. Purchase wanted her \$5,000 without regard to it, and would insist on its being paid or secured to her, or she would not permit Mrs. Walton to carry out the option. Thereupon Mr. Seibel, by his attorneys, tendered to Mr. Townsend, for Mrs. Walton, \$5,000, according to the proposition which he had made to her a few days before, but it was refused; Mrs. Purchase declaring that it should not be accepted unless she was secured, and Mr. Townsend, after communicating with his client, stating that her contract was with Mrs. Purchase, and she would not sell without her consent.

(6) As the result of this interview, Mrs. Purchase on July 1st, in order, as she conceived, to protect her interests, secured a new agreement from Mrs. Walton, upon the same terms which had been submitted to her by Mr. Seibel, and which she had said would be acceptable to her. By it Mrs. Walton covenanted to sell and convey the property in question to Mrs. Purchase, her heirs and assigns, for the price of \$40,500, payable, \$5,000 upon the signing of the agreement, and \$18,000, with interest, on October 1, 1901; the other \$17,500 being represented by the existing mortgage on the property, to which the sale was expressly made subject. All previous agreements between the parties, both verbally and written, were also, in express terms, made null and void. Mrs. Purchase made the \$5,000 down payment called for by this new agreement, and a deed was prepared and executed by Mrs. Walton, and left in her custody, to be delivered to Mr. Seibel in case he completed his part of the original agreement by October 1st. But in the end the property was sold to the United States government, and Mrs. Purchase lost it.

(7) On September 25, 1901, Mr. Seibel was formally notified in writing by Mrs. Purchase, through her attorney, that she would be ready on October 1st to carry out the terms of the contract between them, and would expect him to be so, also; stating in that connection that the \$17,500 mortgage on the property was due and payable on demand, and could be paid off at any time, and would be paid off by her on October 1st. The fact is that the mortgage referred to was not, by its terms, due and payable as asserted, and could not be paid off without the consent of the mortgagees, which there is no evidence that Mrs. Purchase ever obtained.

Discussion.

While the facts are fully reported in the foregoing findings, the rights of the parties to this litigation are to be determined, in my judgment, by the situation as it was on July 1, 1901. Not only was

that the day on which the property was to be conveyed to the plaintiff, but on it, in derogation of the existing relations with the plaintiff, the defendant, by a new and distinct agreement with Mrs. Walton, the owner of the property, annulled the original option, and took another and different one, by which all parties were thenceforth bound. By it the price was increased to \$40,500, and, as a part of it, the Gerstley mortgage of \$17,500, which was the main cause of the existing difficulty, was to be left as an incumbrance on the property, although the defendant had covenanted that it should be delivered clear and free. The plaintiff was thereby released from the obligation of his contract; the defendant not only having failed to perform her part of it, by having the property duly conveyed to him on the day named, but having precluded herself from doing so thereafter by the new arrangement which she had made. It may be possible, if the plaintiff had been prepared on or before October 1st to tender \$45,000 to Mrs. Purchase—\$40,000, the original price to Mrs. Walton, and \$5,000 for herself—that an adjustment could have been made, including the satisfaction of the \$17,500 mortgage, which there is some evidence that the mortgagees were ready to release if the unearned interest was paid them for the time it had yet to run. But as a matter of strict law, he was not called upon to do this, and it is by this that the case is to be judged. It was the original option that he agreed to take, and not a new one, with different terms and conditions, even though this corresponded with those which he had himself suggested; and it was to be consummated by July 1, 1901, according to his arrangement with Mrs. Purchase, and not three months later, although, as to Mrs. Walton, it may have held good, provisionally, that much longer.

Upon this showing the plaintiff, as it seems to me, is entitled to recover. It is unquestionably the law that where the vendee, under an unexecuted contract for the sale of real estate, has paid a part of the purchase money, and the vendor fails to complete his engagement, the vendee may disaffirm the contract and bring an action for money had and received. 1 Sugd. Vend. (8th Am. Ed.) 236; Feay v. Decamp, 15 Serg. & R. 227. It falls under the broad principle stated by Parker, C. J., in Griggs v. Austin, 3 Rick. 20, 15 Am. Dec. 175, that "where money is paid by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment, and the thing stipulated to be done is not performed, the money may be recovered back." It is true that where the vendor is in no default, but, on the contrary, is ready and willing to perform on his part, the vendee cannot recover. Battle v. Rochester City Bank, 5 Barb. 414. But the time fixed for performance is deemed of the essence of the contract, so that, if the vendor is not able to perform on that day, the vendee may elect to consider the contract at an end and sue. Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. Ed. 219; Cornish v. Rowley, 1 Wheat. Selw. 137. And that is the situation here. It was the positive undertaking of the defendant that the title should be conveyed to the plaintiff on July 1st, and that it should be free and clear, nothing of which was done or offered. This, under the authorities cited, constituted a clear breach of the contract, of which the plaintiff is entitled to take advantage without more. It is said that he made no tender so

as to put the defendant in default, and that, without this, non constat that she might not have been prepared to comply with her engagement upon the plaintiff's complying with his. But if she was, she should have shown it; and we know for a fact that she was not, of which the new arrangement entered into with Mrs. Walton is sufficient evidence, if there were nothing more. Without regard to this, however, the plaintiff not asking for performance, and the defendant being unquestionably in default for want of an ad diem compliance, a tender to complete the default was superfluous and unnecessary.

It is said, however, that the parties have undertaken to provide in the contract under what circumstances the \$2,000 should be refunded, and that the plaintiff is not entitled to go outside of this. "If Mary B. Walton," it declares, "shall contest the validity of the said lease [meaning the option] or refuse to make title to the said property upon the tender of the consideration money, the party of the first part [Mrs. Purchase] hereby agrees to return to the party of the second part [Mr. Seibel] the sum of two thousand dollars paid by him for this option." Neither of these contingencies, admittedly, happened. Mrs. Walton never refused to make title to the property, neither did she at any time contest the validity of the option, and, on the contrary, was apparently ready to carry it out according to its terms, or to modify it in the way proposed by the plaintiff in order to overcome the difficulty presented by the existing incumbrance upon the property. But this does not necessarily conclude the plaintiff here. The present situation is something entirely outside of and beyond anything which is so mentioned, and was evidently one which was not contemplated by the parties. It was the possibility of difficulty with Mrs. Walton that they had in mind, and not a default on the part of either of themselves, which was not anticipated, and therefore was not touched upon. Now that this has arisen, however, it is to be met and dealt with upon general principles, without regard to the provisions of the contract referred to which do not apply to it; nor is it to go unrelieved because the contract is silent upon the subject.

Judgment is therefore directed to be entered in favor of the plaintiff for \$2,000, with interest from July 1, 1901, amounting to the sum of \$2,416, and the defendant's claim of set-off is denied.

MOORE v. FIDELITY TRUST CO. et al.

(Circuit Court, E. D. Pennsylvania. January 31, 1905.)

No. 14.

1. FEDERAL COURTS—ACTION AGAINST EXECUTORS—ACCOUNTING—JURISDICTION.

Where the surviving partner of a firm is one of the executors of the estate of his deceased partner, the settlement of which is pending in the probate court of the state, a bill in equity will not lie in the federal Circuit Court to compel an accounting between such executors involving an accounting by the surviving partner of his deceased partner's interest in the firm, such proceeding being within the jurisdiction of the probate court.

2. SAME—DIVERSE CITIZENSHIP—INCIDENTAL RELIEF.

Complainant, a nonresident distributee of the estate of a deceased partner, the administration of which was pending in the probate court of the state of his decease, filed a bill in the federal Circuit Court to compel the executors of the deceased partner, one of whom was the surviving partner, to account, and prayed judgment directing an account between the two executors other than the surviving partner and such surviving partner, together with an accounting concerning the partnership affairs between such surviving partner and the estate. *Held*, that the accounting concerning the partnership affairs was the principal object of the bill, and, there being no diversity of citizenship between such executors, and no federal question involved, the court was without jurisdiction.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

In Equity. Motion to dismiss bill.

John M. Gardner and V. Gilpin Robinson, for complainant.
H. Gordon McCouch, for Fidelity Trust Co.

J. B. McPHERSON, District Judge. Andrew M. Moore, in his lifetime, and Joseph F. Sinnott were partners in the wholesale liquor business under the firm name of Moore & Sinnott. They were the successors in business of John Gibson's Son & Co., and sold, among other liquors, a whisky that had become well known as "Gibson" whisky. Moore died in 1898, a resident of Pennsylvania, and the bill avers that Sinnott has carried on the business since that time without accounting fully to the estate of his deceased partner. He himself is one of the executors, but there are two others who might compel him to account under the provisions of a statute of Pennsylvania passed in 1901 (P. L. 174), which provides:

"That where one of two or more executors, administrators, guardians, assignees or trustees shall be personally or individually indebted or obligated to the estate which he represents, it shall be lawful for the remaining executors, administrators, guardians, assignees, or trustees, or either of them, to institute an action at law, bill in equity, or other appropriate legal or equitable proceeding, on behalf of the said estate, against such executor, administrator, guardian, assignee or trustee, individually, to recover or enforce the said indebtedness or obligation, the same as if such executor, administrator, guardian, assignee or trustee were not connected with the said estate."

The bill is brought by a son and distributee under the will, residing in the state of New York, and avers that the other two executors have failed to require an accounting from Sinnott, although they have often been requested to bring the appropriate action. The principal subject of dispute seems to be the right of the surviving partner to use certain trade-marks and trade-names for his individual benefit, and the bill seeks to have that question determined, praying the court to direct an accounting between the two other executors and Sinnott as surviving partner concerning the partnership affairs, "and, as incidental thereto, to determine what, if any, assets, property, or rights, including said firm name and the right to do business under said firm name as 'successors to John Gibson's Son & Co.,' good will of said business, trade-marks owned and used by said firm, and other assets belonging to said firm of Moore & Sinnott that have not been, and are now, un-

disposed of, and that remain in common as the property of said firm, and that, in order thereto, a sale thereof and of the business of said firm be directed by a decree of this court, and the proceeds arising therefrom be credited to the account of said firm for application and distribution, according to the respective interests of said estate and the said Sinnott therein, and to the end that on the coming in of the report of such sale an accounting and settlement of the affairs of said firm may be had under the order of this court," etc. It is objected that such an accounting and sale would, in reality, be taking part in the administration of Moore's estate, and that a federal court has no jurisdiction to entertain such a bill, the relief prayed for being in the exclusive power of the orphans' court of Philadelphia county. This position, I think, must be sustained. It is true that ordinarily the orphans' court in Pennsylvania has no power to settle a partnership account (*Miller's Appeal*, 136 Pa. 349, 20 Atl. 565; *Weigley v. Coffman*, 144 Pa. 489, 22 Atl. 919, 27 Am. St. Rep. 667); but it does undertake that task where the surviving partner is the executor or administrator of his deceased associate. *Brown's Appeal*, 89 Pa. 139, where this was done, may perhaps be distinguished because of its peculiar facts; but in *Price's Estate*, 81 Pa. 263, the inquiry was made without dispute and as a matter of course. The executor had charged himself with the value of the testator's interest in a firm of which these two were members, and exceptions were filed to the accuracy of the amount. The auditor to whom the exceptions were referred—a distinguished member of the Philadelphia bar—reported, *inter alia*:

"An examination of the correctness of this credit involved an examination and settlement of the partnership books and accounts of Thomas J. Martin & Co., and a further investigation of the business carried on after Mr. Price's death."

His report was confirmed by the orphans' court, and on appeal the Supreme Court also assumed without question that the accounting was necessary:

"The executor was also the surviving partner of the testator. In his account he charged himself with the sum of \$2,662.89 as the value of the deceased partner's interest in the firm. The auditor surcharged him with the sum of \$2,242.09 as the real value of said interest. The contention upon this question protracted the audit very greatly, and involved a tedious examination of the books and the business of the firm."

In *Unruh's Estate*, 13 Phila. 337, the point was decided in an opinion delivered by Judge Ashman, who used this language:

"The accountant held the adversary position of surviving partner of the decedent and administrator of his estate. He charged himself in his account with the proceeds of the decedent's interest in the business, and claimed credit for the amount on the ground that the interest had not yet been settled. The books of the late firm were produced at the audit, and the value of the decedent's share in the partnership assets was assessed and fixed by the auditing judge. It was contended that this inquiry was not within the province of the orphans' court. The cases of *Price's Estate*, 81 Pa. 263, and *Brown's Appeal*, 36 Legal Int. 236, however, leave no doubt of the jurisdiction of that court where the surviving partner is executor or administrator of his deceased partner, and the reasons are given briefly in *Leland v. Newton*, 102 Mass. 350."

These reasons are as follows:

"When one of two partners dies the survivor should settle the estate and account to the personal representative of the deceased. But if the survivor himself becomes the personal representative of the deceased he becomes bound, as executor or administrator, to render an account of his proceedings to the judge of probate. That account necessarily involves the settlement of the partnership affairs. There is no need of any other legal process, because all persons interested in the estate have an opportunity to be heard in respect to the settlement. He has no right to have his account allowed without such hearing."

This position seems to me to be sound. The executor is bound to account for everything of value that belongs to the decedent's estate. Among these assets is the interest in the late partnership, and with the value of that interest the executor must charge himself, or he does not account fully for the property that has come into his hands. In order to charge himself, he must appraise the interest, and for this purpose he is better equipped than any one else can be. The charge being made, any interested person may challenge its correctness, and the orphans' court is then obliged to inquire whether the partnership account has been accurately taken. The result may be that the estate is shown to be a debtor to the executor as surviving partner, and in that event he is entitled to a credit in his account as executor. In the contrary event, he is surcharged with the proper amount. So, also, if the executor has been making an unlawful profit out of the partnership property in which the decedent's estate still owns an interest, he has been using the assets of the estate for his private gain, and again makes himself liable to surcharge. The amount of such surcharge can only be determined by inquiring how extensive such use has been, and how much should be paid in compensation therefor. And if, upon the filing of an account in the orphans' court any interested person should believe that the executor had failed to account for assets of the estate which had come into his possession, or that he had negligently failed to collect assets that were within his reach, a complete remedy is afforded by the right to file exceptions seeking to surcharge the accountant with the value of such assets. This of necessity obliges the orphans' court to decide whether these assets actually exist and should be accounted for. In the present case, if two of the three executors have been derelict in duty by failing to sue the third under the provisions of the act of 1901, their dereliction can be inquired into by the same process, namely, filing exceptions with a view to surcharge. And if it becomes necessary to sell the good will of the firm and the right to use its trade-marks, the orphans' court has the power to turn the property of the estate into money, whenever that course becomes necessary for purposes of distribution.

Proceedings such as these seem to me to be part of the administration of the estate, with which a federal tribunal is not permitted to interfere (*Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867); and, as the bill is an equivalent for the procedure just referred to, it should not be entertained by the circuit court. Whether the court would have power to act if the bill asked no more than a decree directing the other two executors to sue *Sinnott* under the Pennsylvania act of 1901 need not be decided, for, as the foregoing extract from the

prayer for relief shows, the Circuit Court is asked not only to inquire whether certain assets of the estate exist, but to make sale of them if found, although such assets are now under the control of the orphans' court, and subject to its decree. The Supreme Court, in *Byers v. McAuley*, has explicitly decided that this cannot be done by a federal court.

It will be observed, also, that if the Circuit Court required Sinnott to account to the other two executors, as the bill expressly prays—

"Wherefore your orator prays judgment directing an accounting by and between the defendants Fidelity Trust Co. and Walton Pennewill, as executors of the estate of Andrew M. Moore, deceased, and the defendant Joseph F. Sinnott, of and concerning the partnership affairs between said surviving partner and said estate, as and of the time of and from the death of said deceased to the date of said accounting"—

and took charge of the accounting itself, it would be deciding a controversy between persons all of whom are citizens of the same state. Evidently this is not a mere incident of the relief prayed for, but is the principal object of the bill, and in my opinion this consideration is another fatal objection to the jurisdiction. A number of English cases are referred to in the complainant's brief, where a bill such as this has been entertained by the Court of Chancery. I need scarcely point out, however, that the limited jurisdiction of the Circuit Court is the controlling consideration, and that cases dealing with the powers of a court of general jurisdiction, such as the Court of Chancery, must be read here with the necessary qualifications. Whatever chancery powers the Circuit Court may possess, it cannot exercise them to administer the estate of a deceased person, nor to decide an independent controversy between citizens of the same state that does not involve a federal question. As is declared in *Byers v. McAuley*, the Circuit Court may sometimes determine such controversies, where it has taken property into its custody by virtue of its original jurisdiction, and has thus acquired the ancillary jurisdiction to hear all claims against the fund, by whomsoever made. "Possession of the res draws to the court having possession all controversies concerning the res." In the present case, however, the decedent's estate is being administered by the orphans' court of Philadelphia county, and this court has no power or control over the assets. The controversy outlined in the bill calls for the exercise of original, and not ancillary, jurisdiction, and concerns a subject—the administration of a decedent's estate—with which the Circuit Court has no original power to deal.

For these reasons I am of opinion that the bill should be dismissed.

HENRY F. MICHELL CO. v. MATTHUES, State Treasurer.

(Circuit Court, E. D. Pennsylvania. January 19, 1905.)

No. 25.

1. FEDERAL COURTS—STATE STATUTES—VALIDITY—STATE DECISIONS.

Where a taxpayers' action was brought in the federal court to determine whether Pa. Act April 14, 1903 (P. L. 1903, p. 175), increasing the salaries of state judges, infringed the state Constitution, and before the determination of a motion to dismiss the bill the state Supreme

Court decided that the act was constitutional, such decision was binding on the federal court.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. SAME.

The Supreme Court of the state having jurisdiction over the subject-matter and parties to the suit in which such question was determined, the validity of such determination could not be reviewed in the federal courts on the ground that the decision was rendered by a single justice as constituting the court, the other justices having refused to take any part by reason of alleged disqualification.

Motion to Dismiss Amended Bill of Complaint.

James W. M. Newlin, for complainant.

Hampton L. Carson, for respondent.

J. B. McPHERSON, District Judge. The attorney general of the commonwealth of Pennsylvania, appearing for the defendant, who is the state treasurer, has moved to dismiss the bill of complaint, and has assigned several reasons therefor; but none of them, I think, need now be considered, because the situation of the cause has materially changed since the motion to dismiss was argued.

The complainant's bill as originally filed is as follows:

"Your orator, Henry F. Michell Company, avers that it is a corporation created by and existing under the laws of the state of Delaware, and is a citizen of the state of Delaware and resident therein.

"Your orator further avers that the defendant, William L. Matthues, is the treasurer of the state of Pennsylvania, and is a citizen of the state of Pennsylvania, and a resident therein.

"Your orator further avers that it is a taxpayer in the state of Pennsylvania, and pays taxes to the said state of Pennsylvania.

"Your orator also avers that the amount involved in this controversy between your orator and the defendant exceeds the sum of five thousand dollars (\$5,000) exclusive of interest and costs.

"Your orator further avers that as a payer of taxes to the state of Pennsylvania it has a right to prevent the defendant William L. Matthues, state treasurer, from paying out of the state treasury any money in violation of the Constitution of the state of Pennsylvania.

"Your orator further avers that article 3, section 13, of the Constitution of Pennsylvania provides as follows:

"No law shall extend the term of any public officer, or increase or diminish his emoluments after his election or appointment."

"Your orator further shows that the Legislature of Pennsylvania by the Act of April 14, 1903 (P. L. 1903, p. 175), increased the salaries of judges of various courts of the commonwealth of Pennsylvania, after their election or appointment. And your orator further avers, on information and belief, that the said judges are endeavoring to compel the defendant to pay them the said increased salaries, which the said statute in terms requires the said defendant to do.

"Your orator is advised by counsel that the attempted increase in the salaries of judges elected prior to April 14, 1903, makes that portion of the statute of that date unconstitutional, because the same is in plain violation of the prohibition contained in article 3, section 13, of the Constitution of Pennsylvania above quoted.

"Your orator further avers that every judge in the commonwealth of Pennsylvania is personally interested in the determination of this question. The judges elected prior to April 14, 1903, are personally interested to the extent of the increased salaries provided for them by the said statute, and the judges elected or appointed since the passage of the said statute are interested in determining the same to be constitutional as to other judges

previously elected, because such a determination would establish the right of the Legislature in the future to still further increase the salaries of those judges who are now entitled to receive the increase of salaries provided by the said statute.

"Your orator further says that it is without any adequate remedy at law in the premises, and that the interference of a court of equity is imperatively required to enforce your orator's rights.

"Your orator therefore prays for equitable relief as follows:

"One. That the defendant, William L. Matthues, treasurer of the state of Pennsylvania, be restrained from paying any money out of the treasury of the state of Pennsylvania to judges of the several courts of the said commonwealth of Pennsylvania elected before the passage of the said act of April 14, 1903, in excess of their salaries as fixed by law prior to their election."

—With the usual prayer for process and further relief.

Not long afterwards, the bill was amended by adding the following paragraphs:

"Your orator further says that its bill, as originally filed, raises a federal question which gives jurisdiction to this honorable court, irrespective of the amount involved, or the citizenship of either party thereto.

"Your orator is advised by counsel that the Constitution of Pennsylvania is so explicit on the subject of judges' salaries that it could not have entered into the minds of the members of the convention that they were leaving the Constitution in such a position that the courts provided by it would be called upon to determine a question in which every judge would be personally interested. The convention therefore provided no tribunal to hear a contention which it had provided should not be raised. Having arisen, and jurisdiction having been assumed, since the filing of this bill, by the Supreme Court of Pennsylvania, your orator is advised that the proceeding in that court by the commonwealth through the attorney general against the state treasurer for a mandamus to pay increased salaries is not a proceeding in 'due course of law' or 'according to the law of the land,' and that it does deprive your orator of 'the equal protection of the law,' as these terms are used in the Constitution of the United States.

"Your orator further shows that the Supreme Court of Pennsylvania is composed of seven judges, of whom six were elected before the passage of the increased salary act, which is the subject of this bill. Each of these six judges has a direct personal interest in the determination of the question upon which his court has assumed jurisdiction in a cause pending therein from Dauphin county, Pennsylvania, which in the ordinary course of procedure would be heard on appeal in May, 1905. It has been advanced in that court and has within a few days last past been heard in Pittsburgh. One of the six judges directly and personally interested in the contention before him declined to sit, which reduced the court to six members, which can decide in favor of its own increased salaries by a divided court, and can do this before this honorable court can determine the constitutional question raised by your orator's bill.

"Your orator is further advised by counsel that the Legislature in January next can create a court under article 5, section one, of the Constitution of Pennsylvania, which can lawfully hear and determine the question involved in this bill. The people can elect this tribunal at the February election, and they can deliver their judgment promptly thereafter. The Legislature having passed the judicial salary act, and the contested construction put upon it leaving the courts in the control of the Legislature as to their salaries, it may be assumed that the Legislature will create such a court promptly, if the judges want it, and that new tribunal will directly represent the people of the state, whose taxes pay the judges' salaries."

The questions which the bill and the amendments thus attempt to raise, with some other questions, were argued upon the motion to dismiss; but the only two that need now be noticed are the constitutionality of the act of 1903, and the federal question whether the hearing before the Supreme Court of Pennsylvania was "due process of law."

or "according to the law of the land," or deprived the complainant of "the equal protection of the law," for the reason that six of the seven judges who constitute the court were pecuniarily interested in the increase of salary proposed by the act. But these two are no longer open for discussion, for they have recently been disposed of by the Supreme Court of the state in an opinion filed on December 31, 1904. In that opinion it was held that the act of 1903 did not offend against the Constitution of Pennsylvania, and, while it is scarcely necessary to cite authority for the proposition that the interpretation of its own fundamental law by the highest tribunal of a state is binding upon the federal courts, I may be permitted to refer to two late cases upon this subject decided by the supreme court of the United States: *Pitts., C., C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, and *Winona & St. Paul Land Co. v. Minnesota*, 159 U. S., 533, 534, 16 Sup. Ct. 83, 40 L. Ed. 247. As to the remaining question, it appears from a statement in the opinion that no one of the six judges who were interested in the question took part in the decision, but that the subject was considered and decided by Mr. Justice Thompson alone, who was appointed after the act of 1903 was passed, and was therefore disinterested, because he, at least, was undoubtedly entitled to the higher rate of pay fixed by that statute. I quote the relevant paragraph from his opinion, which is, of course, to be accepted as conclusive evidence of the facts therein stated:

"The universal rule of judicial action is that judges sit in cases in which they are interested only under compulsion of necessity arising from the entire failure of any other competent tribunal. In the present case one judge is wholly free from interest, and by force of this fact the powers of the court necessarily devolve upon him. If one or two or even a majority were disqualified by interest, the powers of the court would be exercised by the others without question. The fact that only one is free from interest makes no difference in principle; it is merely more inconvenient. The disposition of the question raised on this appeal has therefore devolved on the only member of the court not interested in the case, the other members of the court having declined to consult or enter into any discussion of the case."

It is apparent, therefore, that the complainant's bill in equity has become superfluous; the constitutionality of the act of 1903 has been definitely affirmed by the highest tribunal of the state, and the federal question which the amendment to the bill seeks to raise has been shown to lack the necessary foundation of fact.

The bill is accordingly dismissed, at the costs of the complainant.

Motion to Amend Further.

The foregoing opinion was about to be filed when the complainant made a motion to amend again by adding the following paragraphs to the bill:

"The complaint amends the bill heretofore filed herein by adding thereto the following additional paragraph, stating matter of fact which has occurred since the hearing of the motion of the attorney general of Pennsylvania to dismiss the original bill and the amendment filed October 27, 1904:

"Your crator further says that since the argument of the said motion to dismiss, to wit, on December 31, 1904, there was filed with the prothonotary of the Supreme Court of Pennsylvania in the case of *Commonwealth at the relation of the Attorney General vs. the State Treasurer*, an opinion written

by one of the judges of the Supreme Court of Pennsylvania, whose term of office expired the next day, to wit, Justice Thompson, in which paper the said justice gave his individual views on the judicial salary question.

"He began this statement of his own views by calling attention to the fact that all of the seven judges of the Supreme Court of Pennsylvania except himself were personally interested in the determination of the question on appeal, and then added this language:

"The disposition of the question raised on this appeal has, therefore, devolved on the only member of the court not interested in the case, the other members of the court having declined to consult or to enter into any discussion of the case."

"The opinion of Justice Thompson then goes on to consider the question involved in the appeal, and, after giving his individual views thereon, attempted to make the same a judgment of the Supreme Court of Pennsylvania by undertaking to affirm the judgment of the court below.

"Your orator further avers that when this appeal from the court of common pleas of Dauphin county was heard at Pittsburgh, October 17, 1904. Chief Justice Mitchell announced that the court had some hesitation about jurisdiction and would retire for consultation. Shortly thereafter, and upon the same day, the court reassembled and announced that one of their number, Justice Brown, for personal reasons would not sit during the hearing, and thereupon the other six judges, including Justice Thompson and the five senior judges, all personally interested in the cause, did then and there take and exercise jurisdiction by sitting as a Supreme Court and hearing the cause argued by counsel on both sides.

"Your orator further says that the Constitution of Pennsylvania, article 5, section 2, provides as follows:

"The Supreme Court shall consist of seven judges, who shall be elected by the qualified electors of the state at large."

"Your orator further avers that by reason of the six judges taking and exercising jurisdiction, and by further reason of the provision of the state Constitution just quoted, the opinion of Justice Thompson, as to which the other members of the court declined to consult or enter into any discussion, is not a judgment of the Supreme Court of Pennsylvania, and is not binding on the circuit court of the United States, and that the case now rests as a judgment of the court of common pleas of Dauphin county unreversed and undecided by the Supreme Court of Pennsylvania.

"Your orator for these reasons is advised by counsel that the individual views of Justice Thompson have merely personal and academic interest, and that your orator is entitled to have the merits of the cause at issue in this case determined on its merits by this honorable court."

It would be useless to permit this amendment to be made. It does not even profess to raise a federal question, and this court has no jurisdiction to sit in judgment upon the action of the Supreme Court of Pennsylvania on a purely domestic controversy, and pronounce its formal decree to be void. The state court had appellate jurisdiction over the subject-matter of the suit and of the parties thereto, the cause was heard by all the judges except one, and judgment therein has been duly entered upon its record. This, I think, is conclusive upon a circuit court of the United States, which cannot properly concern itself with the question whether the judgment was void because it was entered by one judge only. If it is void for that reason, its invalidity must result from a violation either of the state Constitution or of some fundamental rule of general jurisprudence, and neither ground of invalidity can be examined by a federal tribunal.

The motion to amend is refused, and a decree of dismissal will be entered.

In re MCGOWAN.

KNITTEL et al. v. MCGOWAN.

(District Court, E. D. Pennsylvania. January 26, 1905.)

No. 1,935.

1. INVOLUNTARY BANKRUPTCY—INSOLVENCY—EVIDENCE.

Under Bankr. Act July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], providing that a person shall be deemed insolvent within the provisions of the act when the aggregate of his property shall not, at a fair valuation, be sufficient in amount to pay his debts, evidence of insolvency in an involuntary bankruptcy proceeding must be such as to satisfy the jury that defendant's existing indebtedness is more than the value of his assets at the time the petition is filed.

2. SAME—NEW TRIAL.

Where, in an involuntary bankruptcy proceeding, there was no denial of defendant's indebtedness, but he merely raised technical objections to the manner of proving the same, he would not be granted a new trial, though the claims were not established by the same technical exactness as is required where the indebtedness is directly in issue.

3. SAME—EVIDENCE—JUDGMENTS.

On the hearing of an involuntary bankruptcy proceeding the record of a judgment which was a subsisting claim against the bankrupt was properly admitted in evidence, though it had been opened to allow the bankrupt to make defense.

4. SAME—DATE OF ENTRY.

In an involuntary bankruptcy proceeding a judgment entered against the alleged bankrupt in a state court more than four months before the commission of the act of bankruptcy was admissible to show insolvency.

5. SAME—CLAIMS—PROOF—HARMLESS ERROR.

Where, in an involuntary bankruptcy proceeding, defendant did not deny certain claims alleged as tending to show insolvency, and on production of the creditor's books he did not avail himself of an opportunity to cross-examine such creditors with reference to the books, he was not prejudiced by the court's permitting the creditors to testify to the amounts of their respective claims from memoranda taken from the books.

6. SAME—UNMATURED CLAIMS.

On an issue of a bankrupt's insolvency, evidence of indebtedness for which the bankrupt's unmatured notes were held was properly admitted, in the absence of the bankrupt's denial of such indebtedness.

7. SAME—REVERSIONARY INTEREST.

Where an alleged involuntary bankrupt had executed a deed in fee to certain real estate, evidence that he had a parol agreement with the grantee, by which, on his payment of certain judgments and claims, the property was to revert to him, and that such reversionary interest was an asset valued at \$20,000, was inadmissible on the issue of his insolvency.

8. SAME—PRESERVATION OF ESTATE—INSTRUCTIONS.

Where, in an involuntary bankruptcy proceeding, it was necessary, pending determination, to renew the alleged bankrupt's hotel license, and the bankrupt failed to exercise the option of continuing in possession, provided he could pay for the new license, whereupon his license was sold, an instruction on the issue of insolvency that the license fee was paid for the purpose of preserving the only valuable asset of the estate, and that the amount so paid was to be considered as a liability under the proof that the purchaser of the license agreed to pay \$16,000 for it with the license fee paid, or \$14,900 if he paid the license fee for the succeeding year, was proper.

9. SAME—LIQUOR LICENSE—PREJUDICE.

On an issue as to an alleged involuntary bankrupt's insolvency he was not prejudiced by a ruling that his liquor license was an asset of his estate.

[Ed. Note.—Franchises and licenses as assets in bankruptcy, see note to *Fisher v. Cushman*, 43 C. C. A. 389.]

In Bankruptcy.

William F. Johnson and Samuel W. Cooper, for plaintiff.

Charles H. Edmunds and Samuel Scoville, Jr., for defendant.

HOLLAND, District Judge. In this case an involuntary petition in bankruptcy was filed, and the alleged bankrupt filed an answer denying that he had committed the act of bankruptcy set forth in the petition, or that he was insolvent, and requested that these issues be tried by a jury, according to the provisions in the bankrupt act. Accordingly, an issue was framed, and the case was tried by a jury, and a verdict rendered finding against the bankrupt. Evidence was offered of the entry of two judgments against the bankrupt in the court of common pleas of Philadelphia county within four months, which he failed to vacate or discharge within five days before the sale of his property, upon which a levy had been made by the sheriff of the county. There was no dispute as to these facts tending to establish the commission of the act of bankruptcy. As to the question of his insolvency, the creditors offered in evidence two other judgments, which had been entered in the court of common pleas of Philadelphia county, one of which had been opened by that court for the purpose of allowing the defendant, who is the alleged bankrupt, to make a defense, and was objected to for that reason. The other judgment was offered in evidence as a subsisting claim against the alleged bankrupt, and was objected to upon the ground that it was entered of record in the said court more than four months before the date of the commission of the act of bankruptcy, and for the other reason that it was for more than was due the plaintiff in the judgment. Counsel for the creditors, however, stated the fact that the whole amount of the judgment was not due, and only submitted it as evidence of an indebtedness, and stated the correct amount, to wit, \$975. All the other claims not of record were offered in evidence, making a total of about \$20,941.37. Claims amounting to \$11,782.95 were offered in evidence for the Rothaker Brewing Company by G. F. Rothaker, Jr., who produced an extract from the books of their company, and was allowed to testify to the claims from this statement, which was objected to by the counsel for the bankrupt upon the ground that it was necessary to produce the books. He was, however, allowed to testify to the amount, and the books were subsequently produced for the purpose of examination by the bankrupt's counsel, and for the purpose of examining the witness as to the books and the correctness of the indebtedness; but the bankrupt's counsel did not call the witness for that purpose, although the books were produced. Other claims were admitted in the same way. Herman Voight was permitted to testify that the bankrupt was indebted to him in the sum of \$1,500 for notes and interest, but he did not produce these notes because they were not due and payable at this time. However, the indebtedness had been created prior

to the time the involuntary petition in bankruptcy was filed. Joseph Gaidas testified that \$975 was due on the judgment entered of record in Philadelphia county, and that he knew of his own knowledge that this amount was due upon that judgment.

Upon the question of assets counsel for the bankrupt offered to prove that at the time the hotel property in Philadelphia had been transferred by him there was a verbal agreement that upon the payment of certain indebtedness the property should revert to him, and that the value of this equity was worth \$20,000, although the deed on its face was an absolute fee-simple deed, without any reservations. This evidence was excluded. The bankrupt's business was that of a hotel keeper, and at the time of the commission of the act of bankruptcy was a licensee of a hotel in Philadelphia. Some time prior to the trial of this case new licenses for the year were issued in Philadelphia, and the bankrupt was unable to raise sufficient money to take out the new license at a cost of \$1,100, and the receiver was directed to sell his license, and to provide for payment of the license fee for the new license for the coming year. He accordingly advertised and sold the same for \$14,900 if the purchaser paid for the new license, and \$16,000 if the receiver was required to pay the license fee. These facts were established, and the court charged as follows:

"A number of amounts have been presented, among them \$11,782.95 of the Rothaker Brewing Company, in which there is \$1,100 charged for the payment of a license fee which was paid by them on the 11th day of May, which was long subsequent to the presentation of the involuntary petition in bankruptcy. That was paid for the purpose of preserving the only valuable piece of property that was convertible in bankruptcy to pay the debts of this defendant, and I charge you, gentlemen of the jury, that this is a fair item to place in this total of liabilities, because, if it is not placed in the liabilities, according to the testimony, it is to be taken off of the value of the license, because the party who purchased that license was to give \$16,000 for it with the license fee paid, or \$14,900 if he paid license fee for this year."

The court also charged that debts payable in the future were to be taken into consideration on the question of insolvency, and submitted to the jury the question as to what amount of indebtedness had been offered in evidence, and the amount proven to their satisfaction of that submitted. The jury were also told that a liquor license in a bankrupt court was an asset for the payment of debts.

Twenty exceptions were filed to the admission and rejection of evidence and the charge of the court, which may be classified as follows: (1) To the admission of a judgment entered in the court of common pleas, which had been opened for the purpose of allowing the defendant to make a defense to the claim; (2) to the record of a judgment entered against the bankrupt more than four months before the commission of the act of bankruptcy; (3) to the admission of claims by witnesses without requiring them to testify from books of original entry, although the books were produced in court subsequently by the witnesses; (4) to the admission of evidence as to indebtedness on notes without producing the same in court; (5) to the rejection of the offer of evidence, on the part of the bankrupt, to show the value of an equity in real estate, for which he had given an absolute deed in fee simple; (6) to the charge of the court directing them to take into consideration

the payment of \$1,100 of the license fee by the receiver; (7) to the comments of the court as to the measure of proof in establishing the claims, and the amounts claimed to have been established; (8) to the statement of the court that a liquor license is an asset in the court of bankruptcy. These exceptions are too voluminous to state verbatim. I have not been convinced that any of them raise a question to warrant the court granting a new trial. As the question of the commission of the act of bankruptcy is undisputed, the only issue controverted was the question of insolvency at the time of the filing of the petition in bankruptcy. By section 1, subd. 15, c. 541, Act July 1, 1898, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], "a person shall be deemed to be insolvent within the provisions of the act when the aggregate of his property * * * shall not at a fair valuation be sufficient in amount to pay his debts." The issue, then, before the jury was the question of solvency, and the burden of proof under section 3, subd. 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], is placed upon the creditors. They are required to submit evidence to show the amount of his debts and the value of his assets. The evidence produced for the purpose of showing his indebtedness must be such as to satisfy the jury of its existence, and that it is more than the value of his assets at the time the petition is filed. Where there is no denial of the indebtedness, as in this case, and the alleged bankrupt only raises technical objection to the manner of proving that indebtedness, without denying its existence, a new trial will not be granted, although the claims are not established by the same technical exactness as is required in the trial of cases where the indebtedness is the question directly in issue, yet the petitioners are required to establish the existence of the indebtedness to the satisfaction of the jury. There was no dispute in this case by the bankrupt that he owed these claims, offered in evidence in the manner stated.

1. We think there was no error committed in allowing the record of the judgment entered in the court of common pleas of Philadelphia county to be offered in evidence, although it had been opened for the purpose of allowing the defendant to make a defense to it. It was a subsisting claim, and, if he had a defense to the claim as a subsisting one against his estate in bankruptcy, he could have made it before the jury; but he offered no evidence whatever to show that he was not indebted to the plaintiffs in that judgment.

2. It was entirely competent to offer evidence of the judgment, although entered in the court of common pleas more than four months before the commission of the act of bankruptcy, for the purpose of showing the solvency or insolvency of the bankrupt; and the evidence of Mr. Gaidas was in his favor, as it established the fact that, instead of over \$4,000 being due on this judgment, there was only subsisting a claim at that time of \$975.

3. A number of claimants were permitted to state from memoranda taken from books of original entry the respective amounts of their claims, who afterward produced their books in court for the purpose of being cross-examined by counsel for the alleged bankrupt, if he saw fit to do so. This evidence was submitted to the jury for the purpose of showing them the claims due from the bankrupt's estate to that

amount; and if he saw fit to dispute these claims it would have been incumbent upon the creditors to establish their existence with the same certainty and the same measure of evidence as is required in the proof of any fact before a jury, and it was a question for the jury as to whether or not there was sufficient evidence submitted to them for the purpose of establishing these claims as subsisting indebtedness at the time the petition was presented, and it was submitted to them to pass upon this question.

4. The admission of evidence of an indebtedness, for which notes were held, not yet payable, was submitted to the jury, and there was no denial of the existence of this indebtedness. If it had been disputed, another question might be presented; but we see no reason why the jury should not be permitted to find the existence of this indebtedness, upon the evidence submitted in regard to it, when the alleged bankrupt was on the stand, and did not deny that the notes had been given and the indebtedness existing as testified to by the claimant.

5. The bankrupt set up a verbal agreement, which he alleged was made by him with the grantee of a property, to whom he had given a deed in absolute fee simple, to the effect that upon the payment of certain judgments and claims that the property was to revert to him, and he offered to prove this reversionary interest arising out of this verbal agreement was an asset valued at \$20,000. This was ruled out, and we think the statement of the facts in connection with it is a sufficient answer to the offer.

6. Before the trial of this case it was necessary to renew the license, which was the asset of greatest value in this estate. The record of this case before the trial will show that the alleged bankrupt was given the option of continuing in possession of the property, provided he could pay for the new license, which was to be taken out on a certain date to prevent its being forfeited. He failed to raise sufficient cash for that purpose, and the receiver was directed to sell the license and to pay the new license fee in order that this asset might be preserved. He accordingly advertised the license for sale, and sold to the present owner for \$16,000 provided he (the receiver) paid the license fee, but the purchasing price was to be \$14,900 in case the purchaser paid the license fee. In view of this condition of affairs, and the necessity of preserving this asset, the charge of the court, as above set forth, was fully warranted.

The question of the amount of indebtedness proven was submitted to the jury for them to find what amount existed at the time the petition was filed. The amounts specified in the charge of the court were simply amounts to which the items totaled in various aspects of the case, but the question as to the total amount proven was to be determined by the jury.

As to the question of whether or not a liquor license was an asset, we do not see how the bankrupt could be injured by the instructions of the court that it is an asset, as he was interested in showing assets to an amount greater than his indebtedness, and the charge of the court, in holding the license to be an asset, was to that extent favorable to his contention of solvency.

Motion for a new trial refused.

ATLAS RY. SUPPLY CO. v. LAKE & RIVER RY. CO. et al.

(Circuit Court, N. D. Ohio, E. D. January 27, 1905.)

1. CORPORATIONS—INSOLVENCY—RECEIVERS—EFFECT.

Neither the pendency of a creditors' suit against an insolvent corporation, nor the appointment of a receiver of its assets, nor a decree for the sale thereof affects corporate existence, or prevents the corporation from acting as such and incurring indebtedness.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2388.]

2. SAME—CREDITORS' SUIT—PENDENCY—FEDERAL COURTS—LIS PENDENS.

A creditors' suit pending against an insolvent corporation in the federal court is constructive notice of lis pendens with respect to all property of the corporation in the district and division.

3. SAME—CREDITORS PENDENTE LITE—RIGHTS.

Where creditors of an insolvent corporation became such pending a creditors' suit in the federal courts to subject the corporation's assets to the payment of its debts, and were enjoined from prosecuting their legal remedies in the state courts, they were entitled to intervene in the proceedings in the federal court, and to participate only in such assets as remained after payment of the claims of creditors existing at the time the creditors' bill was filed.

In Equity.

Weed & Miller, for complainant.

Garfield, Howe & Westenhaver, for the Cleveland Trust Company.

Squire, Sanders & Dempsey, for N. M. Berk.

Frank E. Ream, for Z. T. Herndon.

Barton Griffith and J. P. Wilson, for the Columbus Savings & Trust Co.

WING, District Judge. On the 5th day of August, 1903, a bill was filed in behalf of the complainant, alleging that a materialmen's lien existed in favor of the complainant, and that the defendant was insolvent, and with other allegations sufficiently broad to make it a creditors' bill for the administration of the assets of the defendant railway company. A receiver was appointed for all of the property and assets of the company. Injunction was issued against the officers and agents of the railway company from in any wise interfering with the management of the property by the receivers. On August 17, 1903, the court made an order requiring all creditors to file their claims on or before the 1st day of October following, on penalty of being forever barred from participating in the distribution of the assets of the company. Notice was given of this order. Later the claims filed were referred to a master, and the master made his report, which was confirmed. On March 20, 1904, the Cleveland Trust Company intervened by petition and cross-bill, setting up a mortgage upon a portion of the premises. Issue was made, and solved in favor of the intervener, and the property covered by the mortgage was sold under a decree of foreclosure. About the time of the sale, or perhaps a little after, it was discovered by the receivers that property of the defendant corporation existed in Summit county, of which they had theretofore had no knowledge.

New receivers were appointed, who went into possession of this property by order of the court, and it is now in the possession of the receivers in this cause. One of the interveners—N. M. Berk—became a creditor during the pendency of this suit. He commenced a suit to foreclose his mortgage in the court of common pleas of Summit county, Ohio. Another of the interveners—Z. T. Herndon—and also the Columbus Savings & Trust Company, intervened in this suit. At the instance of the receivers, who filed their petition in this court, these proceedings in the state court were stayed by injunction, after a rule had been entered requiring the intervening petitioners to appear and show cause why they should not be so enjoined. Hearing was had on this rule on July 24, 1904, at which hearing the court held that it had jurisdiction on the bill as presented to appoint a receiver for all the property and assets of the Lake & River Railway Company, including that acquired from the Richland & Mahoning, and that it had done so. The property acquired from the Richland & Mahoning is the property situated in Summit county, and with respect to which suit was brought in the state court by the interveners. The intervening petitioners were enjoined from prosecuting their suit in the state court, and given leave to intervene in this suit within 60 days. The answer and cross-bill of N. M. Berk was filed after the expiration of the 60 days, but with leave of court. With respect to the answer and cross-bill of Berk, motion is filed to strike it from the files, and also a demurrer.

The answer and cross-bill shows that the claim of Berk originated pending this suit, a considerable time after its commencement, and after the appointment and qualification of the receivers; that C. W. French, president of the Lake & River Railway Company, applied to Berk for a loan; that Berk agreed to lend to the Lake & River Railway Company the sum of money, provided the proper corporate steps were taken by the directors authorizing the loan and providing for the execution and delivery of the mortgage, and provided further that the property was free and clear of all incumbrances; that action was taken by the stockholders and directors authorizing the company to borrow a sum not to exceed \$17,000, to be evidenced by a promissory note. Further answering, Berk shows that an abstract of title covering the property was prepared for him by a reliable abstracter, and all of the records of Summit county, Ohio, in which said property was located, were searched for the purpose of ascertaining the title to the property contemplated to be mortgaged under the provisions of the resolution above referred to; that he was advised by said abstracter, and now states the fact to be, that upon the 5th day of November, 1903, the record title to said property was in the Lake & River Railway Company, free and clear of all incumbrances, in so far as might appear from the records of Summit county; that, relying upon the action of the stockholders and directors, and without any knowledge of the pendency of this suit, he took from the Lake & River Railway Company a note and mortgage deed dated November 5, 1903, by the terms of which the Lake & River Railway Company sold and conveyed to Berk, his heirs and assigns, the property, which is fully described in the bill, and which is the property situated in Summit county. There are further allegations in the answer and cross-bill of Berk adapted to be the basis of attack upon

the decree of this court upon the mortgage issued to the Cleveland Trust Company. The prayer of the answer and cross-bill of Berk is for judgment against the Lake & River Railway Company in the sum of \$17,000, with interest; that the Cleveland Trust Company, Calvary Morris, and the Columbus Savings & Trust Company be made parties defendant, and be required by a day certain to answer to the matters alleged; that a temporary restraining order be issued restraining the said the Cleveland Trust Company and Calvary Morris from disposing of the property of the Ashland & Wooster Railway Company sold under the proceedings heretofore had in this cause; that the decree of foreclosure and sale entered on March 30, 1904, in this cause, and the proceedings had thereunder, including the sale of the property, be set aside, and held for naught; that Calvary Morris and the Cleveland Trust Company be required to redeliver to the receivers heretofore appointed in this cause all of the property obtained by them at the sale under such foreclosure proceedings, which the receivers were ordered to turn over to the purchaser; that the \$500,000 of the first mortgage bonds referred to in the bill of complaint filed by the Cleveland Trust Company, August 20, 1903, and the alleged mortgage deed of the Ashland & Wooster Railway Company referred to therein as security for the payment of said first mortgage bonds, be declared illegal and void, and judgment be entered against the Cleveland Trust Company on its cross-bill of complaint; that the Lake & River Railway Company be required within a time certain to pay the claims of Berk and those persons or corporations whose claims have been allowed by the special master, and that, in default thereof, an order of sale issue, appointing a special master, and directing him to sell all of the property of the Lake & River Railway Company, and out of the proceeds thereof pay to the claimants herein their claims in the order of their priority.

The theory upon which relief is given under a so-called creditors' bill, or a bill brought by one creditor in behalf of all for the administration of the assets of an insolvent corporation, is that such assets form a trust fund, of which the then creditors are the cestuis que trustent. In order to administer this trust, receivers are appointed to preserve the property pending the ascertainment of the rights of creditors as to priority and as to amount. It is of course, true that neither the pendency of such a suit nor the decree of sale affects the corporate existence of the defendant, nor in any way prevents it from acting as a corporation; and particularly such suit does not in any wise prevent the corporation from incurring indebtedness. It does not follow from this that either the corporation, or a creditor who becomes such pending such a suit, can divert the distribution of the trust fund from those entitled to its distribution at the time of the impounding of the assets, to wit, the filing of the bill. A suit affecting title to property, in a federal court, is constructive notice of *lis pendens* with respect to all property in the district and division. Berk shows in his bill that he relied upon an examination of the records of Summit county and in no wise examined the records of this court. This, perhaps, is not material, but it shows that Berk omitted those things which would have given him actual notice of at least a cloud upon the Summit county property.

Whatever rights Berk has acquired by loaning money to the Lake & River Railway Company upon the security of the mortgage described in his petition were and are subject to the rights of creditors as ascertained in this suit. He undoubtedly has a right to any surplus which may remain after such ascertained indebtedness has been paid. In so far as the cross-bill contains allegations designed to support that portion of the prayer of the bill which asks for the setting aside of the decree of foreclosure and the reopening of the issues then decided, and the turning over of the property by the purchaser, and other results which would follow the granting of such prayer, it is my decision that it is an improper cross-bill to be filed by one who has become a creditor pending the suit. Because Berk has been enjoined from proceeding against this property in the state court it is proper that he should intervene in this cause for the protection of his interests in any assets which may bring proceeds in excess of the amount of the claims of creditors who existed at the time of the filing of the original bill, but his pleading should be confined to the assertion of that right. The motion to strike the answer and cross-bill of Berk from the files is therefore granted, but with leave to Berk to file such amended intervening pleading as may be adapted to protect his interests in the surplus hereinbefore referred to. This he may do within 30 days.

Because of the striking of the pleading from the files, it is unnecessary to pass upon the demurrer, which is also stricken from the files.

With respect to the cross-bill of the defendant the Columbus Savings & Trust Company, it is shown that the intervener became a mortgage creditor of the Lake & River Railway Company pending this suit, as hereinbefore stated. This intervener intervened in the suit brought by Berk in the court of common pleas of Summit county, Ohio, for the purpose of foreclosing its mortgage. It was enjoined from proceeding further in the state court, and allowed to intervene in this cause. The cross-bill is confined to allegations in regard to the bonds and mortgage upon which it founds its claim. It has been allowed to intervene with respect of this matter, and, for the purposes referred to in the part of this opinion which relates to the answer and cross-bill of Berk, its appearance in this case and the filing of its pleading are proper. The motion to strike its cross-petition from the files is therefore overruled.

Demurrer is filed to this cross-petition. Inasmuch as the allegations in the petition may, under certain circumstances, to wit, there being a surplus of assets above an amount necessary to pay the creditors who existed at the time of the filing of the bill, entitle the cross-petitioner to relief, the demurrer is overruled.

The cross-bill of Herndon shows an indebtedness which has arisen pending this suit. He has a right to intervene, under the former orders of this court, and for the purposes mentioned with respect to the other interveners herein. The motion to strike this petition from the files is therefore overruled. Inasmuch as he shows an indebtedness, although it had its inception pending this suit, he may be entitled to relief of some nature. Therefore the demurrer to his cross-bill is overruled.

In re SPALDING.

(District Court, S. D. New York. January 13, 1905.)

1. BANKRUPTCY—PROCEEDINGS—ABATEMENT—DEATH OF BANKRUPT.

Proceedings in bankruptcy do not abate by the death of the alleged bankrupt after a petition is filed, and before adjudication.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 134.]

2. SAME—BANKRUPT ACT—INSTRUCTION—RECEIVERS.

Bankr. Act July 1, 1898, c. 541, § 3a, subd. 4, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [Supp. U. S. Comp. St. 1903, p. 410], providing that an act of bankruptcy takes place when, because of insolvency, a receiver or trustee has been put in charge of a person's property under the laws of the state, is not limited to cases in which a receiver or trustee has been appointed under the laws of the state providing for administration of insolvents' estates.

3. SAME—ESTOPPEL.

Where a judgment creditor of an alleged bankrupt filed a creditors' bill, in which he obtained the appointment of a receiver for the bankrupt's property because of his alleged insolvency, among other grounds, the creditor was estopped from denying that the bankrupt was insolvent at the time such receiver was appointed in subsequent involuntary bankruptcy proceedings instituted by other creditors.

4. SAME—INSOLVENCY.

The appointment of a receiver in a judgment creditor's suit against an alleged bankrupt in a state court, because of the debtor's insolvency, among other things, constituted an act of bankruptcy, within Bankr. Act July 1, 1898, c. 541, § 3a, subd. 4, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [Supp. U. S. Comp. St. 1903, p. 410].

Myers & Goldsmith and Herman B. Goodstein (E. J. Myers, of counsel), for petitioning creditors.

Bacon & Crane (Selden Bacon, of counsel), for W. & J. Sloane, an intervening creditor.

Hamilton Anderson, for Mulhearn Steam Heating Company.

Hugo S. Mack, for alleged bankrupt.

HOLT, District Judge. This is a motion to confirm a referee's report finding that no adjudication in bankruptcy should be made. The alleged bankrupt died after the petition was filed. I agree with the opinion of Judge Wheeler in *Re Hicks*, 6 Am. Bankr. R. 182, 107 Fed. 910, that proceedings in bankruptcy do not abate by the death of the alleged bankrupt after the petition is filed, and before adjudication.

The ground of bankruptcy alleged in the petition is the appointment of a receiver in a judgment creditor's suit. The interpretation of the meaning of that portion of section 3a, subd. 4, Bankr. Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing that an act of bankruptcy takes place when, because of insolvency, a receiver or trustee has been put in charge of a person's property under the laws of a state, is somewhat difficult; but, upon the whole, I think that it is too strict a construction to hold that it only applies to those cases in which a receiver or trustee has been appointed under the laws of a state providing for the administration of an insolvent's estate. There are many states which have no general insolvent laws. If, in

such a state, a receiver has been put in charge of a person's property because of his insolvency, I cannot believe that his creditors are barred from filing a petition in involuntary bankruptcy against him on that ground. The result would be that this ground of bankruptcy would only be available to citizens of states which have insolvent laws. In this case a judgment creditor's suit was brought to set aside certain fraudulent transfers of property. Such an action may undoubtedly be maintained in certain cases without proof of insolvency. But in proceedings in involuntary bankruptcy under this clause of the act, the question is not whether the action in which the receiver was appointed was brought because of insolvency, but it is whether the receiver was appointed because of insolvency; and, if insolvency was one of the grounds for the appointment asserted in the papers presented to the court, and upon which the court acted in making the appointment, the fact that there were other grounds asserted in the papers which may have influenced the court does not seem to me to take the case out of the operation of the bankrupt act. The plaintiff, having alleged that the defendant is insolvent in obtaining the appointment of a receiver, is, it seems to me, estopped from denying it when other creditors institute proceedings in involuntary bankruptcy based on the appointment. The object to be effected by the amendment of the bankrupt act in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [Supp. U. S. Comp. St. 1903, p. 410]) was to provide, in accordance with the general purpose of the act, that the estate of an insolvent should be distributed ratably among his creditors. The appointment of receivers of the property of insolvents had not been provided for in the original act, and was an obvious method of evading its general purpose. In this case the alleged bankrupt had, as alleged in the judgment creditor's bill filed, by various proceedings, substantially transferred all his property, and placed it beyond the reach of execution; and a particular creditor was endeavoring, by a judgment creditor's suit, to obtain an equitable lien upon the property so transferred, for the purpose of obtaining payment of its debt in full. A receivership was an instrumentality, and an efficient instrumentality, in accomplishing that purpose, and I think that his appointment under such circumstances was an act of bankruptcy. Of course, receivers are frequently appointed, not because of insolvency, and without any necessary claim of insolvency—such, for instance, as a receiver appointed in a suit to recover an heirloom or a similar article, having an especial value to the plaintiff, or in a suit to foreclose a mortgage, when the property mortgaged is an insufficient security. But when, in a judgment creditor's suit, a receiver has been appointed of substantially all the assets which can be made available for the payment of the debtor's liabilities, and the complaint and affidavits upon which the application for the receiver is made assert, as one of the grounds for the application, that the defendant is insolvent, I think that, under the amendment of 1903, an act of bankruptcy has taken place, and that the other creditors are entitled to bring proceedings in involuntary bankruptcy against the debtor upon that ground.

I am therefore unable to confirm the referee's report in this case.

DARNELL et ux, v. KROUSE.

DARNELL v. SAME.

(Circuit Court, E. D. Pennsylvania. January 5, 1905.)

No. 68.

1. NEW TRIAL—GROUNDS—EXCESSIVE VERDICT.

A court may modify a verdict in favor of the plaintiff, in an action for a personal injury, as excessive, where it appears from evidence produced in support of the motion for a new trial, with respect to the present condition of plaintiff's health, that recovery from the effects of the injury has been more rapid and complete than was anticipated by the physicians on whose testimony the verdict was based.

At Law. On motion for new trial.

Francis Fisher Kane, for plaintiffs.

J. Jos. Murphy, for defendants.

J. B. McPHERSON, District Judge. Very little of the testimony that was taken in support of these motions is properly to be described as after discovered evidence, and for that reason most of it must be disregarded altogether. The jury has settled finally the question of liability for the injuries suffered by the respective plaintiffs, and the conflicting testimony was of such a character that I should not be justified in disturbing the verdict, so far as that point is concerned. But there is another point about which I feel more freedom, namely, the size of the verdict in favor of Mrs. Darnell, and the testimony upon this subject, tending to show the present condition of her health, is, I think, relevant and important. As she did not deny it, I cannot avoid drawing the inference that the physicians' forecast at the trial was too gloomy, and that her recovery has been speedier and apparently more complete than they ventured then to hope. The verdict must certainly have been influenced by the medical opinion, then expressed and not contradicted, that she would probably never recover her health, and would be unfitted for doing her accustomed work as a teacher. As it seems to me, therefore, the award of the jury has now been shown to be too large, and I think that fairness requires it to be reduced.

It is therefore ordered that if the plaintiff Mrs. Darnell, on or before January 25th, remits so much of the verdict in her favor as exceeds \$2,000, the clerk will make the proper entry refusing the motion for a new trial in No. 67, April sessions, 1904; otherwise the motion will be granted. In No. 68, April sessions, 1904, a new trial is refused.

STERN v. KIRBY LUMBER CO. et al.

(Circuit Court, S. D. New York. November 16, 1904.)

1. CORPORATIONS—STOCK SUBSCRIPTIONS—FRAUD—EQUITABLE RELIEF—RESCISSION.

Where a stock subscription was obtained by fraud, the subscriber was entitled to maintain a bill in equity to annul the same without alleging or proving that he had sustained pecuniary loss by reason of the fraud.

Leon Kaufman, for complainant.
Arthur H. Van Brunt, for defendants.

WALLACE, Circuit Judge. This demurrer raises the single question whether, in an action in equity to annul a subscription by the plaintiff to the capital stock of a corporation because the plaintiff was induced to subscribe by the fraudulent representations of its officers as to the value of its assets, it is necessary that the plaintiff allege in his bill of complaint that he sustained pecuniary loss by reason of the fraud. It is urged in support of the demurrer that although, according to the bill, the assets were far below the value represented, non constat the stock subscribed for was of equal or greater value than the subscription price, and in such a case a court of equity would not give the relief sought. It may be that the plaintiff has made a profitable bargain, but, if he has, it is not for the defendant to assert that he must abide by it. The party who has been induced by fraud to become a subscriber for the shares of a corporation, or to enter into any other contract which subjects him to future liabilities, may, if he choose, waive or condone the fraud; but it is also his right to have the contract annulled. If he resorts to a court of law for redress, he must, of course, prove that he has sustained pecuniary loss. But in a court of equity it is the fraud, and not the damages, which entitle him to relief. Doubtless a court of equity would not grant relief in a case of purely inconsequential fraud, but the present bill does not present such a case. The reasonable deduction from the allegations of the bill is that the plaintiff's stock would have been of greater intrinsic value if the assets of the corporation had been such as they were represented to be. The only authority cited in support of the contention of the defendants is *Aron v. De Castre* (Sup.) 13 N. Y. Supp. 372, but the doctrine of that decision was distinctly repudiated by the higher court in the later case of *Harlow v. La Brum*, 151 N. Y. 278, 45 N. E. 859.

The demurrer is overruled, with costs.

IMPORTERS' & TRADERS' NAT. BANK OF NEW YORK v. LYONS et al.

(Circuit Court, E. D. Pennsylvania. January 21, 1905.)

No. 61.

1. DEPOSITIONS—WHEN ALLOWABLE.

In actions at common law the depositions of witnesses cannot be taken before the trial, to be used on the trial, but must be taken orally in open court, unless the witnesses reside more than 100 miles from the place of trial, or are bound on a voyage to sea, or are about to go out of the United States or out of the district in which the case is to be tried, and to a greater distance than 100 miles from the place of trial, before the time of trial, or when the witness is aged and infirm, and in these excepted cases the deposition may be taken and read at the trial.

[Ed. Note.—Conformity of federal courts to state practice in taking depositions, see note to *O'Connell v. Reed*, 5 C. C. A. 602.]

2. COURTS—UNITED STATES CIRCUIT COURTS—PRACTICE—RULES.

Rev. St. § 918 [U. S. Comp. St. 1901, p. 685], authorizing the Circuit Courts to make rules and orders regulating their practice, should be construed in connection with section 914 [U. S. Comp. St. 1901, p. 684], requiring the practice and proceedings in Circuit Courts to conform, as near as may be, to the practice in the courts of record of the state, any rule of the court to the contrary notwithstanding.

3. MOTIONS—DISCRETION OF COURT—DETERMINATION OF FACTS.

Motions are always addressed to the discretion of the court, and it is entirely within its province to determine in what manner it will satisfy itself of the facts which appeal to its discretion.

4. SAME—HEARING ON RULES—USE OF DEPOSITIONS.

Rev. St. § 918 [U. S. Comp. St. 1901, p. 685], authorizes the Circuit Courts to make rules regulating their practice. Section 914 [U. S. Comp. St. 1901, p. 684] requires the practice in such courts to correspond with that of the state courts. Rule 7, § 4, of the Circuit Court for the Eastern District of Pennsylvania, provides that on rules to show cause the testimony of witnesses shall be taken by depositions. There is no act of Congress, or statute of Pennsylvania, or rule of local practice of that state, in conflict with the rule. *Held*, that depositions may be taken to be used on the hearing of the rule, notwithstanding the provision of Rev. St. § 861 [U. S. Comp. St. 1901, p. 661], requiring proof in the trial of actions at common law to be by oral testimony, and examination of witnesses in open court.

Motion to Show Cause Why the Service of Subpcena should not be Set Aside.

J. W. M. Newlin, for the motion.

Frank P. Prichard, opposed.

HOLLAND, District Judge. The above-mentioned suit at common law is pending in this circuit, and, in connection with this case, the plaintiff presented a petition alleging certain facts, and obtained a rule to show cause on the defendants. In that rule the defendants filed an answer. The case is down for argument on Wednesday, February 1st. The defendants, however, subpoenaed Edward Townsend, president of the plaintiff bank, for the purpose of taking his deposition, to be used at the hearing in the above-mentioned rule. It is contended on behalf of Mr. Townsend that because it is provided in section 861, Rev. St. [U. S. Comp. St. 1901, p. 661], that the "mode of proof in the trial of actions at common law shall be by oral testimony, and examination of witnesses in open court, except as hereinafter provided," the witness' deposition cannot be taken on this rule, but he must be examined in open court at the hearing of the rule.

There is no question but that it has been held by the courts that in actions at common law the depositions of witnesses cannot be taken before the trial, to be used in court before the jury at the trial of the case, but their testimony must be taken orally in open court, except where they reside more than 100 miles from the place of trial, or bound on a voyage to sea, or about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than 100 miles from the place of trial, before the time of trial, or when the witness is ancient and infirm. In these excepted cases the deposition may be taken and read at the trial. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Shellabarger v. Oliver* (C. C.)

64 Fed. 306; Register Co. v. Leland (C. C.) 77 Fed. 242; Despeaux v. Pennsylvania Railroad Co. (C. C.) 81 Fed. 897.

It is not, however, intended in this case to take the deposition of a witness for the purpose of using it at the trial of the case before a jury at common law, but for the purpose of using the deposition at the hearing of a rule to show cause, and for this purpose we are of the opinion the witness' deposition can be taken.

By section 4 of rule 7 of this court, it is provided:

"On all motions or rules to show cause, on the hearing of which facts are to be investigated, the testimony of witnesses shall be taken by depositions in writing, before a judge, magistrate, alderman, notary public, or a commissioner appointed by the court, upon forty-eight hours' notice in writing to the opposite party or his attorney; and no witness shall be examined at the bar, unless by a special previous order of the court."

By section 918, Rev. St. [U. S. Comp. St. 1901, p. 685], the several Circuit Courts of the United States are authorized to "make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules * * * and otherwise regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." This section should be construed in connection with section 914, Rev. St. [U. S. Comp. St. 1901, p. 684], which provides that the practice, pleadings, and forms and modes of proceedings in civil causes in Circuit Courts shall conform, as near as may be, to the practice, etc., in the courts of record of the state, any rule of court to the contrary notwithstanding. *Ewing v. Burnham* (C. C.) 74 Fed. 384; *Savings Bank v. Bossieux*, Fed. Cas. No. 9,977; *Morrison v. Bernards Township* (C. C.) 35 Fed. 400; *Wayman v. Southard*, 10 Wheat. 42, 6 L. Ed. 253.

There is no statute of the state of Pennsylvania in conflict with this rule of the Circuit Court, nor has my attention been called to any rule of local practice in conflict with that adopted by this rule. In fact, it embodies the practice both in the circuit and local courts in this district in the matter of taking depositions on motions or rules to show cause, from time immemorial. Congress has not seen fit to legislate on this matter of practice as to the method of informing the court as to the facts on motions and rules to show cause where the facts are disputed. Motions are always addressed to the discretion of the court, and it is therefore entirely within its province to determine in what manner it will satisfy itself of the facts which appeal to its discretion. The Circuit Court in this district has adopted a method of establishing facts in dispute, on motions and rules to show cause, in conformity with the local practice, and has embodied it in this rule above mentioned. Chief Justice Mitchell, of the Supreme Court of Pennsylvania, in his work on *Motions & Rules at Common Law*, says, "All rules to show cause include authority to take depositions both in support of or against them (*Coulon v. De Lisle*, 1 Browne, 256), and, in general, depositions are required."

This motion, therefore, is dismissed, and Edward Townsend is required to answer the subpoena as a witness, which was served upon him according to law.

BRIGHAM v. PETER BENT BRIGHAM HOSPITAL et al.

(Circuit Court of Appeals, First Circuit. December 7, 1904.)

No. 549.

1. WILLS—CONSTRUCTION AND VALIDITY—LAW GOVERNING.

Where a provision of a will is to be executed in the state wherein the testator was domiciled and the property situated, all the essential facts being local in that state, the construction and effect of the provision are to be determined in accordance with the law of such state at the time when the rights of the parties thereunder accrued.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 947-950.]

2. CHARITIES—CHARITABLE CORPORATION—CAPACITY IN WHICH DEVISE IS HELD.

A corporation created in accordance with the provisions of a will, and to which the testator's residuary estate is transferred by his legal representatives as directed by the will, to be used by it in founding and maintaining a hospital, does not hold the property in trust in the true sense of the term, but as its own, to be devoted to the purpose for which it was created.

3. SAME—RULES GOVERNING DEVISE—TRUST FOR FOUNDING HOSPITAL.

A provision of a will establishing a trust for the founding of a hospital for the care of sick persons of a class particularly described therein, to be effectuated by a conveyance of property to a proper corporation to be organized as the will directs, is within the rules applicable to public charities.

4. SAME—ADMINISTRATION—RIGHT OF VISITATION.

Where property has been lawfully disposed of for charitable uses by a will, the heirs of the testator have no standing in equity to question the powers or title of the devisee or of intervening executors or trustees.

5. SAME—LIMITATION FROM ONE CHARITY TO ANOTHER.

Regardless of any question as to the rules relating to perpetuities, or as to the technical character of the changes in title which may succeed each other, a limitation over from one charity, which speaks from the death of the testator, to another charity, is valid.

6. SAME—CHARITABLE BEQUEST—VESTING OF ESTATE.

A testator, by one paragraph of his will, directed that his residuary estate should be taken, held, managed, and invested by his executors for the term of 25 years; that from the net income they should pay certain specified legacies; that the balance of the net income should be added to the principal of said estate, so that the same should be accumulating for the said term of 25 years, at the expiration of which term they should procure the formation of a corporation, to which said estate and its accumulations should be transferred to be by it used and employed for the purpose of founding a hospital for the care of sick persons in indigent circumstances residing in a specified county. The paragraph closed with the words: "And I give, devise and bequeath said rest and residue of my property and estate accordingly." *Held*, that the entire estate to which the paragraph related was impressed with a trust in favor of the charity named from the death of the testator, subject to the subordinate charge in favor of the legatees, and that the gift vested at once on the testator's death.

7. SAME—ACCUMULATIONS.

In such case the validity of the gift was not affected by the provision for accumulation, since, as the whole estate vested in the charity from the death of the testator, the accumulations would follow the principal as an incident, as matter of law, even if no provision had been made for them.

8. SAME—EXECUTION OF TRUST—DEATH OF EXECUTORS.

Nor was the trust in such case vested in the executors of the class which is regarded in equity as personal, so that it would be defeated by their

death before the expiration of the term of 25 years, but on the happening of that event administrators de bonis non with the will annexed, who were also appointed trustees by the court, might lawfully execute the trust by forming the corporation and conveying the property to it at the end of the stated term.

9. SAME—GIFT TO CHARITABLE CORPORATION—CAPACITY TO HOLD PROPERTY.

Where a testator devised his residuary estate in trust, to accumulate for a term of years, and then be transferred to a corporation to be organized for the purpose, to be used in founding a hospital, the fact that at the time of the testator's death a charitable corporation was not permitted by the laws of the state to hold property to the amount of the devise, did not invalidate the gift as to the excess, since it was to a corporation only which was legally capable of taking, and no rights of the heirs of the testator were affected by a special act, passed after his death, authorizing the organization of such a corporation.

10. SAME—COLLATERAL ATTACK.

A statutory limitation on the amount of property which charitable corporations may hold can be taken advantage of only by the state, and when, by special act, the state has waived its right by authorizing the creation of a particular corporation with enlarged capacity to enable it to accept and hold a gift, the power of the corporation in that respect cannot be questioned in any manner.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 126 Fed. 796.

Chas. A. Snow (Everett W. Burdett and John Gordon, on the brief), for appellant.

Lewis S. Dabney, for appellee Peter Bent Brigham Hospital.

John L. Thorndike (Frederick H. Nash, Asst. Atty. Gen., on the brief), for appellees Attorney General of Massachusetts, E. D. Codman, and L. H. H. Johnson.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This is a bill brought in the interest of one of the heirs at law of Peter Bent Brigham, late of Boston, in the commonwealth of Massachusetts, deceased, with reference to the construction and effect of the portion of his will which we will hereafter state. The bill was dismissed by the Circuit Court, and the complainant appealed to us. There are several heirs, but the bill was not expressed to be in behalf of all. The respondents are the Peter Bent Brigham Hospital, and the administrators who succeeded in due course the deceased executors of the will, and who were also appointed trustees. No question has been made as to parties, and we refer to that topic only that it may be understood that we neither directly nor impliedly express any opinion in reference thereto. We are satisfied that the interests represented before us are such that we are not required to refuse to proceed to a decree on account of any question of that nature.

As the case relates to the construction and effect of a will, and as all the essential facts were local in the commonwealth of Massachusetts, we are bound to proceed in accordance with the rules of law as settled in that state when the rights of the parties accrued, although, so far

as this appeal is concerned, we perceive no substantial question as to which any of these rules differ from those approved by the text-writers, or by the Supreme Court of the United States, or courts of authority in England. The scrivener who drew the will evidently had in mind the established rules applicable to the subject-matter thereof and approved precedents. For any court to question either would be to threaten confusion, not only to existing titles, but to those which may be hereafter created. The history of the case, as stated by the complainant, is as follows:

The questions here arise under the fourteenth, or residuary, paragraph of the will of Peter B. Brigham, who died on May 24, 1877, leaving real estate which was then inventoried at a valuation of \$690,000, and gross personal estate valued in the inventory at \$592,000, a total valuation of realty and personalty amounting in the aggregate to \$1,282,000, before the payment of debts, legacies, annuities, and other disbursements. Messrs. Robert Codman and Joseph Healy, the executors named in the will, duly qualified, and jointly acted as such until the death of Healy; and thereupon Robert Codman acted as sole surviving executor until his death in 1901, about 24 years after the decease of the testator. At that time the entire estate, including realty and personalty, had accumulated to such an extent that it was then valued at \$4,338,000, according to the inventories then filed, of which \$3,014,401 was the valuation of the realty.

On January 25, 1901, the defendants Edmund D. Codman and Laurence H. H. Johnson were appointed by the probate court as trustees under the will. On April 15, 1901, the same parties were appointed administrators de bonis non with the will annexed. A hospital corporation was duly formed and organized on May 8, 1902, under the general laws of Massachusetts. Rev. Laws, c. 125. The Legislature, on May 22, 1902, passed a statute (Acts 1902, p. 330, c. 418) authorizing the defendant corporation to hold real and personal estate up to \$5,900,000 in value. On May 24, 1902, conveyances were made to that corporation.

The will first gave a number of legacies, amounting in all to a considerable sum, most of them payable immediately. These were covered by the second to the thirteenth paragraphs, each inclusive. Then succeeded the fourteenth paragraph, now in question, as follows:

"Fourteenth. All the rest and residue of my property and estate, of every kind and description, real personal and mixed, of which I shall die seized or possessed, or to which I shall be entitled at the time of my decease, I direct my said Executors to take, hold, manage and invest, for the term of twenty-five years from the time of my decease, and to take the rents, interest, income and profits thereof and from the net income thereof to appropriate and pay as follows, that is to say:

"1. They shall pay to my sister, the said Sarah B. Jacobs the sum of five hundred dollars in each and every month, during her natural life.

"2. They shall pay to my niece Sarah Jane Brigham Kendall the sum of two thousand dollars annually during her life, in equal quarter annual payments: and at her decease, they shall distribute the sum of thirty-two thousand dollars to and among her children or child, if any, who shall survive her. If she leave no child living at her decease, this legacy to her children shall lapse.

"3. They shall pay to my niece Roxana Brigham Hankinson, the sum of two thousand dollars annually, during her life, in equal quarter annual pay-

ments; and at her decease they shall distribute the sum of thirty-two thousand dollars to and among her children or child, if any, who shall survive her. If she leave no child living at her decease, this legacy to her children shall lapse.

"4. They shall pay to my niece Deborah Northrup the sum of two thousand dollars annually during her life, in equal quarter annual payments; and at her decease they shall distribute the sum of thirty-two thousand dollars to and among her children or child, if any, who shall survive her. If she leave no child living at her decease this legacy to her children shall lapse.

"5. They shall pay to my niece Clarissa N. Dewey, the sum of two thousand dollars annually, during her life, in equal quarter annual payments; and at her decease they shall pay the said sum of two thousand dollars per annum to her eldest son, Benjamin G. B. Dewey if living, during his natural life, in equal quarter annual payments; and upon the decease of both the said Clarissa N. Dewey and Benjamin G. B. Dewey they shall distribute the sum of thirty-two thousand dollars to and among the child or children, if any, of said Clarissa N. Dewey, who shall then be living. But if no child of said Clarissa N. Dewey be living after her decease and the decease of the said Benjamin G. B. Dewey, then this legacy to children so surviving shall lapse.

"6. They shall pay to Hannah Wright Devlin, wife of William Devlin of Bordentown, in the State of New Jersey, the sum of three hundred dollars per annum, during her life; and at her decease they shall distribute the sum of five thousand dollars to and among her children or child, if any, who shall survive her. If she leave no child living at her decease, this legacy to her children shall lapse.

"7. They shall pay to Eugenia M. Howard, sister of the aforesaid William Devlin of Philadelphia in the State of Pennsylvania, the sum of three hundred dollars per annum, during her life, and at her decease, they shall distribute the sum of five thousand dollars to and among her children or child, if any, who shall survive her. If she leave no child living at the time of her decease, this legacy to her children shall lapse.

"In no one of the above seven provisions of this article shall the words 'child' or 'children' be construed to include the representatives of any deceased child or children.

"My said Executors shall add the balance of said net income that shall remain after making the payments aforesaid, to the principal of my said estate, so that the same may be accumulating for the term of twenty-five years aforesaid; and at the expiration of said term of twenty-five years from my decease, my said Executors shall set aside a sum or sums of money and may deposit the same in some safe trust company—preference being given, other things being equal, to the Massachusetts Hospital Life Insurance Company, of said Boston,—which shall be sufficient to provide for the payment of such of the foregoing legacies and bequests, if any, as shall then be unfulfilled; or may provide for the payment of such unpaid legacies and bequests by the purchase of annuities for the unpaid legatees or otherwise, as my said Executors shall deem expedient; & after the payment, or provision for the payment, as aforesaid of all the foregoing bequests and legacies, the unexpended balances, if any, shall be paid to and for the use of the hospital hereinafter provided for.

"8. At the expiration of said term of twenty-five years from the time of my decease, my said Executors shall dispose of said rest and residue of my property and estate and of all the interest and accumulations which shall have accrued thereon, for the purpose of founding a hospital in said Boston, to be called the Brigham Hospital for the care of sick persons, in indigent circumstances, residing in the said County of Suffolk, in the following manner,—that is to say: They shall procure the formation of a corporation, to be called the 'Brigham Hospital' with suitable provisions as to officers, their powers and duties for control, direction, conduct and administration of the Corporation and the care and management of the funds in its charge; and upon the legal formation and organization of said Corporation, my said Executors shall transfer to it all the property and estate provided for it as aforesaid, to be by it used and employed for the purpose above declared:—and I give, devise and bequeath said rest and residue of my property and estate accordingly."

The complainant rests his case on the following general proposition; and, because we are to treat it as involving two distinct topics, we have divided it by the figures (1) and (2):

(1) "The respondents are placed in a real logical dilemma, for the devise was either contingent or vested at the testator's decease. If contingent, it violated the rule against perpetuities, and was entirely void."

(2) "If vested, it could vest only to the extent of the legal capacity of such charitable corporations to hold property by devise or bequest, and the attempted devise of the excess was void."

Taking that division which we mark (1), the result is an admission, which the complainant could not avoid, that, if the estate covered by paragraph 14 vested at the testator's decease, he has no case, unless it be for the narrow reasons stated in so much as we have marked (2).

We should observe that the corporation contemplated by the will was not to hold in trust, in the technical sense of the word, the property which it might receive. It was to hold it for its own purposes in the usual way in which charitable institutions hold their assets. Such a holding is sometimes called a quasi trust, and an institution like the one in question is subject to visitation by the state; but the holding does not constitute a true trust. On the transfer of the property devised by the fourteenth paragraph to a corporation as was anticipated, all technical trusts ceased. Meanwhile, as we will see, if the gift in dispute vested, the legal fee, wherever it remained, was held on a true trust to such an extent that if, on the organization of the corporation in accordance with the provisions of the will, the title did not at once vest in it under the statutes of uses, which statutes still have force in the United States when the fee is held on a mere passive trust, of which *Sawyer v. Skowhegan*, 57 Me. 500, is a striking illustration, the equity courts would compel a conveyance from whomsoever held the fee. *Perry on Trusts* (5th Ed.) § 299.

As this is a suit in equity, and equity regards as substantial only equitable interests, it would follow that, whether the gift was vested or not, it would not concern the complainant whether, pending the organization of the contemplated corporation, the legal fee remained in the heirs or vested in the executors or their successors. Neither, for the same reason, would any question raised by the complainant merely with regard to the power of the successors of the original executors concern him; nor, as we will see, would the question whether a proper title had been made in the corporation which is the respondent herein. That the heirs have not even visitatorial powers which a chancery court would regard was shown to be the law in *Massachusetts in St. Paul's Church v. Attorney General*, 164 Mass. 188, 41 N. E. 231; that question being in fact the principal, if not the sole, important issue in that case. Therefore the chancery courts would not concern themselves with undertaking to protect them, or any of them, as complainants in a bill in equity, so far as the substantial interests involved have been lawfully devised or bequeathed.

The fourteenth paragraph established a trust for the founding of a hospital for the care of sick persons of the class particularly described therein. There has been no doubt that a fund devoted to the founding of hospitals in general is within the rules as to public charities. So,

also, there is no question that a trust for the founding of a single hospital is within the same rules. All this has been positively held over and over again, and is illustrated by several authoritative decisions cited by each party to this litigation, which form a part of a class so numerous that we do not regard it necessary to detail them. Of course, the immediate beneficiary of a provision for founding a single hospital, or school, or other single institution is not directly within the ordinary requirement of a charitable trust, to the effect that it must provide for a class of beneficiaries; but, as the ultimate purpose to be accomplished is for such a class, a scheme of the character contemplated by Mr. Brigham's will is, as a whole, regarded as within the rules touching public charities.

Therefore we have here a perfect trust for the founding of a hospital for the care of the sick, to be effectuated by a conveyance to a proper corporation to be organized as the will provides. This, when made, accomplishes the trust. Thus, the general purpose of the testator was continuous from his death. Therefore there is no practical difficulty in the way of holding that the trust vested at the death of the testator, however it might have been otherwise under the peculiar circumstances of some leading cases, instances of which are well known. A conveyance like that which, perhaps, would be necessary after the organization of the corporation to vest in it a title, and the title thus vested, have been sometimes described as representing an executory devise. But in the present case a conveyance to a corporation organized according to the will would be in execution of the trust, and flow out of it. Even if, at the expiration of the period named in the will, the legal estate would not, under the statutes of uses, or in any manner analogous thereto, be drawn to the corporation when properly organized, a conveyance of the legal estate to it would operate only to merge that estate with the equitable estate; and, although the result of the merger would be to extinguish the equitable estate, yet, until the merger took place, the equitable estate would be the master estate. Thus, instead of anything in the strict nature of an executory devise, we have an equitable estate, which in equity absolutely controls the property, merely drawing to it the legal estate at such time and under such circumstances that equity compels the merger. We may return to this topic later.

It is common learning that equitable estates and equitable interests may be limited in fee simple, or otherwise limited, like any legal estate. *Godefroi on Trusts* (2d Ed.) 2. This doctrine is so familiar that it hardly need be enlarged on; but it is fully explained in *Williams on Real Property* (19th Ed. 1901), commencing at page 178. It is a well-known sequence that an equitable estate may be limited in one direction, while the legal fee is limited in another, and that neither will be affected by any contingent limitations, executory devises, or other peculiar estates which may affect or inhere in the other. For that reason, in the present case, for the purpose of ascertaining the nature of the interests involved in this equitable proceeding, we must ascertain where the equitable fee is, without being disturbed by the condition of the legal title, even if the passage of that title from the heirs or the executors, as the case may be, to the hospital which is to be incor-

porated in accordance with the will, can be regarded as made effectual only by the way of executory devise. In other words, if we find the equitable interests were vested from the decease of the testator, we are not concerned by the nature of the changes in the condition of the legal title. This at once brings us to the fact that, notwithstanding any questions as to the rules with regard to perpetuities, or as to the technical character of the changes in title which may succeed each other, a limitation over from one charity which speaks from the death of the testator, or from the execution of the deed which provides for it, to another charity, is valid. This rule is clearly stated in *Jarman on Wills* (6th Ed.) *262, where *Christ's Hospital v. Grainger* is explained. In that case a limitation over for the benefit of the second charity was sustained after a lapse of more than 200 years. This rule was specifically restated in *Russell v. Allen*, 107 U. S. 163, 165, 173, 2 Sup. Ct. 327, 27 L. Ed. 397, and in *Jones v. Habersham*, 107 U. S. 174, 185, 2 Sup. Ct. 336, 27 L. Ed. 401.

Other reasons, perhaps of a broader character, might be given for supporting this rule; but it may well be suggested that, where there is more than one charitable purpose, whether they come into existence simultaneously or successively, there is only one apparent cestui que trust, which cestui que trust represents the intended beneficiaries of the charity, and represents them with efficient legal authority. In England this is the crown acting for the public, or the chancellor as the representative of the crown. With us it is the public—that is, the state representing the public, or the chancellor representing the state. This is what *Godefroi on Trusts* (2d Ed.) intends when the author states, at page 768, that a charitable interest created by a trust is a "public interest"; and it is also what is intended by *Fontain v. Ravel*, 17 How. 369, 385, 15 L. Ed. 80, and the citations from *Story's Equity Jurisprudence* there accepted. It is also what is fully explained in the opinion rendered in behalf of the Supreme Court by Mr. Justice Miller in *Mormon Church v. United States*, 136 U. S. 1, 51, 56, 59, 10 Sup. Ct. 792, 34 L. Ed. 481. It being thus impossible that there should be more than one representative cestui que trust, no matter to how many charities, if simultaneously or immediately succeeding each other, the property is devoted by will or deed, it may well follow that directions in reference to the property thus devoted can raise only one equitable title, regardless of changes in the legal title.

Nevertheless, as this topic relates to matters which are governed by settled property rules, our discussion would not be complete, nor the conclusions which we may state be accepted as correct, unless we bring ourselves within proper technical relations, and support ourselves by established authorities. All this is perfectly accomplished in the present case by referring again to the well-known circumstances of *Christ's Hospital v. Grainger*, reported first in 16 Sim. 83, and again on appeal before Lord Chancellor Cottenham in *McN. & G.* 460. That decision has not only been accepted by the Supreme Court in all its aspects in the cases cited, but it has become a settled part of the law. It perfectly illustrates this case in the most extreme form in which the complainant can put it. There there were two trustees and two charitable trusts. The legal estate was declared to be vested in the first trustee and the

equitable estate in the first trust, and, after a lapse of two centuries, the legal estate, and also the equitable estate, were transferred on the second charity. Assuming (as seems to have been to some extent assumed) that in the case at bar, under the circumstances, a vesting over of the legal title in the hospital would be in the way of an executory devise, we have here, as in *Christ's Hospital v. Grainger*, trustees (that is to say, the executors, or the heirs) holding a strict trust for the purpose of founding a hospital, succeeded by the hospital, which, when incorporated, will also hold for a charitable purpose continuous upon the first charitable purpose; that is, for the care of sick persons in indigent circumstances.

Thus the authoritative construction of the fourteenth paragraph is that for all the purposes of this litigation the entire estate to which that paragraph relates was impressed with a trust from the death of the testator, subject to a subordinate charge in favor of the individual legacies contained therein. The whole rest and residue to which the paragraph relates is given in one mass, and devoted as a unit to several legacies, some of which require payments as of the time of the testator's death. It would demand very emphatic reasons, none of which exist here, to justify a conclusion that this gift of a single unit should be broken up and divided between what is necessarily vested and what is contingent. The "said rest and residue" at the very close of the paragraph means the same "rest and residue" with which it commences; and it therefore has clear reference to the estate not disposed of by the prior paragraphs 2 to 13, each inclusive. Consequently, so far as this expression is concerned, alike at the beginning and closing of the fourteenth paragraph, it is the ordinary gift of all the estate which remains after payment of prior specific legacies; and such a gift, unless there is some clear language otherwise, or some provision necessarily leading to the contrary, is authoritatively held as passing a vested title. Moreover, the closing language, as follows, "I give, devise and bequeath said rest and residue of my property and estate accordingly," although not necessary under the ordinary rules applied in construing gifts of the rest and residue, was probably inserted from greater caution, and positively puts the nature of the title beyond question.

In reply to the above, the complainant makes the following propositions:

"A bequest or devise of future accumulations or future income is necessarily contingent, under the well-settled Massachusetts rule of construction, however the will may be construed as to the principal of the estate."

"The fact that accumulations are included in the gift and devise tends strongly, if not conclusively, to show that the vesting of the whole, principal as well as accumulations, was intended to be postponed to the end of the twenty-five years."

"The gift to the proposed hospital of the 'unexpended balances, if any,' is in form and substance a contingent gift."

"The necessity for accumulation for the term of twenty-five years was prescribed by the testator as a condition precedent to the vesting of the entire gift."

"It is clear that before the accumulations for any one year can vest in the charity the accumulation for that year must first have taken place as a condition precedent. The large accumulations of the estate for the twenty-second,

twenty-third, twenty-fourth, and twenty-fifth years are therefore clearly subject to conditions precedent which are too remote within the rule."

"The fact that the devise and gift were to a nonexistent corporation shows that the whole devise and gift were intended to be contingent."

"The execution of an instrument of transfer or conveyance was, under the terms of this will, a necessary condition precedent to the acquisition of title by the defendant hospital."

"Will unmistakably provides that the title of the defendant hospital shall be acquired only upon the legal formation and organization of the corporation."

"Lapse of time is a condition precedent. Here the estate granted to the hospital upon the expiration of the term of twenty-five years is subject to the condition precedent that the time shall first have elapsed before any estate vests."

"The fact that there are intervening contingent remainders tends to show that the future estate of the hospital is itself contingent."

"Before it is possible to hold the estate to the defendant hospital as vested in it at the decease of the testator, this question must be satisfactorily answered: Did the equitable fee in the real estate left by the testator vest in any one immediately upon his decease? If so, in whom, and what parcels of real estate so vested? The same questions must also be answered as to each parcel of real estate acquired by the executors as a part of the accumulations. What applies to one parcel applies to all."

"In the case at bar, upon any possible construction of the will, there was clearly an equitable estate, interest, or charge in favor of individuals, preceding the future estate in fee granted to the defendant charitable corporation."

"The question whether the defendant hospital had a vested equitable estate vesting at the decease of the testator ultimately depends upon the answer to this inquiry: Was the defendant hospital (or any one acting in its interest) entitled to call upon the trustees for a conveyance of the fee immediately upon the testator's decease? If so, the equitable estate was vested. If not, it was contingent."

In addition to the above, the complainant states generally that there are other conditions precedent to any vesting under the fourteenth paragraph. These contentions are, first, to the effect that the testator placed personal confidence in his executors, so that the corporation could be organized only by them, and so that the gift was therefore necessarily contingent on their taking action, while no one could tell whether they would take action until after the expiration of the 25 years named in the will; second, a proposition, which is probably embraced in the first proposition, that it was for the executors named in the will personally to see to it that "suitable provisions were made" as to officers and other matters touching the proposed corporation, and that as to this the executors named were to use their absolute discretion; third, that there was a contingency whether or not the Legislature would remove the charter limits as to the amount of property which charitable corporations could legally hold; and, fourth, that the fourteenth paragraph directs a conversion of the entire accumulated estate into money at the end of the period of 25 years, and that the question whether such a conversion would be made involved a condition precedent to the vesting of any interest in the proposed corporation.

All these objections relate to topics which are necessarily existent in every case where the courts have sustained charitable bequests or devises to be worked out through means not positively ascertained at the death of the testator, or which provide that a corporation to hold shall

be organized under the direction of the testator's executors, and that the property shall accumulate for some period designated by the will. As such elements are necessarily involved in donations of that character, if any of them are fatal here, no such charities could properly have been sustained; and yet they always have been, except under rare circumstances, not existing here. As to this it is not important to notice especially the fact of the period of 25 years named in the fourteenth paragraph, because the possibilities involved in the other features which we have named might have extended beyond the time allowed by the usual rules as to perpetuities, which possibilities, therefore, would be equally as fatal as the limitation of time, if either could be.

It is not necessary to travel over the text-books or the authorities for the purpose of illustration. It is sufficient to refer to *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617, wherein the estate was to accumulate for an indefinite time (that is, until the income would support 50 sailors, page 105, 3 Pet., 7 L. Ed. 617); and where, also, the managers of the gift were made so uncertain that it remained to be determined by the executors or trustees under the will, or by the Legislature of the state of New York, whether the gift should be vested in the executors or trustees as a body of individuals, or in a corporation to be organized by that Legislature. The same general observations apply to *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 24 L. Ed. 450, where the gift was to a corporation to be created by Congress after the death of the testator. Of course, the latter case, as well as *Inglis v. Sailors' Snug Harbor*, was within the ordinary rule as to perpetuities, because the time when each corporation might be organized, if ever, was wholly indefinite, and not limited. Moreover, as in *Inglis v. Sailors' Snug Harbor* the gift did not go into effect until the trustees should judge that the proceeds of the estate would support 50 sailors and upwards, there was another indefinite limitation.

Therefore, while it is true that these various propositions of the complainant relate to uncertainties more or less uncertain, none of them are of the class which, under the rules applicable to wills, amount to such an uncertainty that the law regards it as a contingency in the technical and proper sense of the word. But the complainant also maintains that these uncertainties grouped together disclose an intent on the part of the testator to create an estate which would not vest in charity until the expiration of the period of 25 years. We have, perhaps, said enough on this point; but, inasmuch as this method of interpreting the intention of the testator is a reasonable and customary one where the intention is at all doubtful, we deem it proper here to state the incidental rule which governs the application of the major rule. *Jarman on Wills*, which is the standard authority, ordinarily accepted without question in Massachusetts as well as in England, and by the federal courts, at page [*809], lays down what has everywhere been accepted, as follows:

"It has been generally thought that a very clear intention must be indicated in order to postpone the vesting under a residuary bequest, since intestacy is often the consequence of holding it to be contingent, or at least (and this is the material consideration) such may be its effect."

This is illustrated by what was said in behalf of the court by Mr. Justice Gray in *McArthur v. Scott*, 113 U. S. 340, 378, 5 Sup. Ct. 652, 660, 28 L. Ed. 1015, as follows:

"For many reasons, not the least of which are that testators usually have in mind the actual enjoyment rather than the technical ownership of their property, and that sound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event."

Although hardly necessary to cite authorities on the point, yet this rule of interpretation has been uniformly recognized in Massachusetts as far back as there is any record. In *Dingley v. Dingley*, 5 Mass. 535, 537, decided in 1809, it was said: "For it is a rule of law that a remainder is not to be considered as contingent when it may be construed consistently with the testator's intention to be vested." Applying this rule, it would follow, notwithstanding all the various uncertainties and other supposed peculiarities to which the complainant has called our attention, that the estate given by the fourteenth paragraph would be held as vested independently of the positive language, expressive of the intent of the testator, with which it closes. Taking the paragraph by and large, the various propositions made by the complainant, all combined, cannot secure a different result than that which we have stated at the earlier part of this opinion.

We ought to observe that in our discussion we make no distinction between the realty and the personalty, as it is established, at least within the United States, that, with the aid of the law of trusts, when both personalty and realty are given together—and, indeed, when not given together—each has equal advantages and disadvantages as to all the particulars we are discussing.

The complainant urges with especial force his propositions based on the fact that a portion of the testate estate included specific items of realty; also on the claim that the trust vested in the executors by the fourteenth paragraph of the will was a personal confidence, and could not be executed by their successors; and again, on the specific claim that the provision for accumulation violates the rules as to perpetuities. As to none of these does he bring any text-writer or authoritative judicial decision to his support, while the entire trend of each is the other way. An example is *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 24 L. Ed. 450, already referred to, where the gift was specifically of certain lots of real estate, with directions to make application from the remaining portion of the deceased's estate annually to the payment of "taxes, charges, and assessments," and other expenses (pages 305, 306, 95 U. S., 24 L. Ed. 450), until such period as Congress might incorporate the institution which the will contemplated. Here were white acre and black acre, as well as an annual appropriation of funds which might extend beyond the period limited by the ordinary rule as to perpetuities. We refer to this decision merely because it is illustrative of all others on the topic. Also the confidence vested in the executors was not of the class which is regarded in equity as personal,

a full description of which is found and illustrated in Codefrois' Law of Trusts (2d Ed.) 271, and sequence. All that the executors were required by Mr. Brigham's will to do could be accomplished by any gentlemen of fair character, fair experience, and fair ability, or could be worked out by the chancellor himself. The case in that respect is clearly within the common rule that equity will not allow a trust to fail for want of a trustee.

Neither is there in this case any special difficulty arising from the matter of accumulations. As the whole estate given by the fourteenth paragraph vested from the death of the testator, as we have shown, the accumulations, under the absolute rules of law, would follow the principal, as an incident to it, even if no provision had been made in the will with reference to them. This proposition goes so far that, even when payment of both interest and principal, where no charity is involved, is postponed to a particular period, the legatee, under the positive operation of the common law, may sometimes put an end to the accumulations and receive the income as it accrues. An extreme illustration of this is seen in *Wharton v. Masterman* (1895) A. C. 186. Indeed no case can be found where it has ever been held that the mere rule against perpetuities avoided a directed accumulation, even when resting on a future contingency, except under the same circumstances which would reach the principal fund. Every text-writer and every decided case of authority, unless where there are some local peculiarities, as in Virginia and New York, permit accumulations of income for charitable purposes under the same rules which govern the postponement of the application of the principal, and without any other limitations. There can be no doubt that in England the period over which accumulations in which the public are concerned may extend was in some degree, if not entirely, subject to the control of the crown, acting directly or by its chancellor, though the chancery would not allow the fund to remain indefinitely in its registry; facts which it has been suggested account for the origin of the amelioration in all respects of the rules with reference to perpetuities so far as concerns charitable uses. In harmony with what we have said, a very sensible and true observation on this topic is that of Mr. Justice Lathrop, speaking in behalf of the court, in *St. Paul's Church v. Attorney General*, 164 Mass. 188, 204, 41 N. E. 231, 237, as follows:

"We are of opinion, however, that the proper course is to hold that the limits of an accumulation for the benefit of a charity are subject to the order of a court of equity. By this method of solving the difficulty, on the one hand an unreasonable and unnecessary trust for accumulation can be restrained, and, on the other hand, a reasonable accumulation can be allowed to carry out the intention of the benefactor, and to secure the accomplishment of the trust in the best manner."

In the present case it might be suggested, if necessary, that the intended accumulation was a very wise one, because we cannot shut our eyes to the fact that the modern demands of hospitals, as well as of education, are so extensive as to require, in order to accomplish useful results, what heretofore would have been regarded as immense sums. However all these things may be, and although at times accumulations may be absorbed into the principal, as was done in *Wharton*

v. Masterman, *ubi supra*, no text-writer or judicial authority necessary to be considered has ever held that accumulations should not, in some way, go to the trust under the circumstances of the paragraph of the will we have under consideration, whether construed as giving an estate in *præsentio* or as postponing the vesting pending the result of a contingency. It is specifically stated that, except where there is some peculiar local policy arising through statutes or otherwise, the same practical rules, subject only to the settled limitations with reference to perpetuities, apply whenever both principal and profits are given together even by way of an executory devise. 4 Kent's Commentaries, *286.

This last proposition brings us back to a restatement, briefly, of some of the propositions relating to this case. Except for the fact that the complainant justly regards the issues involved as being, under the circumstances, of very grave importance, and has supported his propositions with much skill, as well as with great earnestness, the whole might have been dismissed from our consideration by a general reference to the state of the authorities; but under the circumstances we have felt compelled to consider all aspects. As we have said, we regard the whole estate given by the fourteenth paragraph of this will as vested from the death of the testator. An executory devise is correctly defined as a devise over after a devise in fee simple, which was not allowable at common law. Greenleaf's *Cruise on Real Property*, vol. 6, *366. In the present case the equitable fee was at all times devoted to charity; but the complainant regards only the legal title, and maintains, therefore, that the ultimate title which he is attacking is a mere executory devise. In that position he is undoubtedly sustained by some expressions which were not necessary, and therefore not thoroughly considered. Even so, his positions fail, alike as to the principal body of the estate and the accumulated income; for, even so, a limitation over in behalf of a charitable purpose may take effect, unless there is a prior fee vested for some other than a charitable purpose for a period beyond the time prescribed by the rule against perpetuities. This was fully stated by the learned judge who disposed of this case in the Circuit Court.

Except for the reasons we have already given, which require us to explain our views more fully than we otherwise would have done, we could well have disposed of the case by the notes of Mr. Justice Story on charitable bequests, which first appeared as an appendix to 4 Wheat. Ed. 1819. It is to be remembered that Mr. Justice Story imbibed his knowledge of the law in Massachusetts; and it never has been questioned, and cannot be questioned, that the views therein expressed by him are the same as have been accepted as settled rules in England, aside from interference by Parliament, in the Supreme Court of the United States, and also throughout New England, especially in Massachusetts. Whatever the cause of their preparation, the notes state succinctly the principal rules which govern this case, as follows:

"So, if a legacy be given to trustees to distribute in charity, and they die in the testator's lifetime, although the legacy is lapsed at law, yet it would be enforced in equity. Again, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy, yet, where the legacy is to be a charity, the court will consider charity as the substance; and in such cases, and in such

cases only, if the mode pointed out fail, it will provide another mode by which the charity may take; but by which no other than charitable legatees can take."

"So, if a corporation, for whose use a charity is designed, is not in esse, and cannot come into existence but by some future act of the crown—as, for instance, a gift to found a new college which requires an incorporation—the gift is valid, and the court will execute it."

The complainant, however, especially as to accumulations, relies on certain expressions in *Hall v. Hall*, 123 Mass. 120, decided on September 6, 1877, and cited in *Hale v. Hobson*, 167 Mass. 397, 45 N. E. 913, decided on January 11, 1897. It is not necessary for us to analyze these expressions, because, while we are bound by the settled rules of law in Massachusetts, it is only as they were settled and unquestioned before the issues in the present case crystallized. This occurred when the testator died, a few days before the opinion in *Hall v. Hall* was passed down. It is hardly necessary to refer to authorities to establish the proposition that it was then settled in that state that under circumstances like those at bar, where the disposition of the accumulations goes hand in hand with that of the corpus of the property, the fact that accumulations are specifically given is not detrimental to the vesting of the entire gift; but it is convenient to cite *Childs v. Russell*, 11 Metc. 16; *Fuller v. Winthrop*, 3 Allen, 51; *Tainter v. Clark*, 5 Allen, 66; *Bowditch v. Andrew*, 8 Allen, 339; and *Weston v. Weston*, 125 Mass. 268. Even if *Hall v. Hall* had been passed down before the death of the testator, and could be applied as maintained by the complainant, the most that could be said about it would be that it unsettled the rules in Massachusetts, so that we would be obliged to look to the English practice and to that of the Supreme Court. We are therefore clear that in all aspects of the case it is against the complainant on that portion of his major proposition which we have marked (1).

Coming now to that portion of the major proposition which we have marked (2), to the effect that the estate could vest in the corporation which is made defendant to this bill only to the extent of its originally authorized capacity to hold property, and that, therefore, the attempted devise of any excess was void, the answers are simple. In the first place, the rule of *cy pres*, to which we have referred, and which is so effectual with reference to charitable uses, would vest the gift in some way if the present corporation was incapable of taking; so that, in view of the fact which we have already stated, that we, sitting in equity, cannot regard the legal title of the complainant, no question could be involved herein which would concern him. But, if the corporation defendant were not expressly authorized by its charter to take the whole of the gift, it is a non sequitur to allege that the "attempted devise" to it of the excess was void, because no such gift was ever attempted by the will. The gift was of necessity to a corporation which could validly and legally take, and only to such a corporation; so that, therefore, if the defendant corporation were incapable of taking, the trusts would wait until one was organized which could take.

In any view, however, the complainant misunderstands the relations of the present corporation. The questions which have arisen with regard to the capacity of corporations to take, have been with reference to existing corporations which were specifically named in the will.

Of course, with reference to corporations so named which have not the capacity to take, if there can be any such corporations, a question may well arise whether, as against the heirs, if the heirs have any rights whatever in consequence thereof, the Legislature could enlarge the power of a corporation after the decease of the testator. No such question arises here, however, because, as we have said, the gift was only to a corporation which was capable of taking; and, if there was any apparent incapacity, the Legislature could, without any possibility of interfering with anybody's vested rights, enlarge its capacity at any time before a conveyance to it was made.

In order, however, to avoid any impression that we do not fully agree with the learned judge of the Circuit Court as to this branch of the case, we refer to the fact that, without any question whatever, the opinion given in behalf of the Supreme Court in *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, already cited, at page 188, 107 U. S., page 348, 2 Sup. Ct., 27 L. Ed. 401, observed as follows:

"Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state which created it."

The opinion did not doubt this rule, and it seems strange that it should ever have been doubted. It is entirely analogous to the rules with reference to the vesting of real estate in aliens, although, with regard to aliens, there was, of course, in the common law of England, a deep-seated policy against such vesting on account of certain obligations arising out of the feudal relations inconsistent therewith. Yet it never has been questioned that, while the common law, which never of itself does a useless thing, would not throw an estate upon an alien by inheritance, the alien might always take by deed or devise, and hold until inquisition of office to the contrary in behalf of the crown. *Greenleaf's Cruise*, vol. 3, *320, vol. 4, *21, vol. 6, *15. This rule has been stated by the Supreme Court; and analogous rulings, which stand unquestioned, have been made by that court in other respects. In *Runyan v. Coster*, 14 Pet. 122, 10 L. Ed. 382, it was decided, at page 131, 14 Pet., 10 L. Ed. 382, that, under the laws of Pennsylvania, corporations barred from holding lands would retain them until divested by due course of law by proceedings instituted by the commonwealth alone, and for its own use. Although *Runyan v. Coster* rested on local rules, yet, at page 131, 14 Pet., 10 L. Ed. 382, the principle was said to be the same which the Supreme Court had repeated in *Fairfax v. Hunter*, 7 Cranch, 621, 3 L. Ed. 453, to the effect that a title acquired by an alien by purchase is not divested until office found. Thus the analogy between an alien and a corporation was declared with reference to the ability to take and hold property. Exactly the same principle is involved in the various cases in reference to the limitations imposed by the statutes of the United States in regard to the powers of banks having federal incorporations, which cases have continued constantly in the same line from our earliest history to the effect that such incapacity can be taken advantage of by the United States alone. *Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631; *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Fortier v. New Orleans Bank*,

112 U. S. 439, 5 Sup. Ct. 234, 28 L. Ed. 764. In the present case the commonwealth, by inevitable inference from its special legislation enlarging the capacity of the defendant corporation to take, has waived all its rights, whatever they might have been, so that the title in question is now quieted in all directions. On the whole, this branch of the complainant's case could accomplish nothing, except, as stated in *Russell v. Allen*, 107 U. S. 163, 173, 2 Sup. Ct. 327, 27 L. Ed. 397, to suggest the possibility of a judicial determination, at the proper time and by the proper tribunal, of any question which might be made, if any, whether the defendant corporation meets the requirements of the gift under consideration—a question in which, as we have shown, the complainant has no interest.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

McDONALD v. DEWEY et al.

DEWEY v. McDONALD.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

Nos. 1,054, 1,081.

1. NATIONAL BANKS—LIABILITY OF STOCKHOLDERS—EFFECT OF TRANSFER OF STOCK.

To establish the liability of a stockholder in a national bank to creditors, on its failure, after he has made an actual out-and-out sale of his stock, and the same has been transferred on the books, although the sale may have been made for the purpose of avoiding liability, three things must concur: (1) The bank must have been insolvent when the sale was made; (2) the seller must have known such fact, or be chargeable with knowledge of it; and (3) the transfer must have been made to one who was insolvent or unable to respond to an assessment, and whose financial condition was known, or ought to have been known, to the seller.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 916.]

2. SAME—FAILURE TO HAVE TRANSFER REGISTERED.

A stockholder in a national bank remains liable to creditors so long as the stock stands in his name on the books, although he may have sold it and delivered the certificate to the purchaser, unless he has done all that he can reasonably do to have the same transferred, by seeing that the certificate is delivered to the bank, with the proper power of attorney and data to enable the officers to make the transfer.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 916-918.]

Who are liable as shareholders in national banks, see note to *Beal v. Bank*, 15 C. C. A. 130; *Earle v. Carson*, 46 C. C. A. 503.]

Grosscup, Circuit Judge, dissenting.

Appeal and Cross-Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The appellant receiver brought this suit against the appellees named in the title of cause 1,054 to avoid certain alleged fraudulent transfers of stock and to recover from the transferror, Charles P. Dewey, an assessment of \$86 a share on 105 shares in the defunct bank.

The bill alleged in substance that the bank failed and became insolvent on May 20, 1897; that the receiver was appointed and took possession on June 5, 1897; that on September 14, 1897, the Comptroller levied an assessment of \$86 upon each share; that on May 8, 1894, Dewey was the registered owner of 105 shares; that the bank was then and continuously until its suspension insolvent, and Dewey knew it; that on May 8, 1894, Dewey assigned 95 shares, and on January 3, 1895, his remaining 10 shares, to Frederick L. Jewett, who was irresponsible; that this assignment was colorable only and was made by Dewey for the purpose of evading his liability as stockholder; that Jewett subsequently made transfers of stock so that, when the bank suspended, the 105 shares formerly standing in the name of Dewey stood upon the records of the bank as being owned as follows, Andrew K. Park 6 shares, William Mathison 4 shares, Jules W. Jouvenat 10 shares, Emile Jouvenat 10 shares, G. C. Hatcher 30 shares, A. C. Kendig 20 shares, and F. L. Jewett 25 shares; that these transfers were made when the bank was insolvent, and for the purpose of evading the liability for an assessment, and to persons who were irresponsible and unable to respond to an assessment, as Dewey knew or ought to have known.

Dewey answered, denying that the bank was insolvent in May, 1894, or at any time prior to 1897, and denying therefore that he knew or had means of knowing of the bank's alleged insolvency from May, 1894, to January, 1895, when he assigned his stock; averring that the assignment to Jewett was made for the purpose of enabling Jewett to hold the shares as Dewey's agent, and that the subsequent transfers were made by Jewett for Dewey; denying that the purpose of disposing of his stock was to evade liability as stockholder; averring that the sales were outright and for the par value of the stock; denying that the purchasers were irresponsible and unable to respond to an assessment; averring that he had sold all his stock and that transfers, except as to 25 shares, were duly made on the bank's books prior to suspension; neither affirming nor denying the transfer of the 25 shares on the bank's books, but requiring the complainant to make strict proof in that regard.

The court found that the bank was organized in 1885 with a capital of 500 shares of \$100 each, of which Dewey owned 105 in 1894; that Jewett acted as Dewey's agent; that Dewey sold his stock through Jewett in December, 1894, and January, 1895; that the bank was then insolvent and Dewey knew it; that 80 shares were transferred on the books of the bank to the purchasers before the bank suspended; that when the bank suspended and went into the hands of the receiver 25 shares still stood and now stand on the bank's books in the name of Jewett as Dewey's agent; that in January, 1895, after the sale of all his stock, Dewey "notified the president of the bank by letter that he was no longer a stockholder in the bank and directed that his name as vice president should be erased from the stationery of the bank, and again about a month later wrote a second letter to the president of the bank to the same effect and protesting against the further use of his name on the stationery of the bank"; that of the bank's debts when Dewey sold his stock only \$2,787.90 remained unpaid when the bank suspended, and of this Dewey's ratable share was \$585.48.

From the decree fixing Dewey's liability at \$585.48 and interest, the receiver appeals, and Dewey presents a cross-appeal.

Sections of the national banking act that need to be referred to are these:

"Sec. 5139. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

[U. S. Comp. St. 1901, p. 3461.]

(The shares of this Nebraska bank were transferable only on the books of the bank, in person or by attorney, on surrender of the certificate that represented the shares proposed to be transferred.)

"Sec. 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

[U. S. Comp. St. 1901, p. 3465.]

"Section 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * *"

[U. S. Comp. St. 1901, p. 3498.]

Other facts are stated in the opinion.

F. M. Hall and E. E. Prussing, for plaintiff McDonald.

A. E. Harvey and R. S. Thompson, for defendant Dewey.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Dewey's assignment of his shares to Jewett did not affect the question of his liability, for the transaction was not an out-and-out sale, but merely established agency. *National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448.

Jewett for Dewey sold 80 shares out-and-out and the transfers thereof were duly made on the books of the bank. The statute says that national bank shares shall be deemed personal property. The full quality of salability is emphasized in *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373. So far as the statute declares, the seller who has his shares transferred on the books of the bank to his purchaser ends his liability as a stockholder. "Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." If the English rule, as stated in *National Bank v. Case*, supra, had been adopted in this country, Dewey could not be held to any liability on account of the 80 shares transferred on the books (for the sale was out-and-out) and the purchasers would have succeeded to all the rights and all the liabilities of Dewey as stockholder.

The American rule is better, we think, and holds the former stockholder under certain conditions, even if he has made an out-and-out sale of his shares and has caused the proper transfers to be made on the books of the bank.

What are the conditions without the existence of which such a former stockholder cannot be held?

He cannot be held, unless the bank was insolvent at the time of the transfer, for the creditors would not be injured. If they should ever sustain loss, it would be by reason of the bank's subsequently becoming unable to pay its obligations. But the negative does not

affirm that such a former stockholder is liable to assessment by the comptroller if the bank ultimately (perhaps years later) goes into the hands of a receiver, simply from the fact that the bank, when he transferred his shares, was insolvent in the sense that if it then went into liquidation the assets would not discharge all the liabilities.

He cannot be held, unless he know or ought to have known that the bank was insolvent at the time of the transfer; for an out-and-out sale, found to have been made in good faith, cannot be impeached. But this negative does not affirm that he is liable if merely the two conditions concur, insolvency and his actual or imputed knowledge thereof. In this case, however, it is asserted that the concurrence of the two conditions establishes liability, and, furthermore, that the liability is not merely for the debts at the time of the transfer which remain unpaid at the time of the ultimate failure and suspension, but is for the amount of the deficiency in the assets to pay the debts at the time of the transfer, which amount flows onward like a river into the ultimate failure and suspension. It is obvious that it is unnecessary to cast even a curious glance at the second contention, if the first is untenable. We apprehend no true reason for holding that the mere concurrence of the bank's insolvency and the stockholder's actual or imputed knowledge thereof inevitably and without any other condition establishes the bad faith, the fraudulent intent, of the selling stockholder. His obligation to creditors is contractual, just as much as if he had entered into a written engagement with each person who was a creditor when he became a stockholder and with each person who became a creditor while his name stood on the books of the bank as a stockholder. If at a particular time, as might be proven years later when the bank suspended, the bank, although then a going concern and meeting all its obligations from day to day as presented, should be unable, if then put into liquidation, to pay its debts in full, and if, by reason of his knowledge of such a condition, a stockholder could not dispose of his shares without having fixed upon him a liability to respond in the indefinite future to the comptroller's assessment after the bank's ultimate failure and suspension, national bank stock would not be very desirable property to own, its saleability in the market, which is a prominent feature in the statute's scheme, would be largely destroyed, and a condition would inevitably result which the law should discourage and not create, that the stockholder would be industrious in not knowing the affairs of his bank and very forgetful of anything that obtruded itself upon his attention. The receiver in this case does not concede that the supposed liability (whether for particular unpaid debts or for the stream of debts) would end if, at a time between the transfer and the ultimate failure and suspension (two years and five months in the present instance), the bank should become prosperous and abundantly able to discharge all of its obligations out of its assets. The supposed liability would charge the selling stockholder with the fraudulent intent to cheat the bank's creditors, even though he had diligently sought and had succeeded in finding a purchaser who was willing

to take the chances of the bank's ultimate failure and suspension and who was amply able to respond to an assessment. We conceive that a sale of the character instanced could be made in perfect good faith, that the transfer of the shares could be effected on the books of the bank in accordance with the statute and the by-laws of the bank, and that, again in accordance with the statute, the purchaser would succeed to all the rights and all the liabilities of the former holder of such shares. But even if it were conceded that such a sale, in and of itself, conclusively evidenced the bad faith and fraudulent intent of the seller, a right of action in the receiver as the representative of the creditors would not be established. Surely, if the purchaser responded to the assessment levied on the transferred shares, the receiver should not be permitted to maintain a suit against the seller. Surely, if the purchaser was able and compellable to respond, the receiver should not be permitted to sue the seller or the purchaser at his election, but should be required to collect from the purchaser who had succeeded to all the rights and liabilities of the seller. It is not enough that a sale be fraudulent as to creditors—the creditors must be injured by the fraud; and they are not injured if they have a direct and primary means of collecting their debts, without resort to the secondary means of setting aside the fraudulent sale. The argument results in the conclusion that the mere concurrence of the bank's insolvency and the selling stockholder's actual or imputed knowledge thereof does not make out a case. The two conditions named must be accompanied by a third.

He cannot be held unless his out-and-out transfer was made to an irresponsible person, unable to respond to an assessment, whose financial condition was known or ought to have been known to him. With respect to knowledge of the purchaser's insolvency, it might be fair to hold that the seller, having knowledge that the assets of the bank would be insufficient, if the bank were then to go into liquidation, to meet fully its obligations, is chargeable with notice of the purchaser's insolvency, unless he be able to establish affirmatively that he had made reasonably diligent inquiry and had been misled or had been unable to discover the true financial condition of his intending buyer.

The necessity of the concomitance of the three conditions hereinabove stated is established by the case of *Bowden v. Johnson*, 107 U. S. 251, 261, 262, 2 Sup. Ct. 246, 27 L. Ed. 386.

There are some expressions in *Stuart v. Hayden*, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639, which, if taken out of their context and separated from the pleadings and evidence, might seem to countenance the contention that averment and proof of the third condition is unnecessary. On reference to the case in the Circuit Court of Appeals for the Eighth Circuit (*Stuart v. Hayden*, 36 U. S. App. 462, 72 Fed. 402, 18 C. C. A. 618), it will be found that the bill averred that the transferees were insolvent; that the answer of the transferor relied on his ignorance of the bank's insolvency and his good faith in making the sale, but did not deny the insolvency of his transferees; and that the answer of the transferees "was in effect an admission of the averments of the bill." There was thus a virtual default as to the third condition, and it is fair to suppose that the transferor's argument in the Supreme

Court was confined to the defense made in his answer. And the expressions in the opinion which are relied on have in the main been explained in *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373.

In *Earle v. Carson*, *supra*, the court quotes the rule as stated by Mr. Thompson:

"A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and to other shareholders, although as between the transferrer and transferee it was out-and-out."

And under the third heading of the opinion the court holds that the transferrer must be chargeable with knowledge of the transferee's insolvency.

In this case the bill charges the existence of the third condition. As the finding of the court, in which we agree so far as it goes, is silent respecting the truth of the averment, it has been necessary for us to examine the evidence in that particular. Without stating the items, it is enough to say that we all agree that there is an utter failure of proof of the insolvency of the various transferees, and, on the contrary, there is considerable proof that they were solvent and able to respond to an assessment.

As to the other 25 shares, Jewett for Dewey indorsed the necessary assignments and powers of attorney upon the certificates and delivered them to the purchasers in Chicago, but no transfers on the books of the bank were ever made.

The general rule (see *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; *Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373) is thus stated in *Whitney v. Butler*:

"In nearly all of" the cases, "where the issue was between the receiver representing the creditors, and the person standing on the register of the bank as a shareholder, it is said, generally, that the creditors of a national bank are entitled to know who, as shareholders, have pledged their individual liability as security for its debts, engagements, and contracts; that if a person permits his name to appear and remain in its outstanding certificates of stock, and on its register, as a shareholder, he is estopped, as between himself and the creditors of the bank, to deny that he is a shareholder; and that his individual liability continues until there is a transfer of the stock on the books of the bank, even where he has in good faith previously sold it and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made. Some of the cases hold that the seller is liable as a shareholder even where the buyer agreed to have the transfer made on the books of the bank, but fraudulently or negligently failed to do so. But it will be found, upon careful examination, that in no one of the cases in which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates therefor to the bank itself, accompanied (where such surrender was not by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register. The position of the seller, in such case, is analogous to that of a grantor of a deed deposited in the proper office to be recorded. The general rule is that the deed is considered as recorded from the time of such deposit. 2 Washburn on Real Prop. bk. 3, c. 4, par. 52. Where the seller delivers the stock certificate

and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer, the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can do to effect a transfer on the stock register."

In *Earle v. Carson* it was said that the presumption of liability begotten by the presence of the name on the stock register is overcome by a finding that a bona fide sale had been made and that the seller had performed every duty which the law imposed on him to secure a transfer on the register of the bank. In the *Whitney* and *Earle* Cases the certificates, with the proper assignments and powers of attorney, were delivered to the bank. Whether, in view of the comparison of the bank to the office of the registrar of deeds, anything short of an actual delivery to the bank of the certificates with the proper assignments and powers of attorney, would be sufficient, is a question unnecessary to consider, because Dewey's letters to the bank fall far short of being all that he reasonably could have done to effect a transfer on the books. He failed to identify the various certificates for the 25 shares, to give the names and residences of the purchasers, and to connect each purchaser with the shares purchased by him. So, if the officers of the bank would have been justified, on the mere assertion of Dewey, in making the transfers on the books of the bank, it is evident that they could not have done so in the absence of the necessary data.

GROSSCUP, Circuit Judge (dissenting). In the conclusion of the court, respecting the twenty-five shares of stock, I concur. From the conclusion of the court, respecting the remaining eighty shares, I feel obliged to dissent.

Preliminary to a statement of the reason for my dissent, I note two facts not brought out pointedly in the majority opinion, but clearly established by the record. The first of these is, that the final suspension of the bank, though it occurred two years and five months after Dewey's transfer of stock, is traceable, in the line of cause and effect, to the insolvency of the bank at the time of the transfer; that is, the suspension when it did occur, was not wholly the outcome of intervening causes, but was the direct outcome, in part at least, of causes existing at the time of the transfer.

The second fact is this: That though so far as the record discloses, Dewey transferred his shares to people not shown to have been insolvent, the motive that actuated the transfer, so far as Dewey was concerned, was to escape his liability as a stockholder in a bank that he knew to be insolvent.

These facts the majority opinion seems to accept. The opinion proceeds, as I understand it, upon the proposition of law, that though the final suspension was in line of cause and effect of insolvency existing at the time of the transfer, and though the transfer was made with the insolvency of the bank in mind, and to escape liability as a stockholder, nevertheless no liability attaches, because, before liability can attach, it must be shown, in addition to the facts stated, that transfer was made to persons themselves insolvent, or to persons who, for some good reason, could not be made to respond to the stockholders' liability. In the

opinion of the majority, before liability attaches three facts must be concomitant, viz.: Insolvency, the stockholders' knowledge thereof, and a transfer to persons themselves insolvent, or unable for any reason to respond; and the absence of any one of these facts defeats a right of action.

Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639, as I read that case, is a direct authority against that proposition. Though in that case the bill averred the insolvency of the transferees, the averment was controverted by the answer, and there was no finding of the court that such insolvency existed; and the language employed by Mr. Justice Harlan, upon which the judgment proceeded, seems to me to expressly exclude the element of insolvency of the transferees as a condition to be established before there could be recovery by the receiver:

"One who holds such shares," said Mr. Justice Harlan, "the bank being at the time insolvent—cannot escape the individual liability imposed by the statute by transferring his stock with intent simply to avoid that liability, knowing or having reason to believe at the time of the transfer on the books of the bank (*Richmond v. Irons*, 121 U. S. 27, 53, 7 Sup. Ct. 788, 30 L. Ed. 864), that it is insolvent or about to fail. A transfer with such intent, and under such circumstances, is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferor and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee. The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts, and engagements, attaches when the bank becomes insolvent, and the shareholder cannot, by transferring his stock, require creditors to surrender this security as to him, and compel the receiver and creditors to look to the person to whom his stock has been transferred. * * * If the bank be solvent at the time of the transfer, that is, able to meet its existing contracts, debts and engagements, the motive with which the transfer is made is, of course, immaterial; but if the bank be insolvent, the receiver may, at least, without suing the transferee and litigating the question of his liability, look to those shareholders who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them."

I do not acquiesce in the suggestion that this language is inadvertent, or that *Earle v. Carson*, 188 U. S. 42, 23 Sup. Ct. 254, 47 L. Ed. 373, was intended to overrule it. The principle formulated in *Stuart v. Hayden* applied precisely to the case there decided—a case in which insolvency of the transferees, apparently, was not considered as an element or condition of recovery—while *Earle v. Carson*, also, had no concern with the insolvency of the transferees as a condition essential to recovery. The question in *Earle v. Carson* was, whether the bank being insolvent, the transferor could be held to stockholder's liability notwithstanding his want of knowledge of such insolvency.

What seems to me to be a reasonable interpretation of the National Banking Act leads to the same conclusion. That act was framed as a practical measure to meet practical conditions. Its chief purpose, unquestionably, was to make these banking associations safe as institutions authorized to issue currency, and to accept deposits. Accompanying this was the further purpose that the share of the bank, like other forms of property, should be freely saleable. But the latter purpose, plainly, was subsidiary to the former.

To carry out the chief purpose—security to the depositors—the act gives the depositor a succession of safeguards. The government is required periodically to inspect the bank; the government is given the summary right to close up the bank; and the stockholder, in the act of becoming such, collaterally contracts, to the extent of his stock, equally and ratably with others, that he will be liable for the contracts, debts and engagements of the bank.

Now to what extent is this third safeguard, the collateral contract, a fixed liability? Under what circumstances was it intended that the liability might be shifted to another? Section 5139 [U. S. Comp. St. 1901, p. 3461] of the National Banking Act provides that the shares shall be transferable on the books of the association, and that every person becoming a shareholder by such transfer, shall, in proportion to his shares, succeed to all rights and liabilities of the prior holder. But under what circumstances was this intended to release the prior holder from his liability? The answer to this question determines the law applicable to the transfer of the eighty shares under consideration.

Practically, there is a great difference, so far as the security of the depositors is concerned, between transfers of stock by stockholders, in the usual course of purchase and sale of bank stock, and transfers made solely to avoid liability. In the transfers of shares in the usual course of purchase and sale, the shares ordinarily pass from substantial and solid interests to substantial and solid interests; while in transfers to escape liability, the shares are apt to go to adventurers, or to others who themselves have something doubtful to trade off. True, the transferees in either case may, technically, be solvent; but the National Banking Act looked, not to solvency only, but to security—to the kind of security one desires when he is parting with his money on the credit of an endorser. Solvency, alone, does not make an endorser desirable. The personality of the endorser—his condition as a sold and safe, as well as a solvent man—is a prime consideration; for, though solvent, an endorser's credit may be so bad, or his business so speculative or otherwise precarious, that no one would be willing to extend credit upon his collateral obligation.

In the framing of the National Banking Act, congress must be assumed to have had in mind these practical considerations. To say that congress, wishing so far as could be done with safety, to make shares saleable, could have entertained no fear that depositors would be hurt in their security by transfers of stock in the usual course of bank stock purchase and sale, is to say, what in the long run is true; for in such transfers the stockholder is usually replaced by a stockholder equally desirable. But to say that congress could not see that depositors would be hurt in their security by transfers made by stockholders fleeing from an insolvent bank, and solely to escape their liability on account of the insolvency of the bank, is to assume that congress disregarded human nature, and all the teachings of experience. To my mind it is clear that it was not intended in the National Banking Act, that the stockholder should be able to drop his liability to depositors, whose deposits were made on the credit of his liability, by the simple device of a transfer; unless the transfer was made, not simply out and out, but in that good faith, also, that goes with the usual course

of bank stock purchases and sales; and this would exclude, clearly, a transfer made simply to escape the obligations growing out of known insolvency.

The statute thus interpreted, Dewey would be liable to the creditors of the bank, not only on the twenty-five shares, but on the eighty shares also. What now, is the measure of that liability? Does it run to the creditors severally, so that only those who were creditors at the time of the transfer may enforce it, or does it run to the creditors en banc, irrespective of when they become creditors, to be enforced by the receiver as an asset of the bank? Is it a liability for the deficit as it existed at the time of suspension, or for the deficit as it would have existed at the time of the transfer, had the suspension then taken place?

Answering these questions in the order named, I am of the opinion that the contracts, debts and engagements of the bank for which Dewey was liable, are not to be held to be the contracts, debts and engagements due to the creditors individually. The liability is for the contracts, debts and engagements of the bank as a unity—a continuous unity, like a continuous stream, changing from time to time in volume, but still the same stream. The depositor who, when Dewey was a stockholder, deposited his money in the bank, and thus became a creditor, is not the only person interested in Dewey's contract to make good, under certain circumstances, the debts, contracts, and engagements of the bank. He who, the next day after Dewey sold his stock, deposited his money, is equally interested; for such latter depositor, unless all safeguards such as this fail, had the right to rely upon the fact, that in the hour of Dewey's withdrawal as a stockholder, the assets of the bank were more than equal to its liabilities, or in case a deficit existed, that the then stockholders would be subject to call to make up such deficit.

Answering the second question, I think, that the measure of liability is the deficit that would have existed had the bank liquidated at the time the transfer was made. Dewey, though knowing of the bank's insolvency, was under no entire disability respecting the sale of such stock. Could a purchaser be found, solvent or insolvent, Dewey could transfer to him his stock. But in case it was not made in the good faith referred to, the transfer would not release his existing liability for the then contracts, debts and engagements of the bank. Now the measure of that liability, had it then been ascertained, would have been the difference between the bank's liabilities and its assets. That the bank was not then suspended, that the deficit was not then ascertained, and made good, cannot be charged to Dewey; for it was no part of his duty, and probably was beyond his power, to bring about a suspension of the bank.

The construction given to the national banking law thus outlined, seems to me to be the one that most nearly meets the just purpose that must have been in the mind of congress. Thus construed, the act is not an embargo upon free disposal of this kind of property by the holder of the property; nor does it on the other hand afford a premium to him who manages to get out stealthily, before the suspicions of the government are awakened, or the depositors of the bank advised.

The decree, according to my view, should have required that an ac-

counting of the liabilities and assets of the bank be taken, as of the day that Dewey transferred his shares, and that ratably with other shareholders, as of that day, Dewey be held liable to the receiver of the bank for the deficiency found to exist. Such a decree would do Dewey no injustice, would do the creditors no injustice, and would carry out, according to my judgment, the plain purposes and spirit of the National Banking Act, as shown in all its provisions—those calculated to promote the interests of the stockholders, as well as those calculated to protect the interests of the depositors.

On the cross-appeal, the decree is affirmed; on the appeal, the decree is reversed, with a direction to enter a decree against Dewey for his full assessment on the 25 shares and for interest thereon.

CUDAHY PACKING CO. v. STATE NAT. BANK OF ST. LOUIS, MO.

(Circuit Court of Appeals, Eighth Circuit. December 24, 1904.)

No. 2,057.

1. MORTGAGE—UNSIGNED MEMORANDUM ON BACK.

An unsigned contract printed on the back of a mortgage, and not referred to therein, cannot in any way qualify the terms of the mortgage.

2. NEGOTIABLE INSTRUMENTS—ATTORNEY'S FEES.

A provision for the payment of attorney's fees in case a note is not paid at maturity does not destroy the negotiability of a note otherwise negotiable.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 403.]

3. SAME—CERTAINTY REQUIRED IN NEGOTIABLE PAPER.

The certainty required in commercial paper is commercial certainty, not mathematical. The courts ought not to hold any provision fatal to the negotiability of such paper which by the general usage of the business world does not have that effect.

4. MORTGAGE—NEGOTIABLE INSTRUMENTS.

A mortgage securing a negotiable note so far partakes of its character as to pass free from equities between the original parties to a bona fide indorsee of the note.

5. SAME—SECURING NONNEGOTIABLE DEBT.

Quære: Whether the mortgagor of a mortgage securing a nonnegotiable debt can, after an assignment of the mortgage, by any dealings with the mortgagee short of actual payment, though had in ignorance of the assignment, raise "an equity" as against the assignee.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 126 Fed. 543.

Edwin A. Krauthoff (Thomas Creagh, J. V. C. Karnes, and Alexander New, on the brief), for plaintiff in error.

C. H. Kohler (M. A. Fyke, E. L. Snider, and J. H. Richardson, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. June 5, 1901, Humphrey & Fleming executed and delivered to Tamblyn & Tamblyn, live stock agents and brokers, of Kansas City, Mo., their promissory note for \$7,000, payable December 1st of that year, with interest at 8 per cent. To secure the payment of this note the makers executed a chattel mortgage of even date upon 300 head of four and five year old steers, which mortgage was duly filed in the proper office June 8th following. June 10th Tamblyn & Tamblyn, for value, indorsed and transferred the note and assigned the mortgage to the defendant in error (the plaintiff below), the State National Bank of St. Louis, Mo. The assignment was not recorded, and was not required to be by law, and no actual notice of the transfer was given to the mortgagors. Before the maturity of the note, namely, August 12, 1901, the mortgagors, without the knowledge or consent of the bank, shipped to the mortgagees, Tamblyn & Tamblyn, 78 head of the cattle covered by the mortgage, who sold the same to the plaintiff in error (the defendant below), the Cudahy Packing Company, and received in payment therefor \$2,331.11, which they applied in partial extinction of another indebtedness due to them by the mortgagors. This action is brought by the bank against Cudahy & Co. for the conversion of the 78 head of cattle. By stipulation it was tried to the court without a jury, and resulted in a general finding and judgment in favor of the plaintiff for \$2,331.11.

Two errors of law are assigned, which it is claimed require a reversal of this judgment: (1) It is contended that the mortgage authorized the sale and the payment to the mortgagees, notwithstanding its assignment. (2) It is urged that the note was not negotiable, within the law merchant, and that the sale having been made by the mortgagors, through the original mortgagees, in ignorance of the assignment of the mortgage, the assignee cannot maintain this action.

The first contention is based upon the following language, which is printed on the back of the mortgage:

"All of said cattle, as herein mentioned, are to be held in said pasture and fed by the mortgagor during the term of this mortgage, and at least three days before the maturity of the note herein mentioned they shall be shipped and consigned to Tamblyn & Tamblyn at the stockyards at Kansas City, Missouri, and when sold by them the proceeds thereof shall be applied, first, in payment of the usual commissions to said Tamblyn & Tamblyn for selling the same and the balance, or so much thereof as may be necessary shall be applied to the indebtedness hereinbefore mentioned.

"If said cattle or any part thereof be consigned to or sold by any person except Tamblyn & Tamblyn, then said mortgagee shall be paid the proceeds of said sale and a commission of fifty cents per head on all the above described cattle so sold."

This instrument was not signed by the mortgagors nor is it in any way referred to in the mortgage. It could not, therefore, be treated as a binding contract between the mortgagor and mortgagee. It is a mere blank paper, with no force whatever. The fact that it is printed upon the back of the mortgage, but not executed, might properly indicate that the mortgagors intentionally refused to be bound by its terms. A more natural interpretation would be that the mortgage was executed by the mortgagors without any knowledge whatever of this printed indorsement on the back of the instrument, and it would be a wholly

unjustified interpretation to hold that they were bound by terms to which they never subscribed. For these reasons, we consider that this indorsement was not binding even as between the original parties. Much less could it be held to be binding upon an assignee of the mortgage, or to qualify in any way his rights under the mortgage itself. But even if the instrument were binding as between the original parties, a fair construction of its language would limit it to the time during which the mortgagees continued to be the owners of the mortgage. Its primary object was to secure to the commission merchants their commissions on the sale of the cattle. It was never intended to destroy the mortgage itself. This, however, would be the result of a construction that would leave this indorsement binding notwithstanding a transfer of the mortgage. The assignee would really have no security whatever, under such an arrangement. He would be dependent upon the fidelity of the commission merchants. If the contention of counsel for the plaintiff in error is sound, the mortgagor and mortgagee had the right to sell and dispose of the mortgaged property, and whether the assignee of the mortgage would ever derive any benefit from it would be entirely dependent upon the fidelity of Tamblyn & Tamblyn. Instead of having a lien upon the property, the assignee of the mortgage would simply have the personal obligation of the original mortgagees. Neither the instrument nor the nature of the transaction justifies any such interpretation.

The note was payable to the order of Tamblyn & Tamblyn, but it contained the following provision: "And in case legal proceedings are instituted to enforce the collection of this note, we agree to pay ten per cent. of the entire amount due as attorney's fees." It is contended that this language destroyed the negotiability of the note, or, more accurately, made the instrument not a promissory note at all, but a mere chose in action. This is the holding of the Supreme Court of Missouri—the state in which this action arose. *First National Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Samstag v. Conley*, 64 Mo. 476; *First National Bank v. Marlow*, 71 Mo. 618; *McCoy v. Green*, 83 Mo. 626; *Creasy v. Gray*, 88 Mo. App. 454. The question, however, is one of general commercial law. The federal courts, in respect of it, are required to exercise an independent judgment. Such has been their uniform practice in regard to all questions affecting negotiable instruments. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865. The case of *Mercer County v. Hackett*, 1 Wall. 83, 17 L. Ed. 548, presented a question very similar to the one now under consideration. The instrument in that case was executed by a corporation, and bore the corporate seal. The case arose in the state of Pennsylvania. The courts of that state had uniformly decided that the presence of a corporate seal destroyed the negotiability of such instruments. The Supreme Court, however, refused to follow this holding, the court saying:

"If this decision of the learned court was founded on the construction of the Constitution or statute law of the state, or the peculiar law of Pennsylvania as to titles to land, we would have felt bound to follow; but we have often decided that on questions of mercantile or commercial law, or usages which are not peculiar to any place, we do not feel bound to yield our own judgment."

There is a statute in the state of Missouri which has some bearing on the question. It reads as follows:

"Every promissory note for the payment of money to the payee therein named or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange."

The decisions of the Supreme Court of Missouri above referred to are not based upon this statute, but rest upon general considerations of the common law, as defining the essential elements of negotiable paper. The statute is affirmative in its language. It declares what elements must be found in a promissory note, but it does not declare what effect the presence of incidental provisions, such as the payment of attorney's fees, shall have. It is conceded that all the elements mentioned in the statute are present in the note in question. It would not be a proper construction of the language which the Legislature has used to hold that every instrument which contained provisions other than those mentioned in the statute should be nonnegotiable. It is not correct to say that promissory notes were not negotiable in England at common law. The statute of Anne is declaratory simply of the common law. It has never been construed by the English courts as creating any new rule. It was enacted to remove the doubts created by the decisions of Chief Justice Holt. This whole subject is discussed with remarkable clearness and learning in the case of *Dunlop v. Silver*, a Circuit Court decision, reported in 1 Cranch, 367, Fed. Cas. No. 4,169. See, also, *Goodwin v. Robarts*, L. R. 10 Ex. 337. The statute of Missouri above quoted seems to have been enacted for the same general purpose as the statute of Anne, namely, to remove any doubt as to the negotiability of promissory notes. We feel at liberty, therefore, to deal with this question as a question of general law, free from statutory restrictions of the state in which the case arose.

Treating it thus, the question at the present time presents little difficulty. There has been considerable conflict in the courts of the different states on the subject, but the clear weight of authority at the present time sustains the doctrine that the incorporation of a provision for the payment of attorney's fees in negotiable paper does not destroy its commercial character. The following states have so held: Alabama (*Montgomery v. Crossthwait*, 90 Ala. 553, 8 South. 498, 12 L. R. A. 140, 24 Am. St. Rep. 832); Arkansas (*Trader v. Chidester*, 41 Ark. 242, 48 Am. Rep. 38); Georgia (*Stapleton v. Louisville Banking Company*, 95 Ga. 802, 23 S. E. 81); Illinois (*Dorsey v. Wolfe*, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 106); Indiana (*Stoneman v. Pyle*, 35 Ind. 104, 9 Am. Rep. 637); Iowa (*Shenandoah National Bank v. Marsh*, 89 Iowa, 273, 56 N. W. 458, 48 Am. St. Rep. 381); Kansas (*Seaton v. Scovill*, 18 Kan. 433, 21 Am. Rep. 212, note, 26 Am. Rep. 779); Kentucky (*Gaar v. Louisville Banking Company*, 11 Bush, 180, 21 Am. Rep. 209); Louisiana (*Dietrich v. Bayhi*, 23 La. Ann. 767); Mississippi (*Clifton v. Bank of Aberdeen*, 75 Miss. 929, 23 South. 394); Nebraska (*Heard v. Bank*, 8 Neb. 10, 30 Am. Rep. 811); Oregon (*Benn v. Kutzschan*, 24 Or. 28, 32 Pac. 763); Tennessee (*Oppenheimer v. Farmers' & Merchants' Bank*, 36 S. W. 705); Texas (*Hamilton Gin & Mill Co. v. Sinker*, 74 Tex. 51, 11 S. W. 1056);

Washington (*Colfax Second National Bank v. Anglin*, 6 Wash. 403, 33 Pac. 1056). No decision has been rendered by the Supreme Court of the United States on this subject, but the question has been frequently before the Circuit Courts, and the negotiability of the instruments sustained. *Howenstein v. Barnes*, 5 Dill. 482, Fed. Cas. No. 6,786; *Bank of British North America v. Ellis* (C. C.) 2 Fed. 44. The same doctrine has been approved by the Circuit Court of Appeals of the Sixth Circuit. *Farmers' National Bank v. Sutton Manufacturing Co.*, 6 U. S. App. 312, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595.

The following state decisions have held that such a stipulation renders the note nonnegotiable: California (*Chase v. Whitmore*, 68 Cal. 545, 9 Pac. 942); Montana (*Stadler v. First Nat. Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582); North Dakota (*Decorah First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473). These decisions all rest upon a statute—being the same statute that was construed by this court in *Second National Bank v. Basuier*, 65 Fed. 58, 12 C. C. A. 517. Maryland (*Maryland Fertilizing Co. v. Newman*, 60 Md. 584, 45 Am. Rep. 750); Michigan (*Altman v. Rittershofer*, 68 Mich. 287, 36 N. W. 74, 13 Am. St. Rep. 341); Minnesota (*Jones v. Radatz*, 27 Minn. 240, 6 N. W. 800); Missouri (*Trenton First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430, and other cases above cited); North Carolina (*New Windsor First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604); Pennsylvania (*Woods v. North*, 84 Pa. 407, 24 Am. Rep. 201); South Carolina (*Carroll Co. Savings Bank v. Strother*, 28 S. C. 504, 6 S. E. 313); Wisconsin (*W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100). The decisions which sustain the negotiability of notes containing a provision for the payment of attorney's fees have, in the main, been justified upon the ground that prior to the maturity of the note, and while it was current in the business world, the provision was inoperative; that it did not take effect until after the dishonor of the note, so that in any case the transferee would take subject to all the defenses existing between the original parties. This reasoning cannot be applied to provisions for the payment of exchange, and upon that ground notes containing such provisions have by many courts been held to be nonnegotiable. *Hughitt v. Johnson* (C. C.) 28 Fed. 865.

We believe that the whole subject might well be rested on safer and more fundamental grounds. Judge Mitchell, in writing the opinion of the Supreme Court of Minnesota in the case of *Hastings v. Thompson*, 55 N. W. 968, 21 L. R. A. 178, 40 Am. St. Rep. 315, indicated the correct doctrine when he said:

"The reason and purpose of the rule that the sum to be paid must be certain is that the parties to the instrument may know the amount necessary to discharge it without investigating facts not within the general knowledge of every one and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument."

The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the functions of negotiable instruments in the judgment of business men ought not to be regarded by the courts. The fine phrase of Chief Justice

Gibson in the case of *Overton v. Tyler*, 3 Pa. 346, 45 Am. Dec. 645, that a negotiable instrument "is a courier without luggage," has been made to do much service in the discussion of this subject. The real question, however, is who shall determine what constitutes "luggage"—the business world, or the judge in his library? In no branch of the law has the sound judgment of the English courts shown itself more conspicuously than in the treatment of this subject. Whenever a new instrument, varying in some of its features from the ordinary promissory note or bill of exchange, has been presented for admission to the class of commercial paper, those courts have called for their guidance men from the actual business world, best qualified to speak on the subject. If, from their evidence, it has appeared that the instrument in question was by the general custom and practice of the business world treated as a negotiable instrument, the court has given effect to that usage, and adjudged the instrument to be subject to the same law as other negotiable paper. This was true not only in the early and formative periods of the commercial law, coming down to the age of Lord Mansfield, but has been followed with the same freedom from time to time down to the current year. Those courts have never forsaken the business world to pursue a definition. A few of the many cases which might be cited will illustrate this practice. In 1824, in the case of *Gorgier v. Mievile*, 3 Barnewall & Cresswell, 45, the question was first raised whether bonds issued by a government should be treated as negotiable instruments. The court called for its instruction as witnesses the principal bankers of London, and, being advised by them that such instruments were generally treated by the commercial world as negotiable, the court assigned that character to them, and decided the case accordingly. The opinion of Chief Justice Cockburn in *Goodwin v. Roberts*, L. R. 10 Ex. 337, is not only a striking illustration of the practice which we are considering, but contains a masterly exposition of the whole subject. The instrument there involved was entirely outside of the class of promissory notes or bills of exchange. It was scrip issued by the banking house of Rothschild in London, entitling the holder, upon the making of certain payments, to the delivery of bonds thereafter to be issued by the Russian government. It will therefore be noticed that the instruments did not even provide for the payment of money at all, but simply for the delivery of bonds. By the testimony of bankers and others qualified to speak on the subject, it appeared that for some 30 years such scrip had been treated by the business world as negotiable, passing from hand to hand, free of defenses. It was contended, however, that such evidence was not admissible to determine whether an instrument was negotiable, but that it was for the court to declare the law from its general knowledge of the customs of the business world, and the qualities essential to such instruments under previous decisions. Speaking to this question, the Chief Justice said:

"The substance of Mr. Benjamin's argument is that because the scrip does not correspond with any of the forms of securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach. Having given the fullest consideration to this argument,

we are of the opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed, stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of in reference to bills of exchange and other negotiable securities, though forming part of the general body *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience. By this process, what before was usage only, unsanctioned by legal decision, has become ingrafted upon or incorporated into the common law, and may thus be said to form part of it."

The learned judge then proceeds to give instances of cases illustrating this view, and continues:

"It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our courts as being in conformity with the usages of trade, of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on 'the custom of merchants.' Usage adopted by the courts having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting up to the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment?"

This decision was affirmed in the House of Lords not only upon the ground of estoppel, but also upon the ground set forth in the opinion of Chief Justice Cockburn. 1 App. Cas. 476. It is quite manifest that if the English court had followed the ordinary definition of commercial paper, instead of having recourse to the business world, the instrument there in question would have been held to be nonnegotiable, for it lacked an attribute which is usually regarded as essential to commercial paper, namely, that it shall provide for the payment of money only. The same practice of taking the testimony of business men for the purpose of determining whether an instrument is negotiable or not is illustrated in *London Joint Stock Bank v. Simmons*, 1892 A. C. 201; also *Bechuanaland Exploration Company v. London Trading Bank*, 1898 2 Q. B. 658. This last case arose upon debentures issued by a railroad corporation. Speaking of the character of the instruments, Mr. Justice Kennedy, who delivered the opinion of the court, says:

"Now, it is, I think, unquestionable, and it was not disputed at the bar, that such a debenture as this, if viewed according to its tenor, merely, and not with regard to mercantile usage, does not belong to the class of negotiable instruments which the law has recognized as such by virtue either of the ancient law merchant or by virtue of statute (such as bills of exchange, promissory notes, and exchequer bills), and the delivery of which confers a good title to the person who acquires them in good faith and for value, notwithstanding a defect in the title of the transferrer. It is most like a promissory note payable to bearer, but it is prevented from ranking as such by its conditions."

The instruments contained many conditions rendering them uncertain both as to the time of payment and the manner of payment, but the court, being advised by the leading bankers of London that such instruments had for a long time been treated as negotiable by the business world, held them to be negotiable, within the law merchant. The Supreme Court of the United States, in the case of *Mercer County v. Hackett*, 1 Wall. 83, 95, 17 L. Ed. 548, approves of the same doctrine. See, also, *Rindskoff v. Barrett*, 11 Iowa, 172; same case, 14 Iowa, 101; *Renner v. The Bank of Columbia*, 9 Wheat. 582, 6 L. Ed. 166; *Mills v. Bank of United States*, 11 Wheat. 431, 6 L. Ed. 512; *The Bank of Washington v. Triplett*, 1 Pet. 25, 7 L. Ed. 37; *Cookendorfer v. Preston*, 4 How. 317, 11 L. Ed. 992; *Kilgore v. Bulkley*, 14 Conn. 362.

Now, if provisions for the payment of attorney's fees and exchange were dealt with upon this basis of commercial usage, the rule of decision would be entirely plain. We have no evidence in this record on the subject, and need none, for we are informed by a great body of judicial decisions that for at least half a century it has been customary in nearly every state of the Union to incorporate such provisions in negotiable paper. This practice has been so general and so long continued that the court itself may now take judicial notice of it. In the judgment of business men, such provisions do not render promissory notes uncertain, or in any way affect their negotiability. These requirements, it should be remembered, do not offend against any rule of morals or public policy. The whole question is, do they render the instruments so uncertain as to destroy their fitness to pass current in the business world? The business world itself ought to be permitted to answer that question. It should be carefully noted that the question whether a given class of instruments shall be admitted to the category of negotiable paper is distinct from the question of the rights or liabilities of parties to such paper. These, usage could not modify or impair. A general custom of the business world may enlarge, but cannot abrogate, the established rules of law. *Goodwin v. Robarts*, L. R. 10 Ex. 337; *Vermilye & Co. v. Adams Express Co.*, 21 Wall. 138, 22 L. Ed. 609.

We can learn from another source, in a trustworthy manner, the opinion of the business world as to the effect of provisions for the payment of exchange or attorney's fees upon instruments otherwise negotiable. In 1896 the commissioners appointed by the several states to promote uniformity of laws prepared the negotiable instruments act. It has since been adopted in 27 states and territories, including the great commercial states of Massachusetts, New Jersey, New York, Pennsylvania, Ohio, and Wisconsin. The concurrent action of the Legislatures of these several states may well be held to fairly represent the judgment and usage of the business world in this country. On the subject of certainty in negotiable paper, this act provides:

"Sec. 21. The sum payable is a sum certain within the meaning of this act, although it is to be paid:

- * * * * *
- "(4) With exchange, whether at a fixed rate or at the current rate; or
- "(5) With costs of collection or an attorney's fee in case payment shall not be made at maturity."

The English bills of exchange act contains similar language in regard to a provision for the payment of exchange. It does not speak to the question of attorney's fees, for the practice of incorporating such provisions in promissory notes seems not to have obtained in that country.

Both upon authority and reason, we are therefore entirely satisfied that the note in question was negotiable, within the law merchant. That being so, the mortgage securing the note partook of its character, and, in the hands of the bank, was free from all equities between the original parties existing at the time of its transfer or arising subsequent thereto. *Carpenter v. Longan*, 16 Wall. 273, 21 L. Ed. 313; *Sawyer v. Prickett*, 19 Wall. 147, 22 L. Ed. 105.

We would not wish to be understood as deciding that a different result would have been reached if the indebtedness secured by the mortgage had been a mere chose in action. We leave that question open for decision when it shall arise. The doctrines of estoppel and good-faith purchaser have been steadily narrowing the "equities" of the original mortgagor or debtor, and enlarging the protection granted to a holder in good faith and without notice. *Merchants' Bank of Buffalo v. Weill* (Sup.) 52 N. Y. Supp. 37; *Id.*, 163 N. Y. 486, 57 N. E. 749, 79 Am. St. Rep. 605; *Ewart on Estoppel*, 376 et seq.; *Curtis v. Moore*, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506. In this last case it was held that the assignee of a recorded mortgage upon real estate which was conveyed by the mortgagor to the mortgagee after an assignment of the mortgage has a valid lien as against a purchaser of the land from the mortgagee who took without notice of the assignment. The mortgage in that case was given to secure a bond. It is, of course, well established that the mortgagor may pay the mortgagee of a mortgage securing a nonnegotiable debt after its assignment if the payment is made in ignorance of such assignment, and the same will have the effect of discharging the mortgage, but whether any transaction less than an actual payment can create an equity as against the assignee is a question which we prefer to leave open for future consideration.

The judgment of the trial court is affirmed.

WINSLOW v. THOMPSON.

(Circuit Court of Appeals, First Circuit. December 22, 1904.)

No. 536.

1. SHIPPING—CONSTRUCTION OF BILL OF LADING—DUTY AND RISK OF TOWAGE.

A provision in a bill of lading for a cargo of coal to be delivered at Portland, Me., which required the consignee "to tow vessel in and out of Back Bay free," is not a contract to pay for the towage merely, but to provide the same.

2. TOWAGE—DUTIES AND LIABILITY OF TUG.

A tug is bound to exercise proper diligence in ascertaining the condition of the channels and other waters where she assumes to tow vessels, and, if it involves any special hazard, in making it known to the tow. If she performs such duties, and damage results to the tow, which

could not have been prevented by the exercise of reasonable care and skill in the act of towing, she is not liable therefor; but, if she fails in such duties, she is liable for the consequences, whatever amount of care she may use in the act of towing, and she is also liable if, having performed such duties, damage results from her negligence in the immediate act of towing, which might have been avoided by reasonable care, notwithstanding the hazards.

3. SAME—NEGLIGENCE OF TUGS.

Tugs employed by the consignee of the cargo, who had contracted to perform the towage, undertook to tow a schooner heavily laden with coal through a channel and over a bar, where the water at the then state of the tide lacked some two feet of being sufficient for her draft at the stern. Having grounded forward, instead of drawing her off astern, as suggested by her master, they attempted to jump her over, which attempt was unsuccessfully renewed on two succeeding days, in consequence of which she was strained and injured, and it became necessary to lighten her cargo. The master of the schooner was unfamiliar with the channel, but it was well known to the captain in charge of the tugs, who knew the depth of water on the bar and the draft of the schooner. *Held*, that the acts of the tugs in persisting in their attempts to pull the schooner over the bar after she grounded were negligent, and rendered the consignee, for whom they were acting, liable for the resulting injury.

Appeal from the District Court of the United States for the District of Maine.

For opinion below, see 130 Fed. 1001. See, also, 128 Fed. 73.

Albert E. Neal (Seth L. Larrabee and William K. Neal on the brief), for appellant.

Benjamin Thompson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This appeal relates to a libel brought by the master of the schooner Marjory Brown against the consignee. It claims freight, which was awarded in the District Court, and which is covered by this appeal, but as to which there is no question. It also claims damages for alleged improper towage, basing the right of action against the consignee on the provision in reference to towage contained in the bill of lading, of which the following is a copy:

B. L. No. 17490.

The Celebrated
Powelton Semi-Bituminous Coal.
Sterling Coal Co.

General Office: 421 Chestnut St., Philadelphia, Pa.

Offices:

New York.
New Haven, Conn.
Boston, Mass.

Greenwich, Philadelphia.
South Amboy, New Jersey.
Baltimore, Md.

Shipped on account of Consign, in good order by Sterling Coal Company, in and upon the Schooner called the "Marjory Brown" of whereof ——— is Master, now lying at Greenwich, Philadelphia, and bound for Portland, Maine. (Their Wharf)

Semi-Bituminous Coal

In Hold On Deck

Gross Tons

1874

Total

Eighteen Hundred and Seventy-four Tons of 2240 Lbs. of Semi-Bituminous Coal, which I promise to deliver in the like good order, at the aforesaid Port of Portland, Portland, Maine, dangers of the sea only excepted, unto Winslow

& Company, or to his or their assigns; Consignees paying freight for the same at the rate of 90c & discharged & to tow vessel in & out of Back Bay free.

In witness whereof, I, the Master or Purser of said Vessel have affirmed to 4 Bills of Lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated at Greenwich, Philadelphia, August 19th, 1903.

A. P. Thompson.

In the margin is the following:

Demurrage at the risk and Expense of Consignee.

The decree of the District Court awarded damages to the libellant for improper towage in the sum of \$2,285.35, with interest. Thereupon the consignee appealed to us. The general facts and the issues which they raise are sufficiently stated in the opinion passed down in the court below. The appellant claims that the provision in the bill of lading relative to towing merely obliges the consignee to pay the cost of towage, but its phraseology, "and to tow vessel in and out of Back Bay free," is too clear to require or permit construction. The consignee employed a reputable and competent corporation, engaged exclusively in towing, with a competent and sufficient fleet of tugs. This, at once, suggests a question whether the remedy of the owner of the schooner was not limited to a proceeding against the tugs or their owner, on the principle that, where a contract, either on its face or by necessary implication, involves the employment of a person or corporation exercising an independent office or profession, the contracting party is sometimes relieved by using due diligence in selecting the person or corporation who is to perform such incidental work. While this issue was made in the District Court, the appellant has waived it so far as we are concerned, and it requires no further consideration.

The vessel in question was a schooner of about 1,000 tons burden, coal laden, drawing 21 feet aft. In order to accomplish her bill of lading according to its terms, she was required to pass through a short, but narrow, channel, where, at ordinary tides, there was not sufficient water for her draft. Under such circumstances, especially where there is a mere bill of lading and not a charter party, both the vessel and the owner of the cargo are held to have known, or to have waived knowledge, of the draft of the vessel and the general states of the tide to the extent that, in the event the vessel in approaching the particular place of discharge is required to await a certain stage of water, each party bears the temporary consequences thereof, so far as the consignee is delayed in receiving the cargo as soon as he may have desired to receive it, and so far as the owner of the vessel, meanwhile, loses her use. Under such circumstances, either party may lighter, but neither is required to do so. Such was the normal condition here, as there can be no question that, on a full tide, the vessel might have been towed safely through the channel in question, although the towage would have required great care.

The proposition is made by the appellant that, whatever may have been the obligation resting on the consignee by the bill of lading concerning the towage in this particular case, the towage was contracted for, not by him, but by the vessel. Some circumstances, and some statements made at bar, created an impression that, as frequently occurs, the Marjory Brown was met by a tug before arrival in the

harbor to which she was destined according to the bill of lading, and engaged towage. The later development of the facts showed otherwise, and that the order for towage came from the consignee, and not from the vessel. It is not necessary to detail the circumstances in reference thereto, as the case is too plain on this point to require it. Undoubtedly, after the order for towage was given by the consignee, there were some conversations between the master of the schooner and the representatives of the corporation owning the tugs, but these did not amount to a new contract. All that can be said is that, if there was anything definite in this conversation, it merely waived certain rights which the schooner and her master would otherwise have had against the consignee or the tugs, according as the master or the owner of the schooner saw fit to proceed against one or the other.

As a result of the conversations to which we refer, the consignee claims that the master of the schooner was advised of the condition of the channel, and thus learned that the position was hazardous, and assumed the risk in reference thereto. On the other hand, this is denied as a matter of fact, and it is also claimed that a tug engaged in general towage service cannot stipulate effectually for such an assumption; and *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382, is relied on. Inasmuch as the law is settled beyond all question that a tug is not a common carrier, and is, therefore, obligated only for reasonable diligence, which, in view of the nature of the service, and, also, in view of the fact that ordinarily the tow is a stranger and the tug is at home, means very great diligence, *The Syracuse* cannot be applied to the extent claimed by the libellant. However, it will be seen that this question is not essential in the present case, wherein, as to each proposition, we will point out the general duties of the tug to her tow, and, also, show that whatever risks may have been assumed by the master of the vessel, if any, they did not cover that special negligence of the tugs which, in this case, was the approximate and true cause of the damage done.

Stated generally, the obligations resting on a tug are as follows:

First. She is "bound to know," which means only that she must use proper diligence in ascertaining, the condition of the channels and other waters where she assumes to tow vessels. *The Margaret*, 94 U. S. 494, 24 L. Ed. 146; *The J. P. Donaldson*, 167 U. S. 599, 603, 17 Sup. Ct. 951, 42 L. Ed. 292; *The Belle*, 93 Fed. 833, 35 C. C. A. 623; *The Nathan Hale*, 99 Fed. 460, 462, 39 C. C. A. 604.

Second. If the peculiarities involve any special hazard, it is the duty of the tug to make them known to the tow, so far as by due diligence the tug might have ascertained them. *The Margaret*, 94 U. S. 497, 24 L. Ed. 146.

Third. If she fails in her duty with reference to propositions 1 and 2, and tows a vessel into a special hazard for that vessel, the tug is liable for the consequences, if injurious, whatever amount of care she may use in the act of towing.

Fourth. If she enters on a towage involving hazards, as to which she performs her duty under propositions 1 and 2, and damage results to the tow which could not have been prevented by reasonable

diligence on the part of the tug in the act of towing, the tug is not liable therefor. *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382; *The Hercules*, 73 Fed. 255, 19 C. C. A. 496; *The Columbia*, 109 Fed. 660, 48 C. C. A. 596.

Fifth. If, notwithstanding the tug has performed her duties under propositions 1 and 2, she enters a hazardous channel with her tow, and there is guilty of negligence in the immediate act of towage which she might have avoided notwithstanding the hazards, and injury results to the tow in consequence of such negligence during the act of towage, the tug is liable therefor.

With reference to all the above propositions, we repeat what we have already said, that reasonable care on the part of the tug means a very great degree of care. Premising that fact, we are obliged in the present case to consider only proposition 5.

The evidence was conflicting as to propositions 1 and 2. There is much ground for maintaining that the corporation which owned the tugs, and Capt. McDuffy, who was their commodore while the service was being performed, were entirely familiar with the channel and sufficiently explained to Capt. Thompson, the libelant and master of the tow, in regard to the risks involved, except only that it is not apparent that the nature of the tides was thus explained, or that he knew to what extent they bore on the conditions. The fact that the masters in immediate command of the tugs which were attending the schooner were unfamiliar with the conditions is of no special importance, inasmuch as Capt. McDuffy was present in command of the fleet. Capt. McDuffy had towed deep-draft vessels through the channel in question by pounding them over the shallow place where the *Marjory Brown* caught, something like 25 in all, and had sounded the channel back and forth time and time again.

Among these vessels was the *Cordelia Hayes*, which drew within 4 inches as much as the *Marjory Brown*, and with whose master Thompson had been in consultation, before he sailed for Portland, as to the nature of the channel. Another was the *Clara B. Randall*, drawing 20 feet 4 inches; another, the *S. M. Plummer*, drawing 20 feet; another, the *R. F. Pettigrew*, drawing 20 feet 4 inches; another, the *C. E. Hayes*, drawing 20 feet 8 inches; another, the *E. W. Clark*, drawing 20½ feet; another, the *F. T. Stinson*, drawing 21 feet, exactly the same draft as the *Marjory Brown*. All these caught and were jumped over, but they seem to have gone in on what Capt. McDuffy describes as a "good tide," a "fair tide," or a "full tide." For example, the *Hayes* went up when there was an 11-foot tide, and the *Stinson* when, as Capt. McDuffy says, "there was a good tide, 10 feet"; yet he admits that, when he went in with the *Marjory Brown*, there was a tide of 8 feet and 8 inches, while a fair tide is 9 feet 5 inches, and a full tide 12 feet.

Under these circumstances, it will be found that *The Syracuse*, 12 Wall. 167, 171, 20 L. Ed. 382, already referred to, has full application to the case. *The Syracuse* was being towed in the neighborhood of the Battery, New York Harbor, where, on account of the number of vessels and the currents, the conditions were difficult. The tide, also, was setting in at that time unusually strong, so that there was inevitably con-

siderable danger in taking a tow so large as *The Syracuse* at that particular time (page 169, 12 Wall., 20 L. Ed. 382). The answer set up (page 169, 12 Wall., 20 L. Ed. 382) that by special agreement, the tow was moved at her own risk. The construction put on this by the counsel for the tug, who was Mr. R. D. Benedict, an admiralty lawyer of very great experience, was that it amounted to a contract on the part of the tow that she would assume the hazards, "provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill." This was all that he claimed, and this is practically the position taken by the court (page 171, 12 Wall., 20 L. Ed. 382), and is undoubtedly the true rule. Applying that to the present case, the result is clear, even though the tugs performed their duty with reference to propositions 1 and 2. If the schooner had merely come up with her bow on the shoal, her stern resting easily afloat, as it might have done, she would probably have suffered no substantial damage. But the injury to her did not come about in that way, as the record clearly shows.

Capt. Thompson testifies, and his testimony is not contradicted, that, after the schooner touched bottom, the tugs drew ahead for a while until the hawsers parted; that they then made other attempts, and parted their hawsers three times; that he then asked them if they could not pull him astern, and they replied that he was almost over; that he did not sound at that time, because it was almost dark; that he was drawing 21 feet aft and 19½ feet forward; that this was Sunday, the day on which the tugs took hold of his schooner; that the tugs continued to work that night for an hour or two hours after high water; that they then left him; that on Monday morning he sounded, and never found over 19 feet the whole time he lay there; that the tugs did not come to him Monday morning, because the morning tide was not so high as the evening tide; that they returned Monday evening, and drew his schooner ahead from 50 to 75 feet; that they did not get her off, although one of the tugs three times pulled apart "an eight-inch hawser, almost brand new"; that they worked that night about two hours or more; that her condition at low water on Monday night was worse than on Sunday night; that on Monday the tugs had pulled her bow over the ledge; that at low water her bow was way down, drawing 20 feet forward, and her stern up in the air; that she then had a list to port; that on Tuesday night they made another effort, but did not start the schooner at all; that the vessel was then leaking and showing some signs of strain, and had a list of 40 degrees; and that on Wednesday he made an application to the consignee, and lightering was commenced.

The injuries to the vessel, for one of her size, were not very serious. It was claimed that her lines, after she was repaired, were somewhat impaired; but no one estimated her irreparable injuries at more than \$1,500 to \$2,000. The repairs cost \$723.15, and the final decree, so far as it relates to damages, was for \$2,285.35. The nature of the injuries to the vessel, as shown after she was hauled out for repairs, including the straining and the impairment of her lines, was clearly of such a character as was caused by dragging her over the shoal on less than a full run of tides, and leaving her

on Tuesday with her bow down and her stern in the air, and with the list of which we have spoken. Capt. Thompson testified that her keel was mashed up for a distance of 125 feet; that "it showed plain enough to any one where she grounded the first night and where she grounded the second night"; that where she grounded, meaning where she grounded the first night, the keel was "mashed and squeezed right out"; that this was forward "near the forerigging, probably 10 feet aft of that"; that the next place where the indentations in the keel were deeper than elsewhere was near the spanker rigging, which, of course, was well aft; and that "these two places were mashed right down flat." The testimony given before the assessor by the master carpenter who had charge of the repairs is somewhat more in detail, but need not be repeated, as it is to the same effect. Evidently, Capt. Thompson's statement in regard to where the schooner "grounded the first night" and "where she grounded the second night" did not refer merely to her bringing up against the shoal, but to the position in which she was left by the subsequent attempts of the tugs to jump or pound her over the shoal. This is plain, because, as we have already said, he testified that the first injury to the keel was near the forerigging, "probably 10 feet aft of that." An injury could not have occurred at that place in the keel until the schooner had been well dragged up on the hard sand, or ledge, or whatever it was.

While the facts with reference to the attempts to jump or pound the schooner over the shoal, and the consequences thereof, were not brought out at the hearing at bar so fully as we have stated them, yet the result to which they lead was considered by the District Court. The learned judge of that court, in his opinion, said: "In the attempt to jump the vessel over the spot where she had grounded, there was clearly a lack of proper knowledge. There was a want of judgment on the part of the towboat captains." And the sixth error assigned is based on the finding that the corporation owning the tugs did not exercise reasonable care "in their undertaking to haul the tow off from the obstruction upon which their lack of knowledge had placed her"; while the thirteenth error assigned also is based on the finding that the schooner was at any time with her bow in 20 feet of water at low tide, with her stern in only 13½ feet of water. What was done in the way of attempting to pound the schooner over the shoal was in no manner within the rule of in extremis as to either the schooner or the tugs. There was no present danger, and there was ample opportunity for deliberation. Neither was it or its consequences, in any view of the maritime law, continuous with the towing of the vessel into the channel in question and her first bringing up against the shoal, or the proximate result thereof. It was all a new and independent condition of things and acts, with independent results clearly marked as such. As we have said, without this the case fails to show that the Marjory Brown would have suffered any substantial damage, and, especially, it fails to show that the inconsequential prior results could have been distinguished from the substantial inju-

ries which the schooner undoubtedly received in the manner we have described in detail.

Therefore, the only question which can arise is whether the attempts to pound the schooner over the shoals involved negligence, and, if yes, whose negligence. That there was an error of judgment for the consequences of which someone should be responsible, the result makes too plain to require further exposition. As we have said, Capt. Thompson testified that, when the hawsers parted, on Sunday evening, he asked Capt. McDuffy if the tugs could not pull his schooner astern, and Capt. McDuffy replied:

"No; she is almost over. It is easier to go ahead than to go astern."

In fact, Capt. McDuffy admitted as follows:

"Q. Whether, at the time the vessel grounded, Capt. Thompson made any suggestions or gave any orders? A. He gave no orders, but followed my orders; that is all.

"Q. According to your best judgment, was it the proper thing to pull the vessel ahead after she grounded? A. Yes, sir."

Undoubtedly, there was an eagerness, in a certain sense not reprehensible, on the part alike of the tugs and of Capt. Thompson, to have the schooner in her berth Monday morning. It was known that the consignee desired to discharge her that morning. It was known, also, by Capt. Thompson, that, if he did not reach his berth on that Sunday evening, he might be compelled to wait several days for more water, thus losing the use of his vessel during the intervening time. Nevertheless, the evidence to which we have referred shows that the responsibility was assumed by the tugs. So far as Capt. Thompson is concerned, it may well be said that on Sunday evening he had no opportunity of understanding the conditions and the probabilities; but, when on Monday he had got his soundings, and had had the day for deliberation, it seems strange that he should have consented to the further attempts of the tugs to pound his vessel over 2 feet of hard sand, or ledge, or whatever it was, being the difference between his draft, 21 feet, and the result of the set of the tide, 19 feet. It might seem that, in consequence of his not ordering the tugs to cease from their attempts, he shared in the responsibility, so that there was double negligence. Nevertheless, no position of that kind was taken in the answer or urged in the District Court, and, therefore, none such is before us. It must be remembered that Capt. Thompson was probably not fully informed as to the relative conditions of the tide. Moreover, the relations of a tug to her tow, as understood in the United States, are often likened to the relations of a pilot, and, indeed, a tug, according to the practice in the United States, may be both tug and pilot. The duty of a master to withhold himself from interfering with the orders of a pilot, except in extreme cases, is well understood. Several observations bearing on this topic appear in Abbott's Merchant Ships and Seamen (14th Ed. 1901) 302, 303, 304. A reference is there made to an expression by Sir James Hannen, that:

"If a master allows a pilot to move his ship when, in consequence of a fog, there is a clear and plain prospect of danger, the master cannot throw the whole blame on the pilot."

Nevertheless, the text admits that it is generally the pilot's duty to decide when the vessel shall get under way. The text also states that, if a pilot reports that, under all the circumstances, the danger of leaving the ship in an existing position is greater than any danger to be expected from moving her, the master would be undertaking a serious responsibility in refusing to obey the pilot's orders. It continues, at page 302:

"In fact, it is suggested that, to justify such a refusal, the master must be prepared to prove that the pilot's orders were reckless, while the master can hardly be to blame for obeying the pilot, unless, with all the means of knowledge at his command, he must or ought to have known that the orders were reckless."

The same proposition is stated to the same effect at pages 303 and 304, by citations from opinions of Dr. Lushington. The result is that, in view of the fact that the tugs were in control of the position, on the same rules which apply to a pilot, it is very doubtful whether Capt. Thompson would not be fully excused for his acquiescence; but, however this may be, for the reasons we have already stated, this topic is not before us. The result is that the consignee must be held responsible for the damage which occurred in the way we have explained; and the decree of the District Court must be affirmed.

Two questions are raised by the assignment of errors with regard to the damages allowed by the assessor and decreed by the court. The first seems to be to the effect that there was not sufficient, or even proper, evidence as to the amount expended for repairs. This was shown, in the ordinary manner, by a bill of items which was produced before the assessor, and, in a general way, by the testimony of the master carpenter, which was proof enough. It is not shown that any objection as to the mere method of proof was made before the assessor, and the rule has been announced over and over again that, ordinarily, such objections cannot for the first time be taken later. The other question is as to the rate at which the vessel's demurrage during the repairs was computed. We see no evidence that it was unreasonable.

The decree of the District Court is affirmed, with interest; and the appellee recovers his costs of appeal.

THE RENO.

UNION TRUST CO. OF ALBANY v. SMITH.

(Circuit Court of Appeals, Second Circuit. December 9, 1904.)

No. 54.

1. COLLISION—SINKING OF VESSEL—MEASURE OF DAMAGES.

The damages recoverable by the owner of a vessel sunk in collision, when she is a total loss, is her value and interest; and to this may be added the necessary expense of raising her, when that is necessary to determine whether or not she can be repaired advantageously; and, when she is sunk in a place where she is liable to be an obstruction to navigation, the expense of removing her may be added. If she was not a total loss, the measure of damages is the reasonable expense of raising and repairing her to an extent sufficient to put her in as good condition as she was before the collision; the burden being on the owner, in any case, to prove the extent of his loss.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 283, 287.]

2. SAME.

The owner of a vessel sunk in collision had her raised and repaired, without any survey, or apparently in any way ascertaining whether she was worth the expense or the reasonable cost of putting her in as good condition as before the collision. *Held*, that evidence of the amount so expended did not furnish a measure of the damages recoverable from the offending vessel, and, it being shown that her value when she was sunk was far less than the amount so expended, that the recovery should be limited to such value, with interest.

Appeal from the District Court of the United States for the Northern District of New York.

See 121 Fed. 149.

J. A. Lawson, for appellant.

Worthington Frothingham, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. This appeal presents the single question whether the recovery awarded to the libelant for the loss ensuing from the collision of the tug *Reno* with the vessel of the libelant's testator, *White*, was excessive. The vessel was a small steamboat, more than 30 years old, which had been fitted up as a ferryboat, and was employed as such on the Hudson river between the city of Albany and that part of the city of Rensselaer nearly opposite. While on one of her regular trips she was sunk by a collision with the tug *Reno*, in about 12 feet of water, a short distance from her ferry slip on the Albany side of the river. The interlocutory decree adjudging the tug in fault for the collision ordered a reference to a commissioner to take proofs and ascertain the amount of the damage. Upon the hearing before the commissioner the proofs for the libelant were confined to evidence showing the amount expended by its testator, *White*, directly and incidentally, in raising and repairing the vessel. The commissioner found that the amount paid out in this behalf was \$1,829.27, and he reported the damages at

this amount. After the proofs for the libelant were closed, evidence was introduced by the owner of the tug tending to show that the ferryboat at the date of the collision did not exceed \$600 in value. In respect to this evidence the commissioner found as follows:

"The evidence offered as to the value of the ferryboat at the time of the collision is very unsatisfactory, so far as it aids in arriving at any definite amount. The libelant [White] purchased the vessel two years before the collision, and while she was beached at Tottenville, for \$600. It appears that, after purchasing her, he raised her from the beach, took her to a dry dock, and made various repairs to hull and machinery, to get her in commission and prepared for the service of a ferry between Albany and Bath; but no evidence of the cost or value of this work was produced."

Rankin, the superintendent of the shipbuilding concern by which the repairs were made, testified that when the repairs were made her timbers and frame were badly decayed, her hull was practically rotten, and that he would not value her for more than \$600—"only for what junk a man would sell her for"; but he did not profess to have any but a superficial knowledge of her machinery. Her machinery was not repaired at this time, and the repairs which were afterwards made to the machinery, though not detailed, seem to have been of an insignificant character. Barrett, a pilot, who was in command of her navigation for a time after she entered upon the ferry service between Albany and Bath, testified that the planking upon her hull seemed to be fairly good, from outside appearance, but the ribs were not good, and were rotten at the bottom; that her engines and boiler were in poor condition; and that, in his opinion, she was not worth more than \$300. His cross-examination showed, however, that he had practically no knowledge of the market value of such vessels. No testimony was introduced for the libelant in rebuttal, except to show that she was estimated at \$3,000 in the inventory of White's estate. This evidence was duly objected to, and, of course, was incompetent. Exceptions were filed to the commissioner's report by the claimant of the tug, insisting that the sum awarded was excessive, and should not have exceeded the value of the ferryboat at the time of the loss. The court below reduced the amount found by the commissioner to \$1,549.19, but no opinion was rendered by the district judge. Apparently he disallowed some of the items which had been allowed by the commissioner, but it cannot be ascertained from the record what items these were.

The damages sustained by the owner of a vessel which is sunk in a collision, when the vessel is a total loss, is her value at the time of the loss, to which interest may be added to afford complete indemnity; and to this may also be added the necessary expenses of raising her, when that is necessary to determine whether she can be repaired advantageously; and when she is sunk in a place where she is liable to be an obstruction to navigation, the expenses of removing her may also be added. If she was not a total loss, then the measure of damages is the reasonable expense of raising and repairing her to an extent sufficient to put her in as good condition as she was before the collision. The burden is upon the owner to prove the amount of his loss, either by showing the vessel to have been a total loss, actually or constructively, or by showing the extent and cost of the necessary repairs and the incidental expenses. *The Baltimore*, 8 Wall. 377, 19 L. Ed. 463; *The America*,

11 Blatchf. 485, Fed. Cas. No. 285; *The Havilah*, 50 Fed. 331, 1 C. C. A. 519.

In the present case no survey was made to ascertain the amount of repairs necessary to reinstate the ferryboat to her previous condition, and there were no estimates of any kind, so far as appears. Apparently, without any preliminary investigation to ascertain whether she was worth raising and repairing, or what it would have cost to remove her or repair her, she was raised, removed, and repaired. The commissioner rejected many items of the expenditure asserted to have been made by the libellant's testator. Among those allowed by him were items aggregating about a thousand dollars for the expenses of raising the vessel and towing her to the place of repairs. It is almost incredible that any such amount was necessarily expended for these purposes, but the evidence that the amount was actually paid is uncontroverted. In view of the place where the vessel was sunk, it is fair to assume that it was necessary to remove her as an obstruction to navigation; but, in the absence of any evidence tending to show what it ought to have cost to do this, or to strip her of her machinery and destroy the hull, any allowance on this behalf would rest merely upon conjecture. The amount allowed for expenditures for repairs must be rejected, because there was no evidence of the extent of the repairs necessary to restore her to her previous condition. Upon all the evidence, we conclude that the contention for the appellant is well founded, and that, upon the most liberal view of the facts for the libellant, an award exceeding the value of the hull at the time of the loss, with interest, should not be allowed, and a recovery to that extent will afford ample indemnity to the libellant. The machinery was saved, and; if it needed any repairs to put it in as good condition as it was before the collision, no allowance can be made therefor, because no proof was offered respecting the necessary cost of such repairs, and for the same reason no allowance can be made for the necessary cost of saving the machinery.

The decree should be modified by reducing the damages to \$600 and interest from the time of the collision. The appellant is entitled to costs of the appeal.

Ordered accordingly.

IN RE KOLIN.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,101.

1. BANKRUPTCY—POWERS OF RECEIVER—PROPERTY IN POSSESSION OF ADVERSE CLAIMANT.

A receiver appointed on the filing of a petition in bankruptcy by creditors is not vested with the powers of a trustee, but is a mere custodian, and is without authority to take possession of property held and claimed adversely by a third party; and on a petition by an adverse claimant to recover property alleged to have been taken from his possession by the receiver without his consent, such issue is the only one properly before the court, the invalidity of his title being no defense, if such allegation is proved.

2. SAME.

Evidence held to sustain a finding that an adverse claimant was not in possession of property when it was taken into possession by a receiver for a bankrupt and that he asserted no claim to possession at the time.

Appeal from the District Court of the United States for the Northern District of Illinois, in Bankruptcy.

On November 6, 1903, certain creditors filed in the court below a petition for adjudication of bankruptcy against Kolin, and upon that day a receiver of the estate was appointed, who thereupon took possession of the property of the bankrupt. On November 14, 1903, Louis Tomsik, the appellant here, filed his petition in the bankruptcy proceeding, asserting that on November 5, 1903, Kolin for a valuable consideration sold to him a certain stock of wines, liquors, and cigars, then contained in the premises of the bankrupt, and also executed to him a lease for the period of 18 months, of the first floor of building No. 1515 on West Twelfth street, in the city of Chicago, the basement floor of buildings Nos. 1511 and 1515 on that street, and the summer or beer garden in the rear of such buildings, with the entrance thereto at No. 1513; that he took possession of the property and premises on that day, and that on the following day the receiver took possession of a portion of the premises demised, namely, the basements; and also took possession of the wines, liquors, and cigars contained in the basements, against the protest of the petitioner. And he prayed for an order redelivering possession.

On November 19, 1903, the receiver answered, asserting that, at the date stated, possession was taken of the property of the bankrupt contained on the premises described and occupied by him; denying Tomsik's right to any of the goods; asserting the bill of sale to be fictitious and executed by the bankrupt in fraud of his creditors; that possession of the property was taken with the consent of Tomsik and no claim by him thereto was asserted until several days thereafter. The bankrupt was the owner of 75 feet frontage on West Twelfth street, with a building thereon erected for a saloon, office, summer garden, and stock room. He was engaged in the business of a wholesale wine dealer, and had operated a portion of the building as a saloon and summer garden during the previous season. The premises in question were known as No. 1511 and No. 1515 West Twelfth street. No. 1511 was used by the bankrupt as an office, and had a basement in which was stored a portion of the stock of wine and liquor used by him in his wholesale wine business. No. 1515 was used by the bankrupt as a saloon up to the latter part of September, 1903, when it was closed because it did not pay to keep open. Between the saloon and office was the main entrance hall, opening from Twelfth street, and leading through a veranda surrounding the summer garden in the rear of the saloon and office. Beyond this garden was a rear building used as a stock room and opening by a door into the garden.

The referee, to whom the matter was referred, reported the evidence, and his conclusion thereon that the transfer to Tomsik was fraudulent as to the creditors of bankrupt and to the knowledge of Tomsik, and that the petition should be denied. Exceptions to the report were overruled by the court, the report approved, and the petition dismissed; from which order this appeal is taken.

Chas. Wolff, for appellant.

Geo. H. Peaks, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. The cause was tried and determined below, and this without objection from either party, upon the question whether the alleged transfer to Tomsik was fraudulent. The court and the parties seem to have overlooked the ruling of this court in *Booneville National Bank v. Blakey*, 47 C. C. A. 43, 107 Fed. 891, that a receiver is a mere custodian of property taken from the possession

of the bankrupt until a trustee is appointed; that he does not exercise the powers of a trustee, and while he may take appropriate measures incident to the protection of the property in his custody, and, in case of perishable property may, under the direction of the court, sell the same when necessary, yet he is not authorized, nor can the bankruptcy court properly direct him, to take possession of property held and claimed adversely by third parties, or to institute actions for the recovery of property claimed to belong to the bankrupt's estate. *Beach v. Macon Grocery Co.*, 53 C. C. A. 463, 116 Fed. 143. The petition of the appellant averred that the property in question was taken from his possession against his protest. The answer averred that possession was taken with the consent of Tomsik and that no claim was asserted by him at the time. The only issue properly before the court was, therefore, whether Tomsik was in possession of the property claiming ownership, and whether he consented to the taking of possession by the receiver. If he was in such possession, however fraudulent his title, the receiver had no right to take possession from him against his protest; otherwise, if he voluntarily surrendered possession to the receiver. The appellant is in no position to take advantage of the course pursued below, since the evidence upon the validity of the transfer was not only received without objection by him, but was in the first instance produced by him.

We are content to affirm the decree dismissing the petition, and upon the ground that the appellant failed to prove any such possession as the law requires, and that he made no claim to possession when possession was taken by the receiver, but, if he was possessed, voluntarily surrendered possession. The question is one purely of fact and it would serve no useful purpose to enter into a discussion of the conflicting evidence. The court below and the master have decreed the facts against the appellant. The master had the witnesses before him, saw their manner of testifying, and is better able to solve the riddle than we could upon this record. The affirmative was upon the appellant to sustain this petition by the preponderance of evidence. It is upon him here to show manifest error in the decree appealed from.

The rooms in this building communicated from the interior by two side doors, from the saloon into the hallway on the one side, and from the office into the hallway upon the other side. It was in fact but one building, used for a single business. The saloon part had been closed for over a month and its business suspended. The pretended sale was not consummated until the evening of the 5th of November, although on that day Tomsik procured a government license, but had not taken out a city license, and had also on that day purchased a small quantity of beer. There had been no change in the visible occupancy of the premises up to the time the receiver took possession. The outer doors of the saloon were closed and Kolin's sign on the exterior of the building remained unchanged. At the time the receiver entered for possession, at about 11 o'clock on the morning of the 6th, Kolin was absent. The doors of the saloon were locked and Tomsik was in the office of Kolin with the latter's bookkeeper. Tomsik told the receiver's representative that he was an employé of Kolin's, showed him around the premises, told him of the labor claims that Kolin owed, and said that

Kolin owed him \$100. He let him into the saloon part and showed him how to lock the doors. He made no claim to the premises or property until some time after he had let the receiver in possession, when, having left the office for a short time, he returned with the bill of sale and lease. The evidence on the part of the receiver, which was credited by the master, showed that the saloon had not been opened for business by Tomsik or any one else. The witnesses stated that "it looked as if everything had been left there without being disturbed quite a while"; that the cash register stood on the counter, with a lot of whisky and beer glasses, the counter and glasses being covered with dust; that there was no evidence of any fresh beer having been drawn; that the front door of the saloon was locked. These are the facts found by the master, and we are unable to say that his finding is unwarranted by the evidence. Kolin remained ostensibly in full possession of the premises, maintaining his office and his residence there. We are fully persuaded that here was no such visible, notorious change of possession, or delivery of goods, as would avail against attaching creditors. A receiver or trustee stands in like plight with attaching creditors. The filing of the petition in bankruptcy "is a caveat to all the world, and, in fact, an attachment and injunction." *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. The evidence establishes that, whatever was the possession of Tomsik, he voluntarily surrendered it to the receiver, and that therefore the latter's possession was rightful, whether the alleged sale was bona fide or fraudulent.

The decree will therefore be affirmed.

In re **FLANDERS.**

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,103.

1. BANKRUPTCY—BAILMENTS—CONDITIONAL SALES.

Where claimant shipped leather to a bankrupt under an agreement that he should sell it on commission, after making advances to the extent of 50 per cent. on the invoice value, and account for the proceeds of sales, less a commission of 5 per cent., freight charges, and advances, and guaranty such sales, the claimant being entitled to a return of the goods on demand, the transaction constituted a bailment, and not a conditional sale, though the bankrupt selected his own purchasers, insured the goods in his own name, and fixed the credits to be allowed, etc.

Appeal from the District Court of the United States for the Northern District of Illinois.

The receiver appointed by the District Court upon the filing of a petition in involuntary bankruptcy against Flanders, a wholesale leather merchant at the city of Chicago, took possession of the bankrupt's property, including the leather which is the subject of this controversy. Thereupon the American Patent Leather Company, the appellee, of Newark, N. J., a manufacturer of patent and enameled leather, filed its petition in the bankruptcy proceeding, seeking restoration of certain leather taken possession of by the receiver, and which it claimed had been consigned to the bankrupt for sale upon commission. The receiver pleaded want of knowledge of the facts stated in the petition, and the issue was referred to a special master, before whom a hearing

was had; the bankrupt and his former bookkeeper being the only witnesses examined. The master reported the evidence and his conclusion that the transaction between the parties was a sale and not a bailment of property, and recommended dismissal of the petition. Exceptions to the report were, on June 29, 1904, sustained by the District Court, and a decree passed directing the return of the property to the petitioner. From such decree the trustee, who had succeeded to the possession of the property, appeals to this court.

For several years prior to the bankruptcy, Flanders had purchased leather from the American Patent Leather Company. Early in the year 1903 he entered into a new arrangement with the company to the effect that the American Patent Leather Company should consign goods to him for sale upon commission; that he should make advances upon the consignments to the extent of 50 per cent. of the invoice value of the goods from time to time consigned, these advances to be made by his notes payable to the leather company. The notes so given were negotiated by the company and they were all paid by the bankrupt at maturity. Such mode of making advances was shown to be customary in the leather trade. Flanders was to receive a commission of 5 per cent. on sales, to guaranty the sales, and to account monthly for the proceeds, deducting freight charges and advances. The consignor had the right to a return of the goods upon demand, subject to repayment of advances made upon them. The leather sent under this arrangement had a particular identification mark known to both parties, but which gave no intimation to others that the goods were consigned, and was placed by Flanders in his store, in separate bins so far as practicable. Flanders sold the goods in his own name and upon such terms as to time as he saw fit. He took out insurance in his own name, and in case of the destruction of the goods by fire he was to account for them to the consignor. This commission account was kept in a special book containing only consignment accounts, and monthly accounts of sales were rendered, deducting commissions, freight, cartage, incidental expenses, and the amount of advances.

Vincent J. Walsh, for appellant.

Keene H. Addington, for appellee.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

We entertain no question of the correctness of the decree appealed from. The rule by which to distinguish between a bailment and a conditional sale we consider as decided in the case of *In re Galt*, 56 C. C. A. 470, 120 Fed. 64. We there held that, if the sender has a right to compel return of the thing sent, it is a bailment, and not a sale, and that in a sale there must be an agreement, express or implied, to pay the purchase price of the thing sold. The cases of *Chickering v. Bastress*, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309, and *Peoria Manufacturing Company v. Lyons*, 153 Ill. 427, 38 N. E. 661, relied upon by the appellant, were considered by us in *Re Galt*, and the distinction noted. In each of those cases the advances stipulated to be made by the supposed consignee were to the entire value of the goods shipped, and the court found that the transactions were sales, sought to be disguised under the cloak of bailment. We have no contention with those decisions. The cases of *Lenz v. Harrison*, 148 Ill. 598, 36 N. E. 567, and *Fleet v. Hertz*, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 192, fully accord with our ruling. The case of *In re Rabenau* (D. C.) 118 Fed. 471, is also easily distinguishable. There the supposed consignee was at liberty to sell at any price and upon any terms that he pleased, and accounted

at a fixed price and at a fixed time previously determined, and at his option was to pay for the goods remaining unsold. The facts here do not warrant the application of that decision to the case in hand. The avails of the goods, at whatever price they were sold, belonged to the consignor. Flanders was to receive his commissions and the return of advances. That advances were made in the form of notes does not change the character of the transaction, or indicate a sale. They point to the contrary. The advances were but 50 per cent. of the value of the goods—not, as in the Illinois cases referred to, the full amount of the value of the goods. The amount of the advances would not indicate a purpose to make an outright sale. The mode of advancement by note was for the mere convenience of both parties. For the notes so issued the consignee had a factor's lien upon the goods in his possession, for which he could exact payment before surrender of the goods; but that does not change the nature of the transaction or convert the bailment into a sale. *Penn. v. Heilbronner*, 108 N. Y. 443, 15 N. E. 701.

The objections that ordinary invoices accompanied the shipments, that such shipments were made direct to Flanders, that the leather was sold by him in his own name, that he allowed credit upon sales, that he guarantied sales, and that he insured in his own name, do not change the nature of the transaction. It is quite competent for a bailee by contract to enlarge his common-law liability, without converting the bailment into a sale. There is nothing in the evidence which indicates a pretentious agreement with a view to defraud creditors. The fact that Flanders for some years prior to this consignment had purchased goods of the bailee does not avail to prove such contention. It is possible—although it is not established by the evidence—that the consignor had become doubtful of the financial responsibility of Flanders and was unwilling further to extend him credit. The true reason probably lies in the statement of Mr. Flanders that they explained to him at the commencement of this consignment account that the leather company was not as strong financially as some of its competitors, and desired an arrangement by which they could have present advancement upon their goods, instead of selling upon a long term of credit. There does not seem to have been entertained by the leather company any question of financial responsibility on the part of Flanders, if, indeed, he was at that time in doubtful financial condition.

The decree is affirmed.

BURKE v. GUARANTEE TITLE & TRUST CO.

(Circuit Court of Appeals, Third Circuit. January 16, 1905.)

No. 51.

1. BANKRUPTCY—EXEMPTIONS—CLAIMS—ENUMERATION OF ARTICLES.

Bankr. Act July 1, 1898, § 7, subd. 8, 30 Stat. 548, c. 541 [U. S. Comp. St. 1901, p. 3425], requires a bankrupt to file his claim of exemptions within 10 days after adjudication; and section 47, subd. 11, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439], requires the trustee to "set apart the bankrupt's exemptions and report the items and estimated value thereof

to the court." *Held*, that a bankrupt's claim of an exemption of \$300 under a state law, to be set off from the stock in trade of his shoe business, consisting of "shoes and slippers, and men's, women's, and children's shoes and slippers, as set out in schedule B, No. 2, under head of C," was not defective for failure to specify the articles claimed as exempt; it being the duty of the trustee, and not of the bankrupt, to set apart such articles.

2. SAME—FORMS.

Bankruptcy form "Schedule B (5)," containing the words "property claimed to be exempt by the state laws, its valuation," etc., does not require the bankrupt to specify the articles specially claimed to be exempt; such forms not being intended to be mandatory, but to be altered to suit the circumstances of the particular case, as prescribed by general order 38 (89 Fed xiv, 32 C. C. A. xxxvii).

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Albert York Smith, for petitioner.

Mr. Morris, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This cause is before us upon the petition of Michael Henry Burke, a voluntary bankrupt, by which, under section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), he asks this court to revise in matter of law an order of the District Court for the Western District of Pennsylvania by which his claim for exemption, as made in the schedule originally filed by him, was disallowed, and his application for leave to amend was refused. The claim was made in the proper place in the schedule, as follows:

"I claim the exemption of \$300.00, under the act of the General Assembly of Pennsylvania, 1849, section one, of the following property: Stock in trade in my shoe business at No. 111 Frankstown avenue, in city of Pittsburgh, county of Allegheny, Pa.; stock in trade consisting of shoes and slippers, and men's, women's, and children's shoes and slippers, as set out in schedule B, No. 2, under head of C, \$300.00."

The learned referee (whose action the court simply approved) was of opinion that this claim "is fatally defective, in that it does not specifically enumerate the articles claimed as exempt under the exemption law of the state of Pennsylvania." But, as we have said in an opinion delivered to-day in the case of *Lipman v. Stein*, 134 Fed. 235, though a bankrupt's right to exemption must be deduced from the state law, yet it is to be asserted in the manner prescribed by section 7 of the Bankruptcy act itself (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]); and that section does not require that he shall enumerate the articles claimed as exempt, but only that "the claim for such exemption as he may be entitled to" shall appear in the schedule which he is required to file. The claim in this case was for \$300 "of the * * * property * * * set out in schedule B, No. 2, under head of C," and that the bankrupt was entitled to the exemption of that property to the amount stated is unquestionable. This was his right, and its denial was not justified by the fact that, in setting out the entire property, he seems to have excessively estimated its

value. What he meant to claim was so much of that property as was of the value of \$300, and this, we think, he made clearly apparent. The law imposed no further condition upon him. It nowhere exacted a specification and appraisal by him of the articles claimed. Having given notice of his claim, it was not his duty, but that of the trustee (section 47, subd. 11, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439]), to "set apart" the bankrupt's exemptions and report the items and estimated value thereof to the court." And there is not a word in the statute to warrant the conjecture that Congress intended that the bankrupt himself should make an itemization and estimate which the trustee, in performing the function expressly assigned to him, might wholly disregard.

It is true that amongst the forms promulgated by the Supreme Court is "Schedule B (5)," in which is contained the words: "Property claimed to be exempted by the state laws, its valuation," etc. But, waiving the question whether in this instance the property claimed and its valuation were not stated in substantial accordance with this direction, it is enough to say that we do not understand it to be anything more than a direction. It could not have been intended to be mandatory. These forms were not designed to effect any change in the law. They are "forms," and nothing more. As was said by the Supreme Court (General Order 38, 89 Fed. xiv, 32 C. C. A. xxxvii), they are to be "observed and used with such alterations as may be necessary to suit the circumstances of any particular case"; and, under the circumstances of this case, we decline to hold that the failure of the bankrupt to precisely observe one of them was fatal to his claim, because we could not do so without subordinating substance to form, and refusing a legal right, merely on account of a defect in procedure, which has caused no injury to any one, and which, if requisite, might be cured by amendment. General Order 11, 89 Fed. vii, 32 C. C. A. xiv; Rev. St. § 954 [U. S. Comp. St. 1901, p. 696]; *In re Duffy* (D. C.) 118 Fed. 926; *In re White* (D. C.) 128 Fed. 513.

For the reasons that have been stated, the order to which this petition for revision relates is reversed, and the matter of the bankrupt's claim for exemption is remanded to the District Court for further proceedings in conformity with this opinion.

THE DORCHESTER.

THE THORNHILL.

(District Court, D. Maryland. July 2, 1903.)

1. COLLISION—DAMAGES—COMMISSIONS ON DISBURSEMENTS.

Commissions for disbursing the amount required to pay repair bills on injuries due to a collision constitute a proper item of collision damages, when the owners are foreigners, and the amount has to be paid to agents who perform the service for the owners.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 283.]

2. SAME—AGENCY FEE.

A reasonable fee for service of the ship's agent in arranging bids, drawing up contracts, and holding consultations and other services in connection with repairs of collision damages is a proper item of collision damages when the owners of the damaged ship live in a foreign country, especially when the ship is a modern steel steamer, the repairs of which require special superintendence and knowledge of the responsibility of bidders at the port where repairs are made.

In Admiralty. Consolidated libels. On exceptions to commissioner's report.

For the decision on the merits, see 121 Fed. 889, and 134 Fed. 1023.

T. Wallis Blakistone, Convers & Kirlin, and John M. Woolsey, for the Thornhill.

Daniel H. Hayne and Robert H. Smith, for the *Dorchester*.

MORRIS, District Judge. The commissioner disallowed the items of damage in Exhibit No. 2 for costs connected with making photographs of the damaged parts of the *Thornhill*. These items of expense were incurred to procure evidence illustrative of the appearance of the ship after the collision, for use in court at the hearing of the cross-libels for collision, and are not connected with the necessary expenses of making repairs, which was the matter referred to the commissioner. The exception is overruled, and the commissioner's ruling sustained.

The disallowance of the item in Exhibit No. 4, for costs of certified copy of master's protest, is approved for the same reason.

The commissioner disallowed certain items of painting and labor and material and part of the cost of dry-docking charged on the damage Exhibit No. 6, as not made necessary by the collision damage. This ruling is well supported by the testimony, and the exception is overruled.

The commissioner has ruled against two items claimed as part of the expense to the owners of the *Thornhill* caused by the collision, which I think should be allowed under the circumstances of this case. The *Thornhill* was owned in Great Britain, and her owners could not personally supervise the repairs made in Baltimore and New York which resulted from the collision. The items disallowed are sums actually paid by the owners of the *Thornhill* to their agents in New York for services in connection with repairs. The first is an item of $2\frac{1}{2}$ per cent. commission for disbursing the amount required to pay the repair bills. This service required the agents to scrutinize the bills, compare them with the contracts, pay them, keep accounts, and render a statement accompanied with the vouchers. That is a service which the owners of the *Thornhill* could not escape from unless they sent some one from England to New York to pay out the money at a much greater outlay. When the owner of the damaged ship lives in a foreign country, the expense he is subjected to in making repairs it seems to me often includes a reasonable compensation to the person he is obliged to employ on the spot to disburse the money. Where such an expense was necessary and reasonable, and has been incurred in good faith, and paid, I cannot see why it should be excluded as not a necessary expense of making the repairs. The decisions of our admiralty courts

have not been in entire harmony as to this item of expense, and doubtless it is the difference in circumstances which have led to different rulings. In this case the owners resided in England, and the repairs were made in New York, and I do not see how this expense could be avoided. The same reasoning applies to another item disallowed by the commissioner. The owner's agent in New York, who attended to arranging to obtain bids from different shipwrights for repairs, who consulted with the Lloyds surveyor and Lloyds agent and the special surveyor as to the repairs, and as to what would be required to enable the steamship to regain her rating, who attended to awarding the contracts and other services in connection with the repairs during the 27 days the repairs were in progress, charged the owners and were paid a compensation of \$150. The Thornhill is a modern steel steamer, the repair of which requires careful expert superintendence with a local knowledge of the machinists who make bids, and such service a shipmaster could not be expected to be competent to give. I think such a charge, when entirely reasonable, and made in good faith, and paid by the owners of the damaged steamer, should be allowed.

I sustain the exceptions to the disallowance of the two last-mentioned items. All other exceptions are to the disallowance of items as to which the testimony was conflicting, and the commissioner's rulings are affirmed.

In re HERRMAN.

(District Court, S. D. New York. June 8, 1900.)

1. **BANKRUPTCY—FORM OF PROCEEDINGS—PENDENCY—DISCHARGE—BAR.**

That a proceeding against the bankrupt under Bankr. Act March 2, 1867, c. 176, 14 Stat. 517, was pending and undisposed of at the time he applied for a discharge in new proceedings instituted under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], was no bar to such discharge from a debt proved in the former proceedings, which had been kept alive by judgment, etc.

BROWN, District Judge. A motion is made for leave to amend the fourth specification of certain creditors in opposition to the bankrupt's discharge by alleging the pendency of former proceedings in bankruptcy under Act March 2, 1867, c. 176, 14 Stat. 517, and of an application for a discharge therein which is still pending and undetermined. That specification, as it stands, states that the discharge of the bankrupt was refused in the former proceeding. Investigation shows that no order to that effect has ever been entered. The moving creditors have a claim which was proved in the former proceedings, and which has been kept alive by a judgment obtained thereon in 1898. The present motion is based upon the theory that the refusal of a discharge in the former proceeding would be *res adjudicata* as respects the same debt in the present proceeding, and that the pendency of the old application for a discharge would be good as a plea in abatement as of a former suit pending, and that the discharge of the old debt can only be sought or obtained in the old proceeding. On consideration, I am unable to sustain this view. Proceedings in bankruptcy are doubtless in the nature of a suit (*Sandusky v. Bank of Ind.*, 23 Wall. 289, 23 L. Ed. 155;

In re Adams, 36 How. Prac. 270, 271, Fed. Cas. No. 40; In re Comstock, 3 Sawy. 128, Fed. Cas. No. 3,077), and no doubt the refusal of a discharge under the act of 1867 would be res adjudicata upon any subsequent application for a discharge under the act as respects the same debt; and similarly, while a former proceeding is pending, no subsequent application for a discharge from the same debts would be entertained under the same act. But these rules, in my judgment, have no application to proceedings for a discharge under wholly independent and widely separated statutes of bankruptcy, like those of 1867 and of 1898. The provisions regulating discharges are quite different in the two statutes, so that, though a discharge were refused under the act of 1867, the bankrupt upon the same facts might be entitled to a discharge under Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]. The facts stated in the moving affidavits and the records of this court furnish a strong presumption that the proceedings for a discharge under the former act were virtually abandoned in 1879, as the bankrupt was not likely to succeed in obtaining it. There were then numerous specifications in opposition to his discharge, two of which were the same as are raised in the present proceeding, and which would bar a discharge under the present act if approved. The former proceeding, which has never been determined by the entry of any order refusing a discharge, can have no greater force as a bar to the present proceeding, however, than if an order of refusal had been in fact entered. But even if such an order had been entered, and even if the refusal was solely upon grounds which would bar a discharge under the present act, the debtor would, in my judgment, still be at liberty to proceed for a discharge under the act of 1898 without reference to the act of 1867, or any proceedings under it; and his right to a discharge now must be determined by the provisions of the present act alone. The only effect of a refusal of a discharge under the old act was to exclude the debtor from all relief under the act, and to leave his debts existing as before. The act of 1898, passed twenty years after the repeal of the act of 1867, marks a new beginning. It is wholly independent of the former act. It was designed to give to debtors a fresh start in life, freed from the weight of all former debts, except such as are expressly excluded from the operation of the present act. Old debts existing under the former act, and kept alive until now by subsequent judgments, are not excepted from the new act, though a discharge from them under the former act was denied. They are therefore presumably within the intent of the present statute. The long disability of the debtor under the pressure of his old debts is, in effect, made by the present act a sufficient punishment for the offenses which previously barred his discharge. The new act, as respects discharges, supersedes the old; and its design to give freedom to all debtors upon an honest compliance with its provisions, subject only to its own restrictions, would be clearly thwarted pro tanto if relief under it were refused merely because similar relief had been refused under the act of 1867. Upon this view of the intent of the present act, it follows that the facts desired to be set up in opposition to the discharge are immaterial, and would constitute no bar to a discharge; and on that ground the motion is denied.

LOMBARD S. S. CO., Limited, et al. v. ANDERSON.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 540.

1. SEAMEN—MASTER OF TRAMP STEAMSHIP—RIGHT TO DISCHARGE.

The master of a steamship seeking cargoes wherever they can be obtained, who is not employed for any particular voyage or for any stated time, may be discharged by the owners at any time, without assigning any cause and without incurring liability for damages, unless they have surrendered that right by the contract of employment.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 250.]

2. SAME—WAGES—DISCHARGE IN FOREIGN PORT.

Where, by his contract of employment, the master of a steamship was to be returned to the port of shipment at the termination of his employment, and he was discharged at a foreign port, he is entitled to recover wages until his arrival at the port of employment, and the expense of his passage there.

3. SAME—EXPENSE OF SICKNESS.

A seaman is not entitled to recover from the owner of the vessel the expenses incident to his sickness, occurring after his rightful discharge in a foreign port, although he may, under his contract, be entitled to wages until his arrival at the port of his employment.

4. SAME—ALLEGED NEGLIGENCE OF MASTER—EVIDENCE CONSIDERED.

Evidence considered, and *held* insufficient to sustain allegations of negligence or incompetence on the part of a master in connection with the grounding of his vessel in a strange harbor, such as to entitle the owners to recoup the damages sustained by them against his claim for wages.

Appeal from the District Court of the United States for the District of Maryland, in Admiralty.

Edward I. Koontz (George Whitelock, on the brief), for appellants.

George T. Mister (Beverly W. Mister and A. Partlett Lloyd, on the brief), for appellee.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

GOFF, Circuit Judge. This appeal is from a decree rendered by the District Court of the United States for the District of Maryland against the respondents below for wages due the libelant as master of the steamship *Salamanca*, as well as for board bills and passage money from the port of his discharge back to the port of shipment. The libelant, who had been master of said steamship more than two years, was discharged at Manila on September 12, 1902. The Lombard Steamship Company, Limited, was the owner of said steamship, and John White was managing owner thereof. The master claimed in his libel that he was entitled to have his passage paid to New York City, where he was employed, and wages up to the date of his arrival at that port, as he was dismissed abroad; that soon after being so employed he took charge of said steamship, and remained in command of her until dismissed; that on being so discharged he proceeded with all dispatch to the said port of New York, where he arrived December 22, 1902; that, in addition to the sum so due him as wages, he paid his passage money home, and that he also paid for his board and lodging in Manila,

and for fees, medicine, and attendance in a hospital at that point; that the owners of said ship refused to pay him said sums so due him; and that he placed his damages at \$1,250.

The respondents claimed that the master was discharged because of his incompetency, and on account of his careless management of the steamer, and also for the reason that he was habitually intoxicated. They charged that because thereof the steamer was damaged by being stranded on a reef in the harbor of Masinloc, to the great loss of the owners, and that there was nothing due him by them on account of wages, or for any other cause whatsoever. Much testimony was taken and considerable documentary evidence introduced, when the court below, on a hearing, rejected the libellant's claim for expenses incurred because of his sickness in Manila, but allowed his wages as master, as claimed by him, and also his traveling expenses from Manila, the place of his discharge, to New York, the port of his shipment.

The appellee did not prove that he had been employed as master for any particular voyage, nor for any special period of time. The steamer sought employment wherever it could be obtained, and at the time the master was discharged it was under charter for use in Philippine and Chinese ports.

The owners of the steamship had the right to remove the master at any time, and that without assigning any cause, and without being liable for damages, unless they had, by the terms of their contract with him, yielded that right, which it seems they did not do. The absolute right of the owners of such a vessel to remove the master, with or without cause, is incontestable. *Montgomery v. Wharton*, 2 Pet. Adm. 397, Fed. Cas. No. 9,737; *Clayton v. Schooner Eliza B. Emory* (C. C.) 4 Fed. 342; *Montgomery v. Henry et al.*, 1 Dall. 50, 1 L. Ed. 32, 1 Am. Dec. 223.

It is quite clear from the evidence that the master was to be returned to New York at the end of his employment, and consequently he is entitled to be reimbursed the expenses incurred by him for that purpose. The sum paid by the master for hospital and medical charges were because of sickness from which he suffered subsequent to his discharge, and, even if the rule applied that a seaman taken sick while in the service is entitled to medical attention at the expense of the ship, it would not cover this case, where the sickness did not occur while he was in the service.

In our opinion, the testimony does not sustain the allegations in the answer that the master was either careless or incompetent, nor does it show that he was habitually intoxicated. So far as the grounding of the vessel on the coral reef in the harbor of Masinloc is concerned, the testimony fails to show either negligence or misconduct on his part, and the only witness examined who was with him at the time of the accident expressly denies that he was intoxicated. He had the services of a pilot when he entered that harbor—a native pilot, whose services he was not permitted to retain. There was no chart of the harbor, nor buoys, and no lights in it, and no marks of any kind except natural objects. He had never been in the harbor before. He requested that a pilot take him out, and the agent of the charterer furnished one for that purpose—one who had surveyed the harbor, and who was supposed

to be thoroughly competent. While there is some conflict in the testimony between the master and this pilot as to what occurred at the time of the grounding of the vessel, we find nevertheless from it that the accident, if not caused by the mistake of the pilot, was the result of an error of judgment on the part of the master. The master had had experience for many years on the sea; he had been in the service of the appellants for a long time; and evidently possessed their esteem and confidence; and his good faith and discretion should not be questioned simply because of the unfortunate results attending the sailing of the vessel from Masinloc Harbor. In order to sustain the charge of incompetency against the master, the evidence should be clear and satisfactory; the onus probandi, as a matter of course, being on the owner. *The Camilla*, Swabey, 312; *The Atlantic*, 9 Jur. N. S. 183.

Finding as we do that there was not either negligence or misconduct on the part of the master, it follows that there was no forfeiture of the wages due him, and that the respondents were not entitled to recoup against him the damages claimed by them to have been caused on account of the grounding of the vessel.

The weight of the testimony shows that the master was entitled to recover his wages from the time of his discharge to the time he reached the port of New York, and also his necessary traveling expenses while making that journey.

The assignments of error are without merit, and the decree appealed from is affirmed.

DU BOIS v. MAYOR, ETC., OF CITY OF NEW YORK et al.

(Circuit Court of Appeals, Second Circuit. November 1, 1904.)

1. ATTORNEYS—SUBSTITUTION—CONDITIONS.

Where plaintiff's attorneys were employed under a contract for fees contingent on their ultimate success in the litigation, it was within the discretion of the court to make an order granting plaintiff a substitution of attorneys on a disagreement with them, conditional on plaintiff's payment of a reasonable compensation for the services already rendered and for their disbursements.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 114.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

George W. Watt and James M. Dohan, for appellant.

Frederick Seymour, for appellees.

Before TOWNSEND and COXE, Circuit Judges, and HOLT, District Judge.

PER CURIAM. The only question presented upon this review is whether or not the Circuit Court erred in requiring, as a condition of the substitution of attorneys, that the complainant should pay the attorneys originally employed by him a fair and reasonable compensation for the services actually rendered and disbursements made by them. We are of the opinion that the most favorable view which can be in-

voked by the complainant is that the matter was discretionary with the Circuit Court. There is here no special agreement as in *Wilkinson v. Tilden* (C. C.) 14 Fed. 778, expressly reserving to the complainant the right to substitute another attorney at any time. There is no specific allegation of misconduct, and no proof whatever of which to predicate misconduct on the part of the attorneys. It is simply a case of disagreement between attorney and client, and, although the complainant has an undoubted right to change his attorneys, it should be upon condition that he pay them fair remuneration for services already performed. The agreement here was that the attorneys should receive a contingent fee dependent upon ultimate success. If permitted to discharge them without condition, the complainant would deprive them of the opportunity to earn the contingent fee, and leave them dependent upon the efforts of other counsel in whose selection they have had no participation, thus leaving them practically remediless.

We think the decree of the Circuit Court was correct, and should be affirmed.

A. LESCHEN & SONS ROPE CO. v. BRODERICK & BASCOM ROPE CO.

(Circuit Court of Appeals, Eighth Circuit, December 24, 1904.)

No. 2,055.

1. TRADE-MARKS—UNFAIR COMPETITION—FEDERAL COURTS—JURISDICTION.

In a suit between citizens of the same state for infringement of a trade-mark, the federal court has no jurisdiction of an issue of alleged unfair competition; its jurisdiction being confined to the trade-mark as registered.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. SAME—REGISTERED MARK.

In a suit in the federal courts for infringement of a trade-mark between citizens of the same state, the validity of the trade-mark depends on the mark as registered, and not as used by complainant in the manufacture of its goods.

3. SAME—COLORED STRAND OF WIRE.

An alleged trade-mark, consisting simply of a colored strand in a wire rope, not restricted to any particular color, is invalid.

4. SAME—REGISTERED MARK.

A registered trade-mark, consisting of "a red or other distinctively colored streak applied to or woven in a wire rope," without further describing the streak, was too indefinite to be sustained as a valid trade-mark.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

See 123 Fed. 149.

George H. Knight and James C. Jones, for appellant.

James P. Dawson (Dawson & Garvin, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. Both complainant and defendant are corporations organized under the laws of the state of Missouri, and are engaged in manufacturing wire rope in that state. The complainant has registered a trade-mark under the act of March 3, 1881, c. 138, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401], which it claims the exclusive right to use, as indicative of its manufacture. In its statement filed with the Commissioner of Patents, it describes its trade-mark as follows:

"The trade-mark consists of a red or other distinctively colored streak applied to or woven in a wire rope. The color of the streak may be varied at will, so long as it is distinctive from the color of the body of the rope. The essential feature of the trade-mark is the streak of distinctive color produced in or applied to a wire rope. This mark is usually applied by painting one strand of the wire rope a distinctive color, usually red."

The appellant, who was complainant below, filed its bill to restrain the defendant from infringing this trade-mark. The trial court sustained a demurrer and dismissed the bill.

Much is said in the brief of appellant to the effect that the defendant has been guilty of unfair trade competition by palming off on the public ropes of its manufacture as complainant's rope. This is a subject, however, over which the federal courts have no jurisdiction. Complainant and defendant are both citizens of the same state, and for this reason jurisdiction is confined to the trade-mark as registered. If that mark is invalid, the federal courts are without authority to grant any relief on the ground of unfair trade competition. *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

Is, then, the trade-mark as registered a valid trade-mark? We do not think it is. Throughout their brief, counsel for appellant refer to its trade-mark as a "strand of a wire rope of a distinctively different color from the other five strands of the rope." That is not, however, the trade-mark claimed in the statement as filed. The court has no power to make such a restriction. It is the registration, and not the manufacture, which controls the federal courts in determining the validity of a trade-mark when plaintiff and defendant are citizens of the same state. If the statement is so general as to render the mark described invalid as a trade-mark, the court cannot sustain a more restricted mark which the claimant actually uses in his manufacture. "The plaintiffs have not restricted themselves to any particular description of goods comprised in such class. Their registration must stand or fall as a whole, for that to which they declare in their registration they intend to appropriate it. There is no provision in regard to trade-marks, such as there has been and is in regard to patents for inventions, that a suit may be maintained where the grant is valid as to a part, but not as to the whole." *Smith v. Reynolds*, 22 Fed. Cas. 638, No. 13,098 (Blatchford, J.).

Furthermore, we do not think that a mark which consists simply in a colored strand in a wire rope, but is not restricted to any particular color, can be sustained as a valid trade-mark. In such a case it is the color which constitutes the mark, and not its configuration, and a right to vary the color indefinitely would destroy that distinctive character

which must inhere in a valid trade-mark. This was the holding of Judge Lowell in the case of Dodge Mfg. Co. v. Sewell & Day Cordage Co., in the Circuit Court for the District of Massachusetts, decided July 5, 1898, but not reported. That case involved the manufacture of ordinary hemp rope. The trade-mark described in the statement was as follows:

"The general feature of said trade-mark is a colored thread, contrasting with the color of the rope, and twisted in the strands of the rope, and periodically visible along the rope."

Of this trade-mark, Judge Lowell said:

"A colored thread of some sort twisted in the rope is evidently almost or quite the only possible way of marking or identifying the rope itself, and it is in evidence that a colored thread has been commonly used for many years for such a purpose, though seldom, if ever, has it been used as a mark of origin. The defendant at one time twisted a blue thread into each strand of the transmission rope which it manufactured, but, upon notification by the complainant that confusion might arise, it ceased to do so at once, and has since used red threads instead. If the complainant has any trade-mark, it is plainly confined to blue thread, for that is the only mark the complainant ever used. To allow the complainant the exclusive right of twisting into rope threads of any and all colors would give it a monopoly of the only practicable way of marking rope. Where a trade-mark is a figure or design, the owner's right may well cover that figure or design reproduced in any color, for the identity of figure may mislead the purchaser in spite of the difference of color. In this case the defendant's red thread will emphasize the difference between its rope and the complainant's blue-thread rope, and cannot deceive anybody."

An injunction was refused to restrain the defendant from continuing to use the red thread in its manufacture.

A more serious defect, however, in the complainants' trade-mark here, arises from the fact that the mark is not confined to a colored strand of the rope. It is described throughout the statement as a "streak." This term is wholly indefinite. A streak might be a straight line running lengthwise of the rope, it might run as circles around the rope, or it might run in spirals, as is indicated by the picture of a section of the rope which accompanies complainants' statement. There is no claim that complainants, in their manufacture, ever ranged through the various forms and colors covered by their statement as filed. It is quite likely that they have confined themselves to a distinctive color of one of the several strands of the rope. This, however, is not the language in which their claim is embodied in the statement filed with the Commissioner of Patents, and the court is compelled to look to that statement, rather than to the manufacture, for we are not here dealing with a common-law trade-mark, based upon use, but a trade-mark claimed and described in a written statement. A trade-mark, to be valid, must be as distinctive and individual as a signature. The trade-mark claimed by the complainant has neither individuality of form nor of color. It may take any of several different forms, and each of these forms may be presented in at least all the seven primary colors. The decision of the lower court is affirmed.

WESTON ELECTRICAL INSTRUMENT CO. v. STEVENS et al.

(Circuit Court of Appeals, Second Circuit. November 3, 1904.)

No. 175.

1. PATENTS—REISSUE—ELECTRICAL MEASURING INSTRUMENT.

The Weston reissued patent, No. 11,250 (original No. 433,637) for an electrical measuring instrument used for measuring the difference of potential between the terminals of an alternating current circuit, while disclosing patentable invention in so proportioning the parts of the apparatus as to reduce the effect of self-induction to a negligible quantity, is invalid as a reissue because the description in the original patent fails to show such invention, or that it was intended to be secured thereby.

2. SAME—INVENTION.

The Weston patent, No. 470,340, for an improvement in the electrical measuring instrument described in the patentee's reissue patent, No. 11,250, is void for lack of patentable invention in view of the prior art.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 119 Fed. 181.

This cause comes here on appeal from a decree of the United States Circuit Court for the Southern District of New York, adjudicating the validity and infringement of claims 2, 4, 6, 10, and 12 of reissued patent No. 11,250, granted June 28, 1892, and of claim 1 of patent No. 470,340, dated March 8, 1892, both granted to Edward Weston, and owned by complainant.

Henry N. Paul, Jr., and Jos. C. Fraley, for appellants.

William H. Kenyon, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. As found by the court below, the reissued patent in suit covers the first practically successful commercial alternating current volt meter, and said instrument is recognized as the standard for measuring differences of potential in alternating current circuits. In these circumstances this court has undertaken an examination of the records and briefs with a disposition to give to the owner of said patent the benefit of the presumption thus raised in its favor.

The question of validity of the reissued patent depends upon the determination of the two following contentions of defendants, namely: (1) That Weston did not discover a single principle or solve a single problem in the art of measurement of alternating currents which had not already been so far worked out and published that no invention was required to overcome the alleged difficulties in the way of the practical application of the prior art. (2) That, if invention was required for the practical solution of the alleged problem, it was not disclosed by Weston.

The alleged invention, as stated in the specification—

"Consists, broadly, in a fixed or stationary coil and a coil oscillating or vibrating on inclosed pivots in the field of force of said stationary coil, said

coils being electrically connected. The vibrating coil on the passage of the current through the circuit, including both coils, assumes an angular position, depending upon the difference of potential between the terminals of the circuit. The reversals of the current in both coils occur simultaneously, and hence an index or pointer connected to the movable coil is always deflected in the same direction, thus indicating the extent of said angular movement upon a suitable scale. My invention further consists in the construction and arrangement of the instrument, as hereinafter more particularly pointed out."

And the improved instrument covered by the patent is described by complainant's expert as follows:

"The improvement described in the reissue patent, No. 11,250, relates to an instrument for measuring the difference of potential between the terminals of an alternating current circuit. The instrument is of the type designated as an electro-dynamometer; that is, it is an instrument whose indications depend upon the mutual action between two coils, one fixed and the other movable, both carrying an electric current. The improvement described in the letters patent consists essentially in the mode of supporting the movable coil, the method of applying the springs which counterbalance the action of the electrical forces, and in making use of these springs to convey the electrical current to and from the movable coil. The movable coil is supported on pivots running in jeweled bearings so nicely adjusted that friction is almost entirely absent, the springs which counterbalance the action of the electrical forces are so arranged and connected as not to increase the friction upon the supports, and these springs being employed for conveying the electric current to and from the moving coil, they do away with the necessity of using any auxiliary connections, mercury contacts, or any other means of carrying the current to and from that coil which might introduce friction, and so become a source of error in the instrument. The improvement further consists in so proportioning the coils and various parts of the apparatus that exceedingly delicate springs are sufficient to control the motion of the movable coil, and, therefore, exceedingly small electrical forces are sufficient to produce the movement of the coil necessary to the indications of the instrument, so reducing to a negligible amount the disturbing effect of self-induction when the instrument is used for the measurement of potentials in alternating current circuits."

The claims involved are as follows:

"(2) In an electrical measuring instrument, a stationary coil, a coil pivoted and vibrating in the field of said stationary coil, and a spring opposing and counterbalancing the impressed action of said movable coil, the said coils and spring being in circuit."

"(4) In an electrical measuring instrument, a fixed coil, a movable coil in the field of said fixed coil, an index showing the extent of movement of said movable coil, and a spring opposing and counterbalancing the movement of said movable coil and in circuit therewith, the said elements being constructed and arranged so that said index will be moved directly to show the extent of motion of said movable coil and by the counterbalancing effect of said spring be maintained in such position."

"(6) In an electrical measuring instrument, the combination of a movable conductor actuated by the current to be measured in a field of force maintained by the said current, and a means of indicating the extent of movement of said conductor, the said conductor being constructed to offer such electrical resistance and of such light weight and so freely movable as that the error due to the disturbing effect of self-induction of the actuating current in said conductor shall bear an infinitesimal ratio to the actual indication and be practically nil."

"(10) In an electrical measuring instrument, a stationary coil, a coil vibrating or oscillating in the field of force of said stationary coil, and a spring of conducting material opposing the movement of said vibrating coil, the said coils and spring being electrically connected."

"(12) In an electrical measuring instrument, a stationary coil, a coil vibrating or oscillating in the field of force of said stationary coil, two coiled

springs of conducting material combined with said movable coil, and circuit connections, whereby said springs and movable coil are connected in circuit."

On November 1, 1887, J. Cauderay obtained a patent for an electric dynamometer. This apparatus was intended to measure and register the electric energy of a direct current. It included an electric meter in combination with an electro dynamometer. The latter, which the patentee states "may be used separately," comprised a fixed or stationary coil or bobbin and a movable one. This movable bobbin "consists of a single wooden ring or core, on which is wound a very long, fine wire offering an electrical resistance of about a thousand ohms." It is supplied with a current of electricity through springs of conducting material coiled in opposite directions, "which serve to allow the current to enter and leave without affecting the free movement of the bobbins." An index shows the extent of the movement of said movable coil. This coil or "bobbin is pivoted * * * at the top and at the bottom, resting with its vertical trunnions in two bearings, which are adjustably attached to the frame of the machine. * * * To secure its independence and sensibility, the bobbin is at its center suspended from a silk thread attached to a flexible arm."

Counsel for complainant attempts to meet the disclosures of Cauderay as follows: His patent was a paper patent, and described an instrument which was designed for direct currents only. It could not have been practically used except in a level position, nor adapted to alternating currents without substantial modifications because of said thread suspension, a certain supplemental spring, and of the cumbersome and heavy movable coil. It is not clear that the coiled so-called springs of Cauderay, apparently constructed of copper, performed any opposing and counterbalancing spring functions. And that Cauderay, being a paper patent, did not sufficiently disclose a principle of construction and operation, so that only mechanical skill was required to adapt it to alternating currents, is indicated by the fact that after its issue electrical experts were agreed that no practical means had been devised for measuring alternating currents. If, therefore, the reissue were an original patent, and the patentee were confronted by Cauderay alone, his improvement might be held to be patentable on the theory stated by complainant's expert that it "consists in so proportioning the coils and various parts of the apparatus that exceedingly delicate springs are sufficient to control the motion of the movable coil," etc. But Weston did not confine his inventive ingenuity to electrical measuring apparatus for alternating current instruments. Counsel for complainant, referring to direct current instruments, states that Mr. Weston had been a pioneer in that field also, and had given the art what are to-day the standard and best and best-known portable direct current instruments in the world. These are shown in Weston patents Nos. 392,386 and 392,387. Weston's patent No. 392,387 was granted November 6, 1888, and is therefore prior by some 14 months to the patent in suit. The specification states as follows:

"I design this instrument principally for the measurement of current-pressure or electromotive force in volts. To this end I support the coil upon jeweled pivots, as already explained, so that it will turn with the minimum of friction, and I oppose to its movement the resiliency of a pair of very

delicate springs. In the path of the current before it reaches the coil, I place a high resistance very large in proportion to the internal resistance of the dynamo, or battery, the current-pressure of which is to be measured."

Complainant brought suit in this circuit for infringement of said patent, and on March 2, 1904, Judge Wheeler filed an opinion sustaining its validity. 128 Fed. 939. The following citations from said opinion indicate its bearing on the validity of the patent in suit: Judge Wheeler, after having described the invention, and stated that Weston "did not discover that a coil in a magnetic field would be moved by a current through it against lesser uniform resistance through distance in proportion to the strength of the current," says as follows:

"What he did invent was the arrangement of proper devices in an instrument for producing, measuring, and indicating such a movement of the coil."

And, referring to the prior art, and especially to Weston's prior patent No. 334,143, as the closest approach to the patent there in suit, Judge Wheeler says:

"But in no one of them is there set forth a coil wound upon such a frame mounted on pivots with counter-acting springs carrying the current in such an arc-shaped magnetic field, nor the combination of any of the parts of the patent in suit to as great an extent as that patent. If that patent does not anticipate this invention, it seems clear that none nor all of the others will. That patent shows a field * * * in which a coil of wire wound about diamagnetic metal is suspended in torsional springs, and made to move in the field by an electric current through the coil against the force of the springs, and to indicate the movement by a pointer on a scale. In an instrument of that patent may be found a coil moving in a permanent magnetic field protected in the same way; but the high torsional suspending wires for the coil prevent making the instrument compact, or capable of operation except in a level position; and it was not a practicable electric measuring instrument for use in many places where such instruments are desired, and where that of this patent can be used. * * * The patent in suit seems to be an improvement over the prior patent by mounting the coil on pivots in an arc-shaped magnetic field between the pole-pieces of a horse-shoe magnet and a soft-iron core, instead of suspending the core upon the torsional wires in the magnetic field of the other patent. That this new arrangement of the coil upon pivots in this form of magnetic field, which would be by the arrangement of the bridge pieces permanent, was a great improvement on all or any prior electric measuring instruments, is very plain and obvious from an observation of the things which had gone before. It involved invention of high order, and resulted in great success. Neither the anticipations relied upon nor the alleged want of patentable novelty seem to defeat or affect the validity of the patent for this improvement."

Recurring now to the elements of the reissued patent by which it was differentiated from Cauderay, we find in No. 392,387 an instrument "capable of operation except in a level position," and therefore "a practicable electric measuring instrument" in any and all places, because "an improvement over the prior patent by mounting the coil on pivots * * * with counter-acting springs" and dispensing with the "torsional suspending wires." It does not appear that the pivots and springs perform any function in the reissued patent different from those covered by No. 392,387. It does appear that the objection to the heavy construction of Cauderay was obviated by the coil supported "upon jeweled pivots * * * so that it will turn with the minimum of friction," its movement being opposed by "the resiliency of a pair of very delicate springs." The sole tangible support left for the reissued

sued patent is that it may be claimed to be the first disclosure of the means by which the direct current double coil instrument could be so adapted to the peculiar conditions characteristic of the alternating current as to result in a practical instrument for measuring the differences of potential in an alternating current circuit. The well-recognized obstacle to the use of the direct current instrument for alternating currents was self-induction; the inertia, so to speak, of the movable coil when subjected to constant rapid reversals of current, often of different rates or frequencies of alternation. This drag or reactance is caused by the friction of the movable coil. "The problem," says complainant's expert, "is to so construct the instrument that, while the coil shall produce sufficient magnetic force to insure accurate indications, their self-induction resistance shall be so small in proportion to the total resistance of the instrument that that total resistance will be practically the same when the instrument is used on direct current circuits or upon alternating current circuits of any frequency." Prior instruments had used suspension attachments and mercury cups and other devices to reduce friction to a minimum. Cauderay used both pivots and a suspension device. Weston, in his No. 392,387, supported the "coil upon jeweled pivots * * * so that it will turn with the minimum of friction." He was the first to solve this problem by a transfer of the direct current instrument to alternating currents, and this transfer comprised, as stated by complainant's expert, "proportioning the coils and various parts of the apparatus" and "reducing to a negligible amount the disturbing effect of self-induction."

In view of all the considerations involved and upon a survey of the whole situation, we are of the opinion that this transfer and adaptation involved invention within the familiar rule.

The claim of counsel for complainant on this point is stated as follows:

"I may say right here that Mr. Weston does not claim to have discovered the magnetic effects of coiled conductors carrying an electric current. He does not claim to have discovered the mutual actions of such coils upon each other. He recognizes the fact that these actions were well known, and that instruments had been constructed or proposed making use of such mutual action of the coils for the purpose of measuring electric currents. What Mr. Weston does claim is 'certain features of construction of an instrument for the measurement of electromotive forces or potential differences in alternating current circuits, which special features overcame certain difficulties in the use of the magnetic effects of coils of wire for the measurement of alternating potential differences; difficulties which, up to that time, had rendered the use of such instruments for such a purpose practically valueless.'"

Assuming, therefore, that such transfer and proportioning of parts involved something more than mere excellence of mechanical and electrical construction, we are brought to a consideration of the question whether this feature is disclosed or sufficiently suggested in the original patent. The only distinct claim to this element of the alleged invention is found in the following language of claim 6:

"The said conductor being constructed to offer such electrical resistance and of such light weight and so freely movable as that the error due to the disturbing effect of self-induction of the actuating current in said conductor shall bear an infinitesimal ratio to the actual indication and be practically nil."

The original Weston patent, No. 433,637, describes an instrument for measurement of alternating currents only differentiated from Cauderay in the details shown in Weston patent No. 392,387. It describes the application of the construction shown in No. 392,387 to the moving coil of the electro-dynamometer. The fact that its effective operation is due to the reduction of electrical resistance by a reduction of the number of turns of wire upon the coil is not hinted at in said specification or claims. Nor is it clear that Weston realized the fact that such reduction of resistance should be small in comparison with the total resistance of the instrument, in order to adapt it to alternating currents. While the expert for complainant admits that this is the important consideration in said construction, there is no statement in the original patent differentiating it in this respect from prior direct current instruments.

The expressions in the specification of the original patent chiefly relied on by counsel for complainant to show the conception of the invention covered by the reissue are:

First, that the spools are "surrounded by coils of fine insulated wire," etc. But a winding with fine wire, also described in Cauderay, does not necessarily imply lightness of construction, but, as is shown in Cauderay, applies to the element of high resistance. The important element, self-induction or reactance, says complainant's expert, "depends upon the number of turns and dimensions of the coil." The fewer the number of turns, the smaller is the amount of self-induction. But the use of a fine wire may or may not imply a decreased number of turns. The specification refers to "shellacked paper" in connection with a frame for the movable coil. Hence it is argued "that the inventor had in mind the reduction of the weight of the movable system to a minimum," as, "by making the coils light, the inventor is, of course, enabled to use fewer turns of wire, and the use of a few turns of wire is the very thing that he would do for the sake of reducing the self-induction of the instrument." If Weston had originally such reduction of weight in mind, he skillfully managed to conceal all reference thereto in his original patent. And when he referred, as above, to the material for the frame, he described it not as of light material, but "of insulating material—such as shellacked paper." It is evident that every element except lightening was covered by the prior art, as already shown, and that the effect of so lightening the construction that the effect of self-induction should "be practically nil" is first stated in the reissue.

We have been confirmed in these conclusions by the position which counsel for complainant was forced to assume in his brief and upon the argument of this appeal. He has failed to point out any tangible or definite statement of invention by the patentee, or any novel, concrete creation in the construction of the patented device. In his brief he contradicts the theory of his expert, and states that "the invention is not a matter of electrical proportioning," but that it consists in the combination of parts constituting the concrete instrument. These parts, as defined by him on the argument, were: (1) The closeness of the coil. But it does not appear that that was any closer than Cauderay. (2) Positive pivots, which would hold the point from sidewise movement.

These are described both in Cauderay and Weston's prior patent. (3) Springs. The same as those described in his prior patent. (4) Direct reading. This is shown in Fig. 4 of Cauderay. In these circumstances it is unnecessary to discuss the well-settled rule relative to reissues. It does not appear from the original specification that the patentee had any idea of any novel means for obviating the self-induction resistance of alternating currents. The claims in suit of the reissue cannot be sustained, because the description in the original patent fails to show that the invention covered by said claims was intended to be secured in the original patent. Walker on Patents, § 233, and cases cited; Hoskin v. Fisher, 125 U. S. 217, 223, 8 Sup. Ct. 834, 31 L. Ed. 759; Pattee Plow Company v. Kingman, 129 U. S. 294, 299, 9 Sup. Ct. 259, 32 L. Ed. 700; Featherstone v. Bidwell, 57 Fed. 631, 6 C. C. A. 487. The improvement of patent No. 470,340 consists in omitting the shellac paper frame of the movable coil of the reissued patent in suit and in constructing it in its annular shape by winding the wire around a mandrel and cementing it together by means of an exterior coating of shellac. This construction reduced the weight of the movable coil, which was the stated object of the alleged invention. The specification of Weston's prior patent No. 392,385 describes a rectangular coil "wound upon any suitable form" and permeated with shellac, "whereby all the turns of the wire are firmly fastened together," and which is removed from the form when the shellac is dry. While No. 470,340 specifically covers an annular construction, the specification states, "by changing the shape of the former A, I may make the coil of any desired form." Other prior publications disclose similarly constructed coils, differing only in shape from that of the patent in suit, in being rectangular with rounded corners. These prior constructions were designed for use in direct current instruments. The argument that it required invention to use such a coil "of any desired form" with an alternating current, or to thus change the shape of the coil, cannot be sustained, especially as it does not appear that any different or new function was accomplished by reason of such use or change.

The decree of the Circuit Court is reversed, with costs, and the cause is remanded to the Circuit Court, with instructions to dismiss the bill.

NORTH JERSEY ST. RY. CO. v. BRILL.

(Circuit Court of Appeals, Third Circuit. January 3, 1905.)

No. 31.

1. PATENTS—INVENTION—CAR TRUCKS.

The Brill patents, Nos. 627,898 and 627,900, for car trucks, granted on a divisional application as to most of their claims, are void for lack of invention in view of the prior art, and especially of the Thyng patent, No. 4,276, which discloses every element of the Brill combination, with the exception that the links by which the semi-elliptic springs are suspended from the side frame of the truck were not elastic or extensible. Such links, however, were old in the art at the time of the Brill patents, and, if any of the claims therein are valid, they are limited to the specific form of link described. As so limited, held not infringed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion of court below, see 124 Fed. 778. See, also, 125 Fed. 526.

Charles H. Duell and John R. Bennett, for appellant.

Francis Rawle and Edmund Wetmore, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This suit was brought for the alleged infringement of two letters patent, No. 627,898 and No. 627,900, both granted on June 27, 1899, to George M. Brill, who assigned them to the complainant. The latter of the two patents is divisional in its relation to the former. The original application was filed July 3, 1897, and the divisional application November 9, 1897. Both patents relate to improvements "in car trucks generally," but "especially to trucks employed in passenger service in connection with electric propulsion." The specification of patent No. 627,898 describes the various parts of the truck, and ends with 111 claims. Patent No. 627,900 has 19 claims. Thus the combined claims of the two patents number 130.

The claims of patent No. 627,898 involved in this appeal are as follows:

"(6) The combination of a truck having a frame, springs supported by said frame, hangers movably supported on said springs, semi-elliptic springs connecting said hangers, and means for supporting a car-body on the truck connected with said semi-elliptic springs, substantially as described."

"(10) The combination, in a car-truck, of the truck-frame, spring-links depending from the truck-frame, semi-elliptic springs connecting the links, and means for connecting said latter springs with a car-body, substantially as described."

"(11) The combination, in a car-truck, of the truck-frame, transversely-swinging spring-links depending from the truck-frame, semi-elliptic springs connecting said links, and a bolster having car-connecting means on said latter springs, said bolster being fixed securely to said springs and swinging in unison therewith, substantially as described."

"(13) The combination, in a car-truck, of the side frames, the semi-elliptic springs movably and resiliently suspended from the side frames, and a bolster secured to said springs, substantially as described."

"(14) In a car-truck, the combination with the side frames having axle-box pedestals, the longitudinally-disposed semi-elliptic springs, extensible and resilient connections between the ends of the said springs and the side frames at or near said pedestals, and a bolster secured to said springs, substantially as described."

"(15) In a car-truck, the combination with the side frames having axle-box pedestals, the bolster, longitudinally-disposed resilient supports for the bolster, and resilient connections between the ends of said supports and the side frames, substantially as described."

"(30) In a car-truck, the combination with the side frames, of the longitudinal leaf-springs, a bolster tying said springs together, links pendent from the truck-frame and adapted to move perpendicularly relatively to said frame, the ends of said springs resting on said links, and further springs adapted to resist the downward movement of the links, substantially as described."

"(80) The combination, in a car-truck, of the side frames, the semi-elliptic springs, a cross-bolster secured to said semi-elliptic springs, links suspended from the side bars and attached to said springs, and further springs combined with said links adapted to oppose the motion of the side frames or the semi-elliptic springs, substantially as described."

"(81) The combination in a car-truck, of the side frames, the semi-elliptic springs, a cross-bolster resting on the semi-elliptic springs, links, and springs

combined with said links, said links deriving their support from the side frames, and connecting the ends of the semi-elliptic springs with the side frames, substantially as described."

"(87) In a car-truck, the combination with the side frames of a car-body supporting bolster, pivotal supports for the bolster depending from the truck-frame, a resilient element directly secured to the bolster and springs for supporting said resilient element through said pivotal supports, substantially as described."

The claims of patent No. 627,900 here involved are as follows:

"(13) In a car-truck, the combination with the side frames, of the links comprising bolts pivoted between their ends, said links being pivotally suspended from the side frame, longitudinally-disposed semi-elliptic springs secured to the lower end of said bolts, a cross-bolster resting on said springs and further springs included in the link suspension of said semi-elliptic springs, substantially as described."

"(17) The combination in a car-truck having an upper chord, of the longitudinally disposed semi-elliptic springs, a transverse bolster supported upon said springs, links depending from and flexibly supported on said upper chord and passing through enlarged apertures therein, said links being articulated between their ends, the ends of the semi-elliptic springs being supported upon the lower articulation of said links, substantially as described."

In the opinion filed by the learned judge below he states that "it is only necessary to consider claim 13," adding that "it is admitted on the part of the complainant that, unless this suit can be maintained with respect to that claim, it cannot be maintained as to any of the claims of patent No. 627,898." For convenience we here again quote that claim:

"(13) The combination in a car-truck of the side frames, the semi-elliptic springs movably and resiliently suspended from the side frames, and a bolster secured to said springs, substantially as described."

The main question in the case is whether this combination was patentable at the time of Brill's alleged invention. Under the proofs it is very clear that the art of truck construction, whether relating to car-trucks generally or to trucks employed in passenger service in connection with electric propulsion, was old, and in a highly advanced state, at the time Brill made these patented improvements. The earliest patent which this record exhibits, namely, the patent to Thyng, No. 4,276, dated November 18, 1845, shows a four-wheel swing-bolster, pivotal car-truck. The bolster in this patent has a central or pivotal bearing and lateral or side bearings; it is supported upon longitudinally extending semi-elliptic springs; the ends of the bolster engage with the semi-elliptic springs beneath the side frames; the upper part of the bolster strikes against the side frames to prevent excessive lateral movement; the semi-elliptic springs are suspended from the side frames by universally moving links, and the links are located adjacent to the axle-boxes, so as to distribute the weight; the links are attached at the central part to the side frames; the side frames are outside the wheel base; and the bolster has transverse and likewise longitudinal movement as far as the transoms will permit, swinging on the links. The foregoing description, which we extract from the testimony of Mr. Abbott, the defendant's expert, we think is quite accurate; and we also adopt as correct his conclusion that the Thyng patent discloses every feature of the principal combination of the patents in suit, with the single exception that the links are not extensible, or, in other words,

do not embody a spring. This conclusion is confirmed by the opinion of the complainant's expert, Mr. Livermore, who (referring to certain prior patents) says:

"The first is the Thyng patent, No. 4,276, dated November 18, 1845. My comparison of the structure shown in this patent with the Brill truck has before been fully given. It does not disclose a car-truck embodying the combination of a truck-frame having side frames, a bolster, longitudinally arranged semi-elliptic springs supporting the ends of the bolster, the elastic links or elastic or extensible suspensions of any kind connecting the ends of the semi-elliptic spring with the side frames. It does, however, embody a combination including all of the above-named elements except the elastic and extensible links, and it has nonelastic links jointed for transverse swinging to connect the ends of the semi-elliptic spring with the side frames."

It appears, then, that the only advance made by Brill on Thyng was to substitute for the latter's nonelastic links for supporting the semi-elliptic springs extensible or elastic links. But elastic or spring links, or spring-suspended links, were old in car-trucks before the time of Brill's improvements here in suit. This record is replete with instances in the prior art in which spring-links, or spring-suspended links, practically identical with those of the complainant's patent, were employed in car-trucks for substantially the same purpose as are Brill's. For example, Longstreth's patent, No. 249,962, dated November 22, 1881, illustrates spring-supported links which support the ends of semi-elliptic springs. The Heffernan patent, No. 412,256, dated October 8, 1889, shows the combination of a truck-frame, spring-links depending from the truck-frame, semi-elliptic spring connecting the links, and means for connecting the latter springs with the car body. In his specification Heffernan states:

"I have herein shown my invention as applied to locomotives, and have also described the spring as being connected to certain character of frames or trucks; but I would herein state that I do not limit my invention either to a locomotive or to suspending the same from the bars described, as other forms of trucks requiring minor changes in this regard may be used in connection with my invention."

In Graham's patent, No. 503,044, dated August 8, 1893, semi-elliptic springs and extensible or spring-links are employed to support the car through the truck-frame, instead of through the bolster. But here we agree with the defendant's expert that "obviously the construction and co-active relationship of the parts are the same, and any one at all acquainted with mechanical matters will at once perceive that, if a semi-elliptic spring and such spring-links can be employed to support a car body in the manner shown in Graham's patent, that it can likewise be employed in the manner shown in complainant's patent."

The patent of Brill and Curwen, No. 610,118, issued August 30, 1898, upon an application filed November 8, 1896, shows as belonging to the prior art equalizing bars movably and resiliently suspended by spring-links from the side frames of a car truck. In this connection, and as part of the prior art, the Peckham patents, No. 464,253 and No. 563,685, dated respectively December 1, 1891, and July 7, 1896, merit particular consideration. In these Peckham patents spring-links are employed for supporting a load (the nose of the motor) so that it may have a universal and swinging motion, which is the function broadly of

the spring-links of the Brill patent here in suit. The spring-link illustrated in Fig. 4 of the Peckham patent No. 563,685 is practically identical with that of the complainant's patents. It has the ball and socket or universal head at its upper end, seated in a corresponding socket in the bar that supports it, and it embodies a spring with which the part it supports engages. The specification of this Peckham patent (referring to this spring link) states:

"The rods, 29, are provided at their upper ends with ball bearings, 31, operating within sockets, 32, which are bolted between the duplex transverse beams, 33. * * * By this construction of motor support the requisite flexible connection is secured for the heel of the motor."

Testifying with respect to this patent, Mr. Abbott expresses the following view, which we think is entirely sound:

"Peckham employs this universally swinging link to support the motor in his truck, but obviously it is immaterial whether the weight supported by such a link be a portion of the load of the car or a portion of the weight of the motor. The construction of the device and its co-active relationship with the parts with which it connects being once understood, it is adaptable, within the common knowledge of any ordinary mechanic, to a multitude of mechanical constructions."

The evidence, we think, fairly leads to the conclusion that the patentee, Brill, took the combination of Thyng's patent, but, instead of using the latter's form of link, substituted therefor another old form of link which had been commonly used for the same or analogous purposes, namely, an elastic or spring-controlled link, the character and function of which were well understood in the art. This substitution may have secured better results, but it did not involve invention. *Stimpson v. Woodman*, 10 Wall. 117, 19 L. Ed. 866; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Pennsylvania Railroad Company v. Locomotive Truck Company*, 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222; *Office Specialty Mfg. Co. v. Fenton Mfg. Co.*, 174 U. S. 492, 19 Sup. Ct. 641, 43 L. Ed. 1058.

We have already made brief mention of the patent to Brill and Curwen, No. 610,118, dated August 30, 1898, issued upon an application filed November 3, 1896, which patent is for improvements in pivotal car-trucks, especially that class of trucks used on passenger cars electrically propelled. The declared primary object of the Brill and Curwen invention is to produce an easy riding truck; a truck having a great degree of elasticity, so as to enable it to adjust itself with the minimum amount of disturbance to the inequalities of the track. This patent has a more important bearing on the present controversy than yet has been intimated. It is the subject of the disclaimer contained in the principal patent in suit, No. 627,898. That disclaimer is as follows:

"The location of the semi-elliptic springs outside of the wheel-gauge on each side of the truck, together with the location of the links for supporting the semi-elliptic closely adjacent to the axle-boxes and the swinging of said springs from the truck-frame from such points gives a better support for the car-body than does the usual link-hung bolster supported from the truck transoms within the wheel-gauge. These general features of construction, however, are embraced in an application filed by Samuel M. Curwen and myself on the 3d day of November, 1896, Serial No. 610,902, and therefore I do not claim the same herein."

The court below held that this statement did not amount to a disclaimer of the combination of claim 13, and "all that was meant was that the patentee did not claim that the mere location of the semi-elliptic springs 'outside of the wheel-gauge' and location of the spring-links 'closely adjacent to the axle-boxes' involved novelty or patentability." But, without questioning this interpretation, it still may be affirmed that an important effect must be given to the disclaimer. It is a solemn concession of priority in favor of Brill and Curwen. The filing and issue dates of the Brill and Curwen patent show *prima facie* their priority over Brill, and we find no satisfactory evidence to rebut that *prima facie* showing. But the admission of the disclaimer settles the question of priority in favor of Brill and Curwen. Patent No. 610,118 to Brill and Curwen must be taken as part of the prior art. Now, the Brill and Curwen patent shows the combination in a car-truck of the truck-frame, spring-links depending from the truck-frame, equalizing bars connecting the links, and means for connecting the equalizing bars with the car body. We here quote two of the claims of the Brill and Curwen patent, namely, claims 7 and 12:

"(7) The combination, in a car-truck, of the side frames, spring-links depending from the side frames, longitudinal equalizing bars connecting the links below the side frames, and means for connecting said bars with a car body, substantially as described."

"(12) The combination, in a car-truck, of the side frames, the equalizing-bars movably and resiliently suspended from the side frames, and a bolster supported on said equalizing bars, substantially as described."

It is obvious that the only difference between the combination shown and claimed by Brill and Curwen and the principal combination of the claims involved in this suit is that the latter claims call for semi-elliptic springs for connecting the links, instead of equalizing bars. But we cannot agree that this is a patentable difference, in view of the prior art. As we have seen, it was old to use semi-elliptic springs for connecting the links. Moreover, it most clearly appears from the proofs that in the combination in question a semi-elliptic spring performs the function of an equalizing bar. Although flexible, the semi-elliptic spring acts as an equalizer. So much is conceded even by the Brill patent in suit, No. 627,898, which, in its specification, states: "The semi-elliptic longitudinally disposed springs not only afford efficient spring support of the car body on the truck, but act in a measure as equalizers, distributing the weight equally on the axle-boxes." The mere substitution of the old form of flexible equalizer, to wit, the semi-elliptic spring in place of the inflexible equalizer of Brill and Curwen, did not involve invention.

Upon consideration of all the proofs we hold that claim 13 of the Brill patent No. 627,898, and all the other claims in suit which rest upon the like combination, lack patentable invention.

If any of the claims in suit can be sustained at all, it can only be by limiting them to the specific form of link described in the complainant's patents. But, if so limited, infringement does not appear. The differences between the link of the complainant and the defendant's link are marked. The link of the complainant's patents embodies the following features: (1) A bolt or rod having a hemispherical head, which fits into a like hemispherical seat at the top of the side bar; (2) a spiral

spring inclosing the rod below the side bar; and (3) a stirrup or hanger, the lower end of which is below the rod, and there engages with the end of the semi-elliptic spring, the upper end of the stirrup passing inwardly, so as to rest upon a cap which is placed above the spring. In consequence of this construction the complainant's link has an unrestrained universal swing or movement, and also a telescopic or lengthening or shortening action by reason of its several parts sliding with relation to each other. The defendant's link is not so constructed, nor has it such universal swing or such sliding movement. The defendant's rod has not a hemispherical head but a crutch-shaped head, and therefore has not an unrestrained universal movement. The defendant's link has lateral swing, but longitudinal movement is resisted. The defendant has not the stirrup or hanger of the complainant's patent. The defendant does not have a spiral spring inclosing the rod below the side bar; on the contrary, the defendant's link is supported above the upper side of the side bar by a spring buffer. The evidence satisfies us that these differences are not formal, but substantial and material as respects results. We hold, therefore, that the defendant's links do not infringe the claim in question.

The decree of the Circuit Court is reversed, with costs, and the case is remanded to that court, with direction to enter a decree dismissing the bill of complaint, with costs.

PETERS v. HANGER.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1904.)

No. 503.

1. PATENTS—ACTION AT LAW FOR INFRINGEMENT—ISSUES AND PROOF AS TO LIMITATION.

Act March 3, 1897, amendatory of Rev. St. § 4921 (29 Stat. 694, c. 391 [U. S. Comp. St. 1901, p. 3395]), and which provides that, in any suit or action for infringement of a patent, there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill or the issuing of the writ in such suit or action, applies not only to suits in equity under said section 4921, but also to actions on the case to recover damages for infringement, brought under section 4919 [U. S. Comp. St. 1901, p. 3394]. The amendment is not a statute of limitation, but a qualification upon the right of recovery, and need not, therefore, be specially pleaded by defendant in an action under section 4919; but, in view of the fact that the condition is imposed by a later enactment, and is not an exception in the original statute giving the remedy, it is a matter of defense, and the general rule in trespass applies—that the time is immaterial—and plaintiff (by force of Code Va. 1904, § 3245) is not required to allege the time of infringement, nor to prove it if stated under a *videlicet*; but defendant, if he seeks to avoid recovery on the ground that the infringements proved by plaintiff were committed more than six years before suit, has the burden of proving such fact, which he may do under the general issue.

On Rehearing. For former opinion, see 127 Fed. 820, 62 C. C. A. 498.

H. M. Smith, Jr., and W. H. Singleton (Charles E. Riordon, on the brief), for plaintiff in error.

Philip Mauro and J. Alston Cabell, for defendant in error.

Before BRAWLEY, PURNELL, and McDOWELL, District Judges.

McDOWELL, District Judge. The former opinion of this court will be found in 127 Fed. 820, 62 C. C. A. 498. The defendant in error was the plaintiff below, and will be hereafter referred to as the plaintiff, and the plaintiff in error as the defendant.

In the declaration it is alleged:

"And the plaintiff further says that the defendant, well knowing the premises, but contriving to injure the plaintiff, heretofore, to wit, since the 11th day of October, 1896, and up to the 3d day of October, 1902, * * *

has unlawfully," etc.

The writ was issued October 6, 1902. No evidence was introduced on the trial showing the time when the infringements were committed. The defendant prayed for an instruction to the effect that the jury should find for the defendant, because no act of infringement was proven during the six years preceding the issuing of the writ, which instruction was refused. This was assigned as error, and it was because of this that this court on the former hearing was of opinion to reverse the trial court and remand the cause, with instructions to grant a new trial.

Section 4919, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3394], so far as now material, reads, "Damages for the infringement of any patent may be recovered by action on the case. * * *" Section 4921, Rev. St., as it appeared originally, relates to the granting of injunctions and allowance of damages in equity for infringements of patents. By the act of March 3, 1897, c. 391, 29 Stat. 694 [U. S. Comp. St. 1901, p. 3395], it is provided that section 4921 be amended by adding thereto this sentence:

"But in any suit or action brought for the infringement of any patent there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action."

If this amendment, which, it is conceded, applies to section 4919, were a mere statute of limitation, we are of opinion that the plaintiff did not have to prove that the infringements were committed within the time stated in the declaration. At common law the time when each traversable fact occurred should be stated. And where the plaintiff seeks to recover for repeated trespasses, he should be careful to allege the period within which they were committed. But where time is not material, if it be stated, as was done here, under a *videlicet*, the plaintiff need not prove the time. In personal actions it is the rule that time is ordinarily not material, and the allegation of time not traversable. Mr. Chitty says, "In trespass, time is not material." 1 Chitty, Pl. (16th Am. Ed.) 352 (274). Mr. Minor says, "Time generally forms no material part of the issue, and, if stated under a *videlicet*, need not be

proved as laid." 4 Minor's Inst. pt. 2, p. 1175. See, also, Stephen, Pl. (Heard) 293, 294; Tabb v. Gregory, 4 Call (Va.) 225-228.

It is provided by section 3245, Code Va. 1887 [Ann. Code 1904, p. 1708], that "all allegations which are not traversable, and which the party could not be required to prove, may be omitted, unless when they are required for the right understanding of allegations that are material." And it follows, under the assumption above made, that the allegation as to time might have been omitted from the declaration.

It is further to be noted that in Virginia the plea of not guilty in trespass on the case—the only plea filed in the case at bar—does not raise a defense under statutes of limitation. 4 Minor's Inst. (3d Ed.) p. 775. Such statutes must be specially pleaded, and the burden of proof is on the party who pleads such statutes. Goodell's Ex'rs v. Gibbons, 91 Va. 608, 22 S. E. 504; Noell v. Noell, 93 Va. 433-439, 25 S. E. 242; Hansbrough v. Neal, 94 Va. 722, 27 S. E. 593; Vashon v. Barrett, 99 Va. 344, 38 S. E. 200. If, therefore, the amendment in question is a mere statute of limitation, the allegation as to time in the declaration was not traversable, and the failure of the plaintiff to prove the time was of no consequence.

However, upon careful consideration we are led to the belief that the amendment in question is not a statute of limitation, but that it is a qualification or condition upon the right of recovery given by section 4919.

In 1 Wood on Limitation (2d Ed.) p. 1, it is said:

"Statutes of limitation are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced; and those statutes which merely restrict a statutory or other right do not come under this head, but, rather, are in the nature of conditions put by the law upon the right given."

In 19 Am. & Eng. Enc. (2d Ed.) p. 150, it is said:

"A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance, time is made an essence of the right created, and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation. A lapse of the statutory period operates, therefore, to extinguish the right altogether. To such limitations the rules of law governing pure statutes of limitations applicable to all classes of actions have no application. They are to be determined by the law of the place under which the right of action arose or the contract was made, and are not to be treated as waived merely because they are not specially pleaded. They are not subject to the disabilities and excuses through which the effect of ordinary statutes of limitation may be avoided, nor, it seems, can they be evaded even by proof of fraud. Whether a particular limitation of time is to be regarded as a part of the general statute of limitations, or as a qualification of a particular right, must be determined from the language employed, and from the connection in which it is used."

See, also, 13 Am. & Eng. Enc. (1st Ed.) p. 689.

In 13 Enc. Pl. & Pr. p. 186, it is said:

"Where a statute is not a mere statute of limitations, but creates an absolute bar by the lapse of a certain period after which no action can be maintained, or where it not only suspends the remedy, but vests an absolute title, advantage may, in general, be taken of such statute without specially pleading it."

See, also, *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; *Davis v. Mills*, 194 U. S. 451, 24 Sup. Ct. 692, 48 L. Ed. 1067.

We think that these authorities and others cited below are sufficient for holding that the amendment in question must be treated as a qualification or restriction on the statutory right of recovery, rather than as an ordinary statute of limitation. From this conclusion it follows that a defendant need not specially plead the restriction, and that this restriction is not subject to the disabilities and excuses through which ordinary statutes of limitation may be avoided. But the conclusion we now reach is that it does not follow that the plaintiff must prove that the infringements complained of were committed within six years prior to the institution of the suit. We have carefully examined all the cases within reach cited as bearing on statutes held to be restrictions upon statutory rights, rather than ordinary limitations. See *Lambert v. Ensign Co.*, 42 W. Va. 813; s. c., 26 S. E. 431; *Cooper v. Lyons*, 9 Lea (Tenn.) 600; *De Beauvoir v. Owen*, 5 Exch. 166; *Newcomb v. The Clermont No. 2*, 3 G. Greene (Iowa) 295; *Townsend v. Billerica*, 10 Mass. 414; *Needham v. Newton*, 12 Mass. 453; *Hallowell v. Harwich*, 14 Mass. 186; *Ives v. Beech*, 2 Root (Conn.) 125; *Kegler v. Miles, Mart. & Y. (Tenn.)* 426, 17 Am. Dec. 819; *Bomar v. Hagler*, 7 Lea (Tenn.) 85; *Taylor v. Cranberry Iron Co.*, 94 N. C. 525; *Bartlett v. Manor*, 146 Ind. 621, 45 N. E. 1060; *Palen v. Johnson*, 50 N. Y. 49; *Pittsburg R. Co. v. Hine*, 25 Ohio St. 629; *Eastwood v. Kennedy*, 44 Md. 563; *Hudson v. Bishop (C. C.)* 32 Fed. 523, and (C. C.) 35 Fed. 820; *Cochran v. Young*, 104 Pa. 333; *Smart v. Mason*, 2 Heisk. (Tenn.) 224; *Swanson v. Tarkington*, 7 Heisk. 616; *Branner v. Nance*, 3 Cold. (Tenn.) 302; *Ashbey v. Ashbey*, 41 La. Ann. 102, 5 South. 539; *Hill v. Rensselaer Co.*, 53 Hun (N. Y.) 194, 6 N. Y. Supp. 716; *Suggs v. Ins. Co.*, 71 Tex. 579, 9 S. W. 676, 1 L. R. A. 847; *Finnell v. Southern R. Co. (C. C.)* 33 Fed. 427; *Baker v. Stonebraker*, 36 Mo. 338. But in no one of these cases is there an intimation that the nonexpiration of the time limit must be proved by the plaintiff. In *Bomar v. Hagler*, 7 Lea, 85, 89, it is said:

"The rule is that a statute which bars the remedy only must be pleaded, but a statute which cuts off the right need not be pleaded, but may be relied upon as a protection if the facts appear." * * *

It is a familiar rule that, when there is an exception or proviso in the enacting clause of the statute relied on, the plaintiff must allege that the defendant is not within the exception, but, if the exception be in some subsequent clause or section, it is matter of defense, to be shown by the defendant. 1 Chitty, Pl. (16th Am. Ed.) 318 (246); *Smith v. Moore*, 6 Greenl. 274; *Vavasour v. Ormond*, 6 Barn. & C. 432; s. c., 13 Com. L. 225; *Spiers v. Parker*, 1 Term R. 141; *Gill v. Scrivens*, 7 Term R. 227; *State v. Barker*, 18 Vt. 195; *Williams v. Hingham Turnpike Corp.*, 4 Pick. (Mass.) 345; *Rex v. Pemberton*, 2 Burr. 1037; *Rex v. Jarvis*, 1 East, 643; *Rex v. Stone*, 1 East, 641; *Steel v. Smith*, 1 Barn. & Ald. 94; *Becker v. State*, 8 Ohio St. 391; *Osborn v. Lovell*, 36 Mich. 246; *Hirn v. State*, 1 Ohio St. 15. In *Rex v. Jarvis*, supra, it is said that, if there is a proviso or exception in a subsequent clause, it must be insisted on by the defendant by way of defense. In *Rex v. Pemberton*, supra, the exception relied on was created by a statute

of later date than that on which the indictment was founded. The court held that such exception need not be negatived in the indictment, but "must be shown by the defendant by way of excuse, either by plea or in evidence." Under this principle, it would seem, as the restriction in the case at bar is imposed by an amendment, and by an amendment to another section of the Revised Statutes, that a right of recovery is shown merely by evidence of an infringement, and that it is for the defendant to prove, if he can, that the infringements were committed more than six years before the institution of the suit. And the fact that evidence on this point for the defendant can be introduced under the general issue, and without a special plea, does not seem a sufficient reason for further departure from established rules.

It is argued that because the declaration in the case at bar alleges that the infringements were committed within a stated period—practically six years prior to the issue of the writ—the necessity of proving this allegation is thrown on the plaintiff. But it is the rule that in personal actions the time of the occurrence of every traversable fact should be stated. And the standard authorities cited in the first part of this opinion, to the effect that time is not material in trespass, and that ordinarily the time alleged in personal actions, if stated under a *videlicet*, need not be proved, are as applicable to the defense given by the amendment under discussion as to the defense given by an ordinary statute of limitation. And we cannot perceive that time is made more material by the amendment in question than it is by an ordinary statute of limitation. Although, by the amendment, recovery may not be had for infringements committed over six years before suit, still it is a matter of defense that the infringements were committed before that time. Matters of defense must be proved by the defendant. While there is authority to the effect that in some instances, where a plaintiff unnecessarily anticipates matter of defense, he will be required to prove his allegation (see *Hill v. Allison*, 51 Tex. 390; *Watkins v. So. Pac. R. Co.* [D. C.] 38 Fed. 711, 4 L. R. A. 239), still it must be remembered that the allegation here in question is as to an immaterial matter, and that the precaution was taken to state the time under a *videlicet*.

It is also to be remembered that if the infringements, or any of them, were committed more than six years prior to the action, it is the defendant who best knows the facts in this respect, and can most easily prove them. Consequently any doubt as to the propriety of excusing the plaintiff from proving the time of the infringements could properly be solved under the rule imposing the burden of proof upon the party that has the best means of knowing the facts. 2 Ency. Ev. 800 et seq., 804; 1 Wharton, Ev. (3d Ed.) § 367; *Rugely v. Gill*, 15 La. Ann. 509; *Bowman v. McElroy*, Id. 663; *Clapp v. Ellington*, 87 Hun (N. Y.) 542, 34 N. Y. Supp. 283.

The conclusion reached by this court on the former hearing, that the remaining assignments of error are without merit, is, upon reconsideration, believed to be entirely sound. It follows that the former order of remand must be set aside, and the judgment of the trial court affirmed.

Affirmed.

CLEVELAND FOUNDRY CO. et al. v. SILVER & CO.

(Circuit Court of Appeals, Second Circuit. February 3, 1905.)

1. PATENTS—INFRINGEMENT—OIL BURNERS.

The question of infringement of the Jeavons patent No. 475,401, for an oil burner, by the device of a subsequent patent, *held* too doubtful on the evidence to warrant the granting of a preliminary injunction.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The following is the opinion of the Circuit Court, by COXE, Circuit Judge:

The patent in controversy is No. 475,401, granted to William R. Jeavons, May 24, 1892, for an improvement in oil burners. The first claim of this patent, the only one in suit, was recently sustained by the Circuit Court of Appeals for the Sixth Circuit. *Cleveland Foundry Co. v. Detroit Vapor Stove Co.* (C. C. A.) 131 Fed. 853.

There is, therefore, no question as to the validity of the claim. It was admitted by the defendant at the argument that no defense challenging the validity of the patent is open in the Circuit Court, unless new facts are adduced. The defense of noninfringement is, therefore, the only one to be considered. This question was not discussed in the *Detroit Vapor Stove Case* for the reason that it was not there an issue. In this respect the *Detroit Case* is the direct converse of the case at bar. There, the validity of the patent was disputed and infringement admitted, here the validity of the patent is admitted and infringement disputed.

In the *Detroit Case* gasoline was used in the infringing stove and the asbestos strand needed for initial lighting, when heavy oils are employed, was dispensed with.

The claim is as follows:

"A hydrocarbon vapor burner consisting of a vapor holder constructed for the free and uniform distribution of the vapor therein by gravity and having a free opening for the escape of vapor, in combination with perforated combustion walls having a flame space between them in communication with the said holder, substantially as described."

The prior litigation established beyond dispute that the burner of the claim must possess the following characteristics:

First. It must be wickless; the asbestos ring of the description and drawings being used not as a wick but as a starting or lighting ring, when heavy oils are used. If light oils, such as gasoline are used, it may be omitted altogether.

Second. The oil must be converted into vapor at or near the point where it enters the trough, by exposing the oil to the heated surface of the holder.

Third. The vapor must be distributed by gravity constantly and evenly to the points where it is utilized to support combustion, so that, if the channel be circular, the vapor will run around on both sides of the channel from about the point of the supply tube, where the oil is vaporized, and rise gradually to a uniform level.

The defendant insists that it does not infringe because its stoves possess none of these elements and characteristics. It is said that the patent covers a vapor burner incapable of operation if kerosene be used as a fuel, but adapted to use gasoline or other volatile hydrocarbon fluids, and that the defendant's device employs a kerosene oil-wick burner similar in all respects, so far as the theory of operation is concerned, to an ordinary oil lamp.

If this be the correct view there can be no doubt that the motion should be denied. I am, however, compelled to the conclusion that it is incorrect and for the following reasons:

First. The patent clearly recognizes the use of both kerosene and gasoline. This is demonstrated by quotations from the description, as follows:

"Either the heavier or the lighter hydrocarbons may be used with this construction of burner. * * * If light oils are used, such as gasoline, etc., which in themselves are inflammable, the asbestos strand may be left out; but with heavy oils * * * it is necessary to produce an initial flame. In operation, say with kerosene oil, which in itself is not inflammable at ordinary temperature, oil is admitted to the absorbent, which absorbs some of it and which can be ignited as a wick."

Second. The defendant does not use the wick of the prior art—the ordinary lamp wick—but does use the asbestos strand of the patent. This strand differs in size and shape from the lighting ring L of the specification, it is probably an improvement upon the ring L, but that it performs the functions described when heavy hydrocarbons are used is established beyond serious doubt.

Third. The experts differ widely as to the operation of the defendant's ring, but the officers of the defendant, prior to the commencement of this action, seem to have had the same understanding as to the work performed by it as is now entertained by the complainants and their expert. The defendant's stove is advertised and sold under the name of "Wickless." In the printed directions for use the ring is not called a wick, but "the asbestos lighting ring" and "the asbestos strip." In a patent granted to the defendant, as assignee of William H. Silver, May 9, 1899, which, apparently, is the patent under which the defendant is operating, the burner is referred to as "of the wickless variety, having an oil cup within which a starting ring of asbestos provides for heating the cup and igniting the oil."

Fourth. Although it may not be proved conclusively that in the defendant's structure vapor is formed which is distributed by gravity evenly around the trough, yet I cannot avoid the conclusion that the great preponderance of testimony points in this direction. The experiments made in court, though not as conclusive and satisfactory as could be desired, seemed to indicate that the defendant's device is a vapor and not a wick burner.

If the defendant be correct in asserting that it employs a wick which is the equivalent for, and can be used interchangeably with, the old capillary wick of an oil lamp, it cannot be seriously injured by an injunction, for such an old wick can easily be substituted. If, on the other hand, the defendant uses a vapor burner it is appropriating the complainants' invention.

The motion is granted.

NOTE. It is probable that the question of infringement can be finally determined as well upon the present record as upon the record at final hearing. Should the defendant appeal from the order and speedily perfect the appeal, a motion will be entertained to suspend the issuing of the writ.

Stephen J. Cox, for appellant.

John R. Bennett, Thomas W. Bakewell, and Clarence P. Byrnes, for appellees.

PER CURIAM. We think the question of infringement too doubtful to warrant the granting of injunction in advance of final hearing.
Order reversed.

UNITED STATES v. VAN SCHAICK et al. SAME v. BARNABY et al.
SAME v. VAN SCHAICK.

(Circuit Court, S. D. New York. December 23, 1904.)

1. CRIMINAL LAW—VIOLATION OF NAVIGATION LAWS—MASTER.

While it is not primarily the duty of the master, under the statutes and inspectors' regulations, to equip a vessel with life preservers or fire apparatus, it is his duty before navigating to exercise care to know whether the ship has such equipment, and whether it is apparently sufficient and in accordance with law, and afterwards to exercise some care respecting

its maintenance, the extent of such care being dependent on his opportunities to examine the appliance and perceive its condition; other duties, relating to the posting of station bills for the crew, and their exercise in fire drill and the use of appliances, are imposed directly upon the master by rule 5, § 15, of the inspectors' rules and regulations; and his neglect of any of such duties, whereby the life of any person is destroyed, renders him subject to indictment and prosecution for manslaughter, under Rev. St. § 5344 [U. S. Comp. St. 1901, p. 3629].

2. SAME—CORPORATE OWNER—AIDERS AND ABETTORS.

A corporation owner of a steam vessel may be guilty of the offense stated in Rev. St. § 5344 [U. S. Comp. St. 1901, p. 3629], which provides that "every owner * * * through whose fraud, connivance, misconduct or violation of law the life of any person is destroyed shall be deemed guilty of manslaughter and upon conviction therefor * * * shall be sentenced to confinement at hard labor," etc., notwithstanding the fact that it cannot be subjected to the punishment imposed; and such fact does not affect the right of the government to prosecute individuals, under said section, who aid and abet the corporation in the commission of the crime.

3. SAME.

The owner of a steamship, who fails to comply with the statute requiring it to be equipped with life preservers and proper fire appliances, either by supplying none, or by supplying those that are unsuitable, inefficient, and useless, and do not conform to the inspectors' rules, is guilty of a "violation of law," and subject to prosecution under Rev. St. § 5344 [U. S. Comp. St. 1901, p. 3629], where such violation results in the death of a person; and in either case the offense is one which may be aided and abetted by a third person who "causes and procures" the omission, and such person may properly be charged in the indictment as a principal.

4. SAME.

In order to constitute an aider and abettor a principal in such offense, it is not necessary that he should have been present at the time it was consummated by the death of a person, since the conduct or omission which constituted the criminal breach of duty was continuous.

5. SAME—SUFFICIENCY OF INDICTMENT.

An indictment charging a violation of the statute and rules, in that, of the life preservers supplied and kept on a steamship for the use of passengers thereon, upward of 900 were unsuitable, inefficient, and useless, and not in accordance with the statutory requirement, is not bad because it does not also charge a failure to supply the requisite number of good life preservers; the furnishing to a passenger of a useless life preserver being as much a violation of the law as a failure to furnish him with any.

6. SAME—BREACH OF DUTY BY MASTER CAUSING DEATH—DUTIES CREATED BY INSPECTORS' RULES.

Inspectors' Rule 5, § 15, requiring masters of steam vessels to keep the fire apparatus thereon in complete working order, and to post station bills and exercise the crew in their duties in connection therewith, is within the power conferred on the board by Rev. St. § 4405 [U. S. Comp. St. 1901, p. 3017], and valid. It does not purport to create offenses, but merely to prescribe duties; but a breach of it, resulting from a master's misconduct, negligence, or inattention, causing death, is manslaughter, because so provided by Congress in Rev. St. § 5344 [U. S. Comp. St. 1901, p. 3629].

On Demurrers to Indictments.

Henry L. Burnett, U. S. Atty., and Ernest E. Baldwin, Asst. U. S. Atty. (William S. Ball, of counsel), for the United States.

Black, Olcott, Gruber & Bonyng (William M. K. Olcott and Terence J. McManus, of counsel), for defendants Van Schaick, Atkinson, and Dexter.

Dittenhoefer, Gerber & James (A. J. Dittenhoefer and Dudley F. Phelps, of counsel), for defendant Barnaby.
Hugo Hirsh, for defendant Pease.

THOMAS, District Judge. The above actions are known as the "Slocum Cases," and the present question involves a demurrer to each of the indictments in the three actions, numbered for convenience 1, 2, and 3, which are found under section 5344 of title 70 of the Revised Statutes [page 3629, U. S. Comp. St. 1901], which provides:

"Sec. 5344. Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed, and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any Circuit Court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years."

The defendant Van Schaick was master of the steamboat General Slocum. She was owned by the Knickerbocker Steamboat Company, a corporation, whose managing directors and officers were the defendants Barnaby, president; Atkinson, secretary; Dexter, treasurer; while Pease was employed as the commodore of the fleet. Resort must be had to the indictments for a statement of the facts that are conceded for the purposes of the demurrers.

The Slocum was inspected by the inspectors of the United States on May 5, 1904, and thereupon permitted to navigate for a year the waters of the Bay and Harbor of New York, and rivers tributary thereto, Long Island Sound, and coastwise between Rockaway Inlet and Long Branch. On June 15, 1904, while navigating the East river, a fire occurred, and was so uncontrolled that many persons were compelled to jump into the water, and some 900 were drowned.

The indictments charge that the deaths were caused (1) by unsafe and unserviceable life preservers (indictment No. 1 and indictment No. 2, count 1; indictment No. 3, counts 1 and 2); (2) by unsuitable, inefficient, and useless life preservers, and incomplete and unfit equipment of steam pumps and hand pumps, so far as the weakness and unserviceability of the hose was concerned, and in that the hose was not provided for and attached to the steam pumps and hand pumps (indictment No. 2, count 2); (3) by the wrongful neglect of Van Schaick, the captain, to discipline and train his crew, whereby none of the crew knew or attended to his duty, and no attempt was made to unlash and swing out the lifeboats or the life rafts, in consequence of which the passengers were obliged to throw themselves into the water, and thereupon drowned on account of the useless and unfit life preservers. Three classes of persons are charged with breach of duty in regard either to the defective appliances or the discipline of the crew, or both, to wit, the owner of the vessel, the Knickerbocker Steamboat Company, Van Schaick, the master of the vessel, Barnaby, Atkinson, Dexter, and Pease.

Indictment No. 1 charges that Van Schaick was—

"Guilty of misconduct, negligence and inattention to duty on such vessel, as such master and captain, in that he then and there unlawfully had and

kept on said vessel, among other life preservers, adjustable to the bodies of human beings, which had been placed thereon for the use of the passengers and other persons on board of the said vessel in case of emergency, and intended for such use, divers, to wit, nine hundred and upwards, unsuitable, inefficient and useless life preservers; that is to say, in the respect that, according to the laws relating thereto, and the regulations thereunder, the said life preservers on said vessel were required to be in good order and accessible for immediate use, adjustable to the bodies of passengers and made of good, sound cork blocks, or other suitable material, with belts and shoulder-straps properly attached in the manner prescribed by the laws of Congress relating thereto and the rules and regulations thereunder as aforesaid, and that every such life preserver should contain at least six pounds of good cork, which should have a buoyancy of at least four pounds to each pound of cork; but in truth and in fact, large numbers of the same, to the amount of nine hundred and upwards as aforesaid, through the unlawful misconduct, negligence and inattention to his duties by the said master and captain, as aforesaid, were unsafe, unsuitable and unserviceable, so that, at the times aforesaid, while the said William H. Van Schaick was master and captain as aforesaid, of the said steamboat, the said life preservers, in large numbers, to wit, nine hundred of the same and upwards, were utterly useless for the protection and saving of human life, in that, in many instances, the covers thereof were rotten and not of sufficient strength and soundness to make them impervious to water, and the shoulder-straps and bands of the same were so decayed that it was impossible to securely fasten the said life preservers to the human body; and the said life preservers did not have the buoyancy required by law; and the unsuitability and the inefficiency and uselessness of the said life preservers for the purpose which they were intended to serve should have been known to the said William H. Van Schaick, and he might by the exercise of ordinary observation, and inquiry, have ascertained the same, and should so have ascertained before the said vessel started on the excursion hereinafter mentioned; and which said unsuitable and inefficient appliances, he, the said William H. Van Schaick, notwithstanding the premises, unlawfully caused, suffered and permitted to be and remain on said vessel, and he was guilty of misconduct, negligence and inattention to his duties upon said vessel, in that he permitted the said vessel to go, and took the said vessel, on said excursion, with the said unsuitable and inefficient life preservers on board, and caused, suffered and permitted, the same to be tendered and held out for the use of the passengers and other persons on board of said steamboat, at the time of her destruction by fire as hereinafter mentioned."

And indictment No. 1 further charges that Barnaby, Atkinson, Dexter, and Pease—

"Being such directors and commodore as aforesaid, did then and there unlawfully aid and abet the said William H. Von Schaick in his said unlawful misconduct, and inattention to his duties on said vessel as aforesaid, and cause, procure, suffer and permit him, then and there, the said misconduct, negligence and inattention to his duties, in manner and form aforesaid, so to engage in and commit as aforesaid."

Indictment No. 2 charges that the Knickerbocker Steamboat Company, the owner of the vessel, "Was guilty of fraud, misconduct and violation of law, in that the said company then and there unlawfully had and kept on said vessel" life preservers in violation of the requirements of law and regulation, specifically describing the requisites, and the condition in which said life preservers in fact were, and charges that:

"The said unsuitable, inefficient and unfit appliances the said Knickerbocker Steamboat Company, notwithstanding the premises, unlawfully caused, suffered and permitted to be and remain on the said vessel and to be tendered and held out to the passengers and other persons on board of the said vessel

for their use at the time of the happening of the fire hereinafter mentioned."

And that the defendants named in the indictment—

"Did then and there unlawfully aid and abet the said Knickerbocker Steamboat Company in its said fraud, misconduct and violation of law, and cause, procure, suffer and permit the said company then and there the said fraud, misconduct and violation of law, in manner and form as aforesaid, so to engage in and permit as aforesaid."

It is further charged in indictment No. 2 that:

"And it was then and there also the duty of the said Knickerbocker Steamboat Company to see that said steamboat was equipped with a good, double-acting steam pump, or other equivalent apparatus for throwing water, and that such pump or other apparatus should be kept at all times in good order, ready for immediate use, and that the same should have at least two pipes of suitable dimensions, one on each side of said vessel, to convey the water to the upper decks, to which pipes there should be attached by means of stop-cocks or valves, both between decks and on the upper deck, good and suitable hose of sufficient strength to stand the pressure of not less than one hundred pounds to the square inch, long enough to reach to all parts of the said vessel, and properly provided with nozzles, and kept in good order for immediate service. And it was also then and there the duty of the said Knickerbocker Steamboat Company to see that the said vessel was provided with two good, double-acting fire pumps, to be worked by hand, and that each of said hand pumps should have well fitted and suitable hose, at least one-half the length of said vessel, kept at all times in perfect order and ready for immediate use for the fighting of fire on the said vessel.

"And by the fraud, misconduct and violation of law by the said Knickerbocker Steamboat Company, the owner of the said steamboat, 'General Slocum,' although the said steamboat was provided, then and there, with the said steam pumps and the said hand pumps, as aforesaid, the said pumps then and there were not provided with, and did not have attached thereto, and ready for immediate use, the said hose, as aforesaid, required by law, in that, the hose, where the same was attached to the said steam pumps, namely, on the main deck of said vessel, was weak, unfit and unserviceable and was unable to stand the pressure as required by law, and on the hurricane and promenade decks of said steamboat no hose whatever was provided or attached to the said steam pumps; and in truth and in fact, no hose whatever was provided and attached, then and there, to the said hand pumps, or either of them, as required by law.

"And the unsuitability, inefficiency and uselessness of the said life preservers for the purposes which they were intended to serve; and the incomplete and unfit equipment of the said steam pumps and the said hand pumps as aforesaid, so far as the said weakness and unserviceableness of the said hose were concerned, and in the respect that hose was not provided for and attached to the said steam pumps and the said hand pumps, as hereinbefore recited, the said Knickerbocker Steamboat Company should have known and might by the exercise of ordinary observation and inquiry, have ascertained, before the said vessel started on the excursion, on the said 15th day of June, A. D., 1904, hereinafter more particularly mentioned. And the said unsuitable, inefficient, incomplete and unfit appliances, the said Knickerbocker Steamboat Company, notwithstanding the premises, unlawfully caused, suffered and permitted to be and remain on the said vessel, and to be held out to the passengers and other persons on said vessel, for their use, and suitable for their safety and protection at the time of the destruction of said steamboat by fire hereinafter mentioned."

And it is further charged in indictment No. 2 that the defendants Barnaby, Atkinson, Dexter, Pease, and Van Schaick—

"Did then and there unlawfully aid and abet the said Knickerbocker Steamboat Company in its said fraud, misconduct and violation of law, and cause,

procure, suffer and permit the said company then and there the said fraud, misconduct, and violation of law, in manner and form as aforesaid, so to engage in and commit as aforesaid."

In addition to the above, it is charged against Van Schaick alone that he violated the regulations respecting fire drill. See rule 5, § 15, given below. Indictment No. 3, count 3, after alleging violation of such regulation, states:

"And by reason of the said unlawful misconduct, negligence and inattention to duty on said vessel, as aforesaid, on the part of the said William H. Van Schaick, so as aforesaid master and captain of the said steamboat, the said crew was without discipline or training as aforesaid, and did not know what to do in the said emergency; and no one of the said crew, nor any other person employed on board of said steamboat, had his post and station of duty, from the beginning of said fire until the final destruction of said vessel, because of it; or knew his duty or attended to the same; and so far as fighting said fire was concerned, being without discipline and without suitable hose and fire appliances, as aforesaid, no one of them attempted it, and no person, by reason of the said unlawful misconduct, negligence and inattention to his duties on said vessel by the said master and captain, was in command, or gave directions as to the suppression of the flames, and in consequence thereof, panic and confusion, without the semblance of order or discipline, prevailed, and said passengers were left to help themselves; and for the same reason, no attempt was made by the said crew, or any of them, to unleash and swing out the said lifeboats, or lower them, or the said life rafts, into the water; and in the absence of good order, through the aforesaid unlawful misconduct, negligence, and inattention to his duties on said vessel, of and by the said master and captain, the said passengers, in large numbers, were pushed and thrown into the water, and cast themselves therein to avoid perishing by the said fire; and the said life preservers then and there being useless and unfit for service, many of those who sought to use them, having adjusted said life preservers to their bodies, relying upon their suitability, efficiency and usefulness for the purpose which they were intended to serve, and for which they had been tendered and held out to them, cast and threw themselves into the waters of East river there, and sinking therein, instantly died by drowning; and many others sank into the flames on board of said vessel and thereby instantly died."

And it is charged that by the—

"Unlawful misconduct, negligence and inattention to his duties on the vessel by the said William H. Van Schaick, the master and captain thereof, the lives of nine hundred persons * * * were then and there destroyed, some by burning and some by drowning, in manner and form aforesaid, and that thereby the said William H. Van Schaick, them, the said nine hundred human beings, in manner and form, and by the means aforesaid, unlawfully did kill and slay."

Who had a duty respecting (1) the life preservers; (2) the hose, and connection thereof with the pumps; (3) the discipline of the crew? Rev. St. U. S. § 4482 [U. S. Comp. St. 1901, p. 3054], provides:

"Sec. 4482. Every such steam-vessel carrying passengers shall also be provided with a good life-preserver, made of suitable material, for every cabin passenger for which she will have accommodation, and also a good life-preserver or float for each deck or other class passenger which the inspector's certificate shall allow her to carry, including the officers and crew; which life-preservers or floats shall be kept in convenient and accessible places on such vessel in readiness for immediate use in case of accident."

It is urged that the words "such vessel" refer to the preceding section, 4481 [page 3053], which relates to a "steam vessel navigating

rivers only, except ferryboats, freight boats, canal-boats, and towing boats, of less than fifty tons."

Sections 4488 and 4489 [pages 3055 and 3056] provide:

"Sec. 4488. Every steamer navigating the ocean, or any lake, bay, or sound of the United States, shall be provided with such numbers of life-boats, floats, rafts, life-preservers, line-carrying projectiles, and the means of propelling them, and drags, as will best secure the safety of all persons on board such vessel in case of disaster; and every sea-going vessel carrying passengers, and every such vessel navigating any of the Northern or North-western Lakes, shall have the life-boats required by law, provided with suitable boat-disengaging apparatus, so arranged as to allow such boats to be safely launched while such vessels are under speed or otherwise, and so as to allow such disengaging-apparatus to be operated by one person, disengaging both ends of the boat simultaneously from the tackles by which it may be lowered to the water. And the board of supervising inspectors shall fix and determine, by their rules and regulations, the kind of life-boats, floats, rafts, life-preservers, line-carrying projectiles, and the means of propelling them, and drags that shall be used on such vessels, and also the kind and capacity of pumps or other appliances for freeing the steamer from water in case of heavy leakage, the capacity of such pumps or appliances being suited to the navigation in which the steamer is employed.

"Sec. 4489. The owner of such steamer who neglects or refuses to provide such life-boats, floats, rafts, life-preservers, line-carrying projectiles, and the means of propelling them, drags, pumps, or appliances as are, under the provisions of the preceding section, required by the board of supervising inspectors, and approved by the Secretary of Commerce and Labor, shall be fined one thousand dollars."

It is urged that the indictment does not state under which section the General Slocum should have been equipped with appliances. If her equipment followed her license, she would fall under both sections. If the place of accident determines the requirement, for the purpose of these actions section 4482 is applicable. In either case it is considered that the primary duty of supplying proper life preservers fell on the owner. This will be discussed later.

Section 18, rule 3, of the general rules and regulations prescribed by the board of supervising inspectors, as amended January, 1904, and approved by the Secretary of Commerce and Labor, provides:

"Every life-preserver adjustable to the body of a person shall be made of good sound cork blocks or other suitable material, with belts and shoulder-straps properly attached, and shall be constructed so as to place the cork underneath the shoulders and around the body of the person wearing it, the shoulder-traps to be sewed on at least 8 inches apart on the back of the preserver, and sewed together at the angle where they cross the body, and must have also a strap across the breast from one shoulder-strap to the other, sewed fast at one end and with a buttonhole in the other, with a button on shoulder-strap to which the crosspiece can be buttoned, and that all belt life-preservers shall be not less than 54 inches in length, measurement from end to end around the body. And it shall be the duty of the inspector to see by actual examination that every such life-preserver contains at least 6 pounds of good cork, which shall have a buoyancy of at least 4 pounds to each pound of cork. Inspectors are further required to direct such life-preservers to be distributed throughout the cabins, staterooms, berths and other places convenient for passengers on such steamer; and there shall be a printed notice posted in every cabin and stateroom, and in conspicuous places about the decks, informing passengers of the location of life-preservers and other life-saving appliances, and of the mode of applying or adjusting the same. Cork cushions, when constructed of good sound cork blocks or other suitable material, with belts and shoulder-straps properly attached, said cushions to contain not less than 6 pounds of cork, when

passed by local inspectors, may be used in lieu of life-preservers on small pleasure steamers."

Passing to the question of fire equipment, section 4471 [page 3049, U. S. Comp. St. 1901] provides:

"Sec. 4471. Every steamer permitted by her certificate of inspection to carry as many as fifty passengers, or upward, * * * shall be provided with a good double-acting steam fire-pump, or other equivalent apparatus for throwing water. Such pump or other apparatus for throwing water shall be kept at all times and at all seasons of the year in good order and ready for immediate use, having at least two pipes of suitable dimensions, one on each side of the vessel, to convey the water to the upper decks, to which pipes there shall be attached, by means of stop-cocks or valves, both between decks and on the upper deck, good and suitable hose of sufficient strength to stand a pressure of not less than one hundred pounds to the square inch, long enough to reach to all parts of the vessel and properly provided with nozzles, and kept in good order and ready for immediate service. Every steamer exceeding two hundred tons burden and carrying passengers shall be provided with two good double-acting fire-pumps, to be worked by hand; each chamber of such pumps, except pumps upon steamers in service on the twenty-eighth day of February, eighteen hundred and seventy-one, shall be of sufficient capacity to contain not less than one hundred cubic inches of water; and such pumps shall be placed in the most suitable parts of the vessel for efficient service, having suitable well-fitted hose to each pump, of at least one-half the vessel in length, kept at all times in perfect order, and shipped up and ready for immediate use."

The subject of fire drill is covered by rule 5, § 15, Inspectors' Rules and Regulations, which is as follows:

"Sec. 15. It shall be the duty of the master of every inspected steamer of 30 net tons and over, carrying passengers on the ocean, lakes, gulf, or bays, when such steamer is under way, to cause to be prepared a station bill for his own department, and one, also, for the engineer's department, in which shall be assigned a post or station of duty for every person employed on board such steamer, in case of fire or other disaster; which station bills shall be placed in the most conspicuous places on board for the observation of the crew. And it shall be the duty of such master, or of the mate or officer next in command, once at least in each week, to call all hands to quarters and exercise them in the discipline, and in the unlashing and swinging out of the lifeboats, weather permitting, and in the use of the fire pumps and all other apparatus for the safety of life on board of such vessel, and to see that all the equipments required by law are in complete working order for immediate use; and the fact of the exercise of the crew, as herein contemplated, shall be entered upon the steamer's log book, stating the day of the month and hour when so exercised, and any neglect or omission on the part of the officer in command of such steamer to strictly enforce said rule shall be deemed cause for the revocation of the license of such officer. Upon navigable rivers the captains of all passenger steamers of 30 net tons and over shall be required to maintain a strict discipline and organize the officers and permanent crew so to act with promptness in case of fire or other disaster; and the captain shall cause to be prepared at least two station bills, assigning the officers and permanent crew to definite places. Said station bills shall be conspicuously placed, under glass, near the inspection certificate."

The duty of the master in respect to this rule and section 4471 will be later discussed.

It is now to be considered whether the master had any duty with reference to the life preservers and other appliances. It should be kept firmly in mind that this question is not whether the duty, if it existed, required much or little diligence on the part of the master,

but rather whether the duty existed at all. Neither the statutes nor the inspectors' regulations make it the duty of the master to select, to provide, to test, or to maintain the prescribed life preservers, nor primarily to inspect and to discard those that originally or from time to time did not meet the requirements. Obviously the primary duty in this regard rests upon the owner of the vessel. It certainly cannot be maintained that the usual law requires that the master of a domestic vessel, navigated in a home port, shall equip her; and the statute, unless there be fitting words to that effect, prescribing the equipment, does not speak to the master. It commands the owner. Hence, if the owner did not perform the duty, it became liable, under section 5344, if death ensued in consequence of its violation of law; and, as considered later, if the master, managing officers, or others caused the violation of law, they are indictable as principals. This conclusion sustains the indictments against such persons for aiding and abetting the company; and so the indictment wherein Barnaby, Atkinson, Dexter, and Pease are charged with aiding and abetting the master, by procuring his misconduct, negligence, and inattention to his duties, would be sustainable, at least, because it charges that the master "unlawfully caused, suffered and permitted to be and remain on said vessel" the unsuitable and inefficient appliances. A further question is whether inattention to the condition of the life preservers, failure to discover defects, if they were obvious or discoverable by the observation demandable of the master of a vessel, was such negligence as would, in case death resulted therefrom, bring the master within section 5344, and whether Barnaby and the others could aid and abet such negligence.

While it is not the duty of the master to equip the vessel with life preservers, and while he may not be chargeable, in the first instance, with the duty of making what would be regarded as a proper inspection thereof, necessary to discover the presence or absence of the qualities and material required by law, yet it is the duty of the master of a vessel, aboard and in command, to use ordinary observation and inquiry, and if thereby, or if from report to him, he has notice of defects either in his vessel or equipment, some diligence is required on his part, tending to the restoration of the defective place or appliance. At least, it would be his duty to report the condition, and make requisition for repairs or sound facilities. Assume that no life preservers were provided; could the master, with actual or constructive knowledge, navigate the vessel with impunity? If he knows of some total omission of requisite equipment, itself perilous to human life, may he deliberately continue to navigate his vessel, wholly indifferent to any catastrophe that may result therefrom? It is thought that such attitude on the part of the master would not be tolerated. And so, if the master blindly uses what he is proffered, however bad or destructive it may be, or constructively or actually knows of defects, and does nothing, he is certainly not performing the duty of a master. It is not the duty of the master to provide the hull of the ship, yet, if he navigates his vessel without any care as to the condition of the hull, or with a hole in the bottom, of which he has knowledge, actual or constructive, and she sinks, and death thereby ensues, he would, it is thought, fall

within the punishment of section 5344. Much more evident would be his guilt if he caused the hole "to be and remain" in the vessel. In other words, if he suffered and permitted it to be and remain in such vessel, knowing or enabled to know, in the use of ordinary observation, of its existence and danger, he would be guilty; and he would likewise be guilty if he caused the defective thing to be on the vessel and to remain thereon. The master's duty requires him to exercise some care to discover both the soundness and safety of the hull and equipment. It is not now a question whether, as regards any particular part of the vessel, the care required is great or otherwise. The question is whether any care is required. What the care should be would depend, among other things, upon the part of the vessel involved, and the opportunity of the master to know of its condition. If any defect would be discoverable in the exercise of such superintendence of the vessel ordinarily demandable of a prudent master, he must be deemed to have discovered it. It may be said that he was not obliged to examine or to test life preservers for the purpose of discovering their condition or buoyancy, especially after the inspector had recently approved them. Let this be admitted. Nevertheless, if the master had reason to know that the inspection was superficial, or the life preservers were not according to the requirements, some duty rested upon him respecting these defective appliances. Whether it would be fulfillment of the duty to report and to protest to the owner is not now the inquiry. It is thought that it must be the master's duty to decline to navigate a vessel if the life preservers, to his knowledge, were so defective as to destroy their usefulness. Then they would be equivalent to no life preservers. It is not the duty of a master to provide a hawser or mooring line, but it is his duty to use some care to know when such a line becomes unfit or is growing unfit for service, and to make requisition for a new one. Life preservers, unlike hawsers, are seldom used, and are stowed away so that defects would be less obvious and not easily discoverable from mere external inspection. Perhaps the defects might be entirely latent. But all this bears upon the question of what would be discoverable in the exercise of such general care and watchfulness as is demanded of the master, and does not permit the conclusion that no care at all is requisite. The law treats the master reasonably and fairly. It does not place duties upon him that belong to his employers or to inspectors. But he commands a ship to which a multitude of persons is committed, and of him care somewhat measured by the responsibility resting upon him is required.

The discussion of the duty of the master of the vessel will be continued while considering the indictment against Van Schaick alone, but in this connection it is convenient to determine whether Barnaby, Atkinson, Dexter, and Pease are charged legally in indictments Nos. 1 and 2.

The officers of the company and Commodore Pease are indicted in one action for aiding and abetting the company, and in another action for aiding and abetting the master, Van Schaick. These officers and Pease do not fall within any class of persons named in the section that creates the offense. Hence the indictment cannot, by virtue of the statute alone, be sustained against them as principals. How, then, can they be charged? A person not falling within the class described in a

penal statute may nevertheless, under the rules of the common law, be charged, provided (a) he was present, actually or constructively, and aided or abetted another person in the commission of the crime; (b) or, being absent, counseled or procured or caused that person to commit the crime; (c) or aided him after he had committed the offense, for example, to escape. If the crime is a misdemeanor, the aider and abettor in any one of the three cases above named would be a principal, and should be charged as such. If the crime is a felony, an aider and abettor would be a principal in the second degree, if he was actually or constructively present when another committed the offense, or he would be an accessory before the fact, or after the fact, according as the case fell within subdivisions "b" or "c," above.

The counsel for defendant Barnaby and his associates contend that such defendants cannot be indicted as principals, because they are not named in the act, nor were they constructively or actually present aiding and abetting; that they cannot be held as accessories, or even principals aiding and abetting, as they did not, and, in the nature of the case, could not, do anything to aid or abet the principals in their alleged neglect of duty. Moreover, it is urged that the officers are charged as principals, and cannot be convicted as accessories, and also that the officers could not be charged as accessories or as aiders or abettors, of a corporation that could not be indicted for manslaughter because it could not be punished for it. These positions may be tested. The corporation was the owner. It violated its duty, and fell within the terms of the statute. But it is urged that it cannot be convicted under the statute. The statute makes the owner's "fraud, misconduct, connivance or violation of law," causing death, an offense. In this case the duty of supplying proper life preservers is commanded by the law. This affirmative command involves another command—that life preservers not in compliance with the law shall not be furnished. The corporation navigated without them, and caused death thereby. It is not necessary to show intention to kill, nor malice in fact.

But it is said that no punishment can follow conviction. This is an oversight in the statute. Is it to be concluded, simply because the given punishment cannot be enforced, that Congress intended to allow corporate carriers by sea to kill their passengers through misconduct that would be a punishable offense if done by a natural person? A corporation can be guilty of causing death by its wrongful act. It can with equal propriety be punished in a civil or criminal action. It seems a more reasonable alternative that Congress inadvertently omitted to provide a suitable punishment for the offense, when committed by a corporation, than that it intended to give the owner impunity simply because it happened to be a corporation.

But it is urged that the officers could not aid or abet the corporation in its misconduct. The fact is that the corporation could not be guilty of misconduct, except as some of its officers or employés not only aided and abetted, but also did the act or failed to act. Of course, it does not follow that, because a corporation committed an offense, its officers or directors either did act or failed to act as the law required, or aided or abetted. But some one or more natural persons must have been the cause of the default. In the action at bar the indictment

points to the persons, Barnaby and his associates, and charges that they "did then and there unlawfully aid and abet the said Knickerbocker Steamboat Company in its said fraud, misconduct and violation of law, and cause, procure, suffer and permit the said company then and there the said fraud, misconduct and violation of law, in manner and form as aforesaid, so to engage in and permit as aforesaid." It should be conceded that, if a duty to act was laid on the corporation, and it did not act, and its officers were inactive, and no duty was laid on them, they could not be charged with aiding and abetting. But here the charge is, in effect, that the officers procured the corporation and Van Schaick to violate the law, and aided and abetted therein. The defendants state that one cannot aid another to do nothing. One person can procure another to do nothing, and, when the law says "act," one person can induce, counsel, order, and even coerce another into inaction. When the law commands one person to furnish good life preservers, another, having the opportunity and control, can procure such person to furnish bad and death-causing life preservers; or, when life preservers become useless and dangerous, one person may have such relation to one whose duty it is to replace and to restore them as to induce him to ignore that duty. Here the corporation and Van Schaick are charged, in effect, with misconduct, in failing to furnish good life preservers, and in furnishing bad life preservers. Who procured them to do it? The indictment charges that the officers and Pease did. The defendants seem to consider that, if the law charges a person not to do something, and he does it, and another is an effective cause of the action, the latter could be an aider and abettor; but if the law charges one person to do something, and he does it not, the person who interposes to stay his performance of duty is not aiding and abetting. If the law provides that a corporation should not dig a ditch dangerous to human life in a particular locality, and it should dig the ditch, then its officers aiding and abetting by procuring such encroachment would be punishable. But if a corporation were commanded to guard a ditch by lights, and the officers directed that it should not be done, or procured its superintendent to omit to do it, would not such officers aid and abet the omission, and be liable to punishment? Here the statute or regulations command the corporation to put aboard and maintain a certain kind of life preservers. That means that it shall not put aboard those that do not meet the requirements, nor permit aboard appliances once proper that have become improper. Now the corporation omits to put on the required kind, but puts on the forbidden kind, and keeps them aboard and navigates with them, and death ensues. This is not passivity alone. It is destructive activity. To put on and maintain what the law says shall not be put on and maintained is an affirmative breach of duty. If no life preservers had been placed aboard, it would have been inertia, an indolent failure to obey, that would be equivalent to open defiance of the law. To place forbidden life preservers is affirmative and active disobedience of the law. To leave aboard such life preservers as the indictment describes was negligence on the part of some one or more persons, tantamount to reckless disregard of duty. A person who actually interposes to cause the disobedient inactivity, as well as he who inter-

venes to cause the disobedient activity, equally offends. It is useless to refer to cases where a corporation has been commanded to do something, and its officers or directors do nothing, or to cases where a corporation is ordered not to do something, and yet does it, and its directors are accused, although there is no evidence that they did anything or were bound to do anything. If the corporation alone is made criminally liable for nonfeasance or misfeasance, or it alone is charged with a duty, its officers not participating cannot be held for the corporation's default if the duty, in some lawful manner, was not placed on them. But when a corporation or an individual is charged to do or not to do a specified thing, under the penalty of punishment, the person who procures the default aids the breach of duty. Whoever seizes the hand and holds back one from performance of a duty is as guilty as one who, seizing the hand, draws forward the one forbidden to the commission of the thing forbidden. The indictments in the present case sufficiently charge both procurement to neglect doing a commanded act, and to do that which is a direct violation of the commanded act.

The next question is: (1) If the principal offense is a felony, are the officers properly charged in the indictment? (2) Is the offense a misdemeanor or a felony? If the former, the persons are properly charged with aiding and abetting. It will not be necessary to decide the second question.

As to the first question, it is urged that the officers could not become principals, because they were not present when the offense was committed. When was the offense committed? It was not consummated until the deaths occurred as the result of the violation of it. The fact that the defendants, one or all, were then absent, is unimportant. The inspection officers were only present at the inspection, but were absent at the deaths, yet that circumstance alone would not acquit them. The owner could not escape on the only plea that he was on shore when the deaths occurred. Even the master of the vessel might not be excused by the mere fact that he was temporarily ashore when the fire occurred. The fault is found in employing the deficient appliances. This fault ripened into a crime when such deficiency resulted in a death. It is charged that the defective life preservers were on the ship, and constructively tendered for use to the imperiled passengers, through a breach of duty on the part of the owner and master, and also because each caused them to be and to remain on the vessel, and that Barnaby and the other officers not only suffered and permitted the fraud, misconduct, and violation of law of the company, and the misconduct, negligence, and inattention of the master, but did "cause and procure * * * then and there" the same. The nature of the offense, perchance, precluded a single act of the company or master, at which an aider and abettor might or might not be present. The duty was continuing. It always rested upon the company. So far as the duty rested upon the master, it remained with him during his hours of service. The very existence of the offense of the company or the master depended upon its continuity, and the charge is that Barnaby and others "then and there" did "cause, procure, suffer, and permit." If it is possible to conceive of a person being an accessory in such a case, yet it is quite as logical to consider such an aider and abettor as a

principal. The government claims that it charges the defendants as principals, and, while the counsel for the defendants contend that Barnaby and his co-directors "can be held, if at all, only as accessories," yet in the same brief it is stated that, "having been indicted as principals, the defendant Barnaby and his co-directors cannot be convicted as accessories." This seems to be an admission by Barnaby that he and his associates are indicted as principals. Hence the indictment is correct in form, and that it was possible for them to be principals is quite evident from the nature of the offense.

It is gravely urged that, although there were bad life preservers to the extent of 900, non constat there were aboard with them the number of good life preservers demanded by law; that the indictment should, but does not, negative the presence of other life preservers sufficient in number and kind; and the inference is asked to be drawn that the person or persons charged with the duty with reference to them did such duty. The argument must be that the law did not forbid, as a part of the equipment for use, the employment of 900 bad life preservers, and the constructive tendering of the same to the passengers on the burning ship for use, and that, as the indictment does not charge that there was not the lawful allotment of good ones, the presumption is that there was, and no one violated the statute in question, although the use of one of the bad life preservers resulted in the passenger's death. The law required that the life preservers be furnished for the use of the passengers; when the passenger took one, in contemplation of law, he took one that had been furnished him to take; and hence the one he took, whereby he drowned, was one that the law forbade the person charged to furnish, and the one that should have been furnished in the place of the one actually provided was not furnished; and hence the person charged is brought in fault. Of course, the drowning man was in such plight that he could not return the bad life preserver and select one whose existence is now dependent on an alleged presumption of law; and, even so, how many of the 900 bad life preservers would it have been his mischance to select and try before he would have secured one of the good life preservers now presumed to be in esse because the indictment does not deny them being? It is possible that he must have saved his life 900 times before he reached a safe life preserver that was in accordance with the law. As stated on the argument, if the law require the provision of 1,500 loaves of wholesome bread, it would hardly be regarded as a compliance if provision were made of 900 poisoned loaves, because the 900 poisoned loaves would be deemed furnished for the passengers equally with the safe loaves. The wrongdoer would not be heard to say that he furnished only the good loaves in compliance with the law.

Some final discussion of count 3 of indictment No. 3, against Van Schaick alone, is desirable. The indictment charges that it was the duty of Van Schaick (1) to cause to be prepared and posted station bills for the deck and engine department, assigning a post of duty for every person employed on board; (2) to call, once in each week, all hands to quarters, and exercise them in the discipline,

and in the unlashng and swinging out of lifeboats, and in the use of fire pumps and all other apparatus for the safety of life on board in case of fire; (3) to see that all the equipments required by law were in complete working order for immediate use; (4) to see that the provisions of section 4471 respecting steam pumps, hand pumps, and suitable hose, "kept in order and ready for immediate service," were obeyed; (5) to see that the life preservers upon the vessel were in good order and repair, and ready and accessible for immediate use, and that they met the requirements of the regulations. And it is further charged that the master (a) neglected to comply with the regulations as to the station bills and fire drill; (b) neglected to have attached to the steam pumps and hand pumps, and ready for immediate use, requisite hose, which on the main deck was weak, unfit, and unserviceable, and on the hurricane and promenade decks was not provided and attached to the hand pumps; (c) was negligent as to the life preservers; and that, through such neglect in regard to fire drill, suitable hose, and fire appliances, and useless life preservers, death was caused.

The duty of the master as to the life preservers has been heretofore discussed. What has been said in that regard is equally applicable to the requirements of section 4471, relating to steam fire pumps and other apparatus for throwing water, suitable hose therefor as directed, and also double-acting hand fire pumps, each having suitable, well-fitted hose, of at least one-half the vessel in length. It is not the primary duty of the master to provide such appliances, but, if they be not supplied, it would be his duty to take some measures, the nature of which would depend upon the existing conditions; and if the provision made was defective, and, in the exercise of the observation demandable of the captain, such omission or defect were discoverable, he would be deemed to know it, and thereupon it would be neglect of duty on his part if he did not exercise due care for the supply or restoration of the omitted or defective parts.

The matter of the fire drill and attention to the working order of appliances is treated by the inspectors' rule 5, § 15, quoted above. It purports to have been made pursuant to section 4405, Rev. St. U. S. [page 3017, U. S. Comp. St. 1901], which provides:

"The board [of inspectors] shall establish all necessary regulations required to carry out in most effective manner the provisions of this title, and such regulations when approved by the Secretary of Commerce and Labor, shall have the force of law."

The regulation (rule 5, § 15) requires of the master: (1) The preparation and posting of a bill assigning stations to the crew. (2) The summoning of all hands to exercise (a) in unlashng and swinging out the lifeboat; (b) in use of fire pumps and all apparatus for safety of life. (3) To see that all equipments are in complete working order for immediate use. (4) To enter the dates when exercise of crew was had. The neglect to enforce the rule is made cause for revoking the master's license.

The title of the act of Feb. 28, 1871, c. 100 (16 Stat. 440), embodied in title 52, is, "An act to provide for the better security of

life on board of vessels propelled in whole or in part by steam and for other purposes." The sections of the title fall within the title. The provision for inspectors of steam vessels and equipment, the provisions relating to the furnishing of fittings and appliances, and the workmanship, material, strength, and adjustment thereof, and the due relation of the parts, for the examination and licensing of masters, mates, engineers, the investigation of alleged breach of duty by any of such officers, and the removal therefor in proper case, for a full complement of licensed officers and full crew, and other requirements, illustrate that the protection of life and property is the vital aim of the statute. Consider appliances peculiarly exposed to the master's observation and scrutiny. Of what avail are steam or hand fire pumps and hose unless the same be kept in good order and ready for use? If, when the fire comes, the appliances are somewhere aboard, but the parts necessary for coaction are disconnected, unready for use, and even seconds of delay are caused thereby, all such appliances may be unavailable to stay catastrophe. And what if the crew be untrained and unexercised in the handling of the hose and the manning of the pumps, so that no man knows his place, and no one lends efficient and well-directed aid, or the crew disperses or crowds forward so confusedly that one defeats the aid attempted by another? Of what use then are fire pumps or hose or lifeboats, or the law that compels them to be furnished? Many tragedies on sea or land answer these questions. As seen above, the master is required by the regulations to assign stations for his crew, and post notices thereof; to exercise his crew in un-lashing and swinging out the lifeboat, in the use of the fire pumps and other apparatus; and to see that all the equipments required by law are in complete working order for immediate use. Such duties, at least, among those attempted to be established by the regulations, pertain to him and his subordinate officers, in the very nature of their positions. A crew and pumps and hose and lifeboats, on the same ship, all unrelated, because no one has taught the crew how to connect and operate them effectively, would be snares tempting passengers to possible death. And who should use care to fit the crew for service in operating these appliances, if not the master, as the ultimate authority aboard, and the responsible commander? Who other than he should have knowledge, if the hose is absent, unconnected to the pumps, and why should he not, above all others, know if it was weak and insufficient? Is it not the duty of a master to cause it to be tested at proper intervals? Where the indictment charges such duties, it cannot be said that it is demurrable. The defendants deny the operative force of the regulations in connection with section 5344, upon the authority of *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591, and *U. S. v. Maid* (D. C.) 116 Fed. 650. The decision in *Flint & P. M. R. Co. v. Marine Ins. Co.* (C. C.) 71 Fed. 210, aids the conclusion that the regulation is sanctioned. There it was held that:

"The rule of the supervising inspectors that all passenger and freight steamers shall have one of the crew on watch in or near the pilot house is authorized by Rev. St. § 4405 [U. S. Comp. St. 1901, p. 3017], requiring the

inspectors to establish rules necessary to carry out the statutory provisions as to steam vessels, among which is one that the vessel shall carry 'a full crew, sufficient at all times to manage the vessel.'"

The cases cited by the defendants involve attempts on the part of governmental agencies other than Congress to create crimes. The inspectors, by their regulation, do not create a penal offense. They declare a duty. A breach of it brings no penalty beyond some liability stated in title 52. But if the regulation be valid, a breach of it, resulting from the master's misconduct, negligence, and inattention, causing death, is manslaughter, because Congress, by section 5344, has provided that a breach of duty, so caused, whereby a person's death is effected, shall be such an offense. Section 5344 does not limit the "duties" of a master for its purposes to statutory duties. Almost the sum of a master's duties, whereon the lives of the persons on his own and other vessels depend, are not imposed directly upon him by statute. But the meaning of section 5344 is that if his misconduct, negligence, or inattention to his duties, however arising, causes the death of another, he shall be guilty of manslaughter. The enumeration in the statute of the duties, and what in relation thereto would constitute misconduct, negligence, and inattention, is beyond human possibility. It is said in *U. S. v. Eaton*, 144 U. S. 687, 12 Sup. Ct. 767, 36 L. Ed. 591:

"It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law either forbidding or commanding it.'"

A misinterpretation of this statement would lead to gross error. For illustration, the Penal Code of New York (section 195) provides:

"A person who, by any act of negligence or misconduct in a business or employment in which he is engaged, or in the use or management of any machinery, animals, or property of any kind, intrusted to his care, or under his control, or by any unlawful, negligent or reckless act, not specified by or coming within the foregoing provisions of this chapter, or the provisions of some other statute, occasions the death of a human being, is guilty of manslaughter in the second degree."

The killing of a human being is not an act. It results from acts done or omitted. This or any statute does not undertake to point out definite, causative act or acts, the commission or omission of which will bring a person within the statute. The variety of such acts or omissions from which culpable negligence may be inferred is infinite. Section 5344, Rev. St. U. S. [page 3629, U. S. Comp. St. 1901], provides that a master's misconduct, negligence, or inattention to his duties, causing death, shall constitute manslaughter. The master's misconduct, negligence, or inattention arises from breach of duties; that is, from acts or omissions to act. When the inspectors declare, confirm, and create a duty, they do not thereby render the breach of such duty a penal offense. Congress alone creates such offense. The entire title 52 cannot be read without perceiving how much dependence must be placed necessarily upon the master for the fulfillment of its provisions, and the necessity for care on his part, and responsibility for the observance of such care, are apparent. For instance, by section 4493 [page 3058] it is provided:

"Whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such

vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage if it happens through any neglect or failure to comply with the provisions of this title, or through known defects or imperfections of the steaming-apparatus or of the hull," etc.

This is not conclusive in these actions, but illustrates the intended relation of the master to passengers and property committed to his care. By section 4448 [page 3039] it is provided:

"All officers licensed under the provisions of this title shall assist the inspectors in their examination of any vessel to which such licensed officers belong, and shall point out all defects and imperfections known to them in the hull, equipments, boilers, or machinery of such vessel, and also shall make known to the inspectors, at the earliest opportunity, all accidents or occurrences producing serious injury to the vessel, her boilers, or machinery; and in default thereof the license of any such officer so neglecting or refusing shall be revoked."

Why should the officers be designated to point out defects and imperfections known to them? They are selected because to them the knowledge is more likely to come, either from direct observation or from report, and because a duty rests upon such officers to exercise such observation, and provide by their discipline for such reports.

The conclusion expressed earlier is reiterated—that, unless the duty as to furnishing equipments and fittings be imposed expressly upon the master of a ship, it is not primarily his duty to provide them; but it is his duty, before navigating, to exercise care to know whether the ship has any equipment, whether it is apparently sufficient and in accordance with law, and, after the introduction of appliances and equipment, it is his duty to have some care respecting its maintenance, the extent of such care being dependent upon the master's opportunity to examine the appliance and perceive its condition; and, further, there are duties relating to the discipline of the crew in the use of appliances, that, in the nature of the case, demand his vigilant attention, lest such appliances, when the occasion for their use arises, be found useless, until the moment when they can aid in saving passengers and property has passed, because the crew is undisciplined and untrained in their operation. Duties that relate to the operation of a vessel, and the use of appliances therefor, and for the protection of the vessel, her passengers and cargo, and the discipline of the crew in connection therewith, are presumptively shared by the master, if they do not devolve entirely upon him. As regards a vessel navigating in domestic waters, there is a greater opportunity for the immediate supervision by the owner, and duties that elsewhere might fall upon the master may be transferred to others. What dependence a master may place upon others under such circumstances, or to what extent his primary duties may have been taken from him and imposed upon others by the owner, or what he has done upon discovering defects, and whether his action thereon fulfilled his duty, are questions that can only be determined after the evidence shall have been presented upon the trial.

The demurrers should be overruled, with leave to plead over at the December term.

ZERRES et al. v. VANINA.

(Circuit Court, D. Nevada. January 28, 1905.)

No. 781.

1. EJECTMENT—POSSESSION—OUSTER.

As a general rule, ejectment, being a possessory action, cannot be maintained for land of which plaintiff is in possession, but it must be affirmatively proved that there has been a disseisin of the plaintiff, and a natural ouster as well as a wrongful possession by defendant.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 65-73.]

2. MINES—CLAIMS—RELOCATION—FORFEITURE.

A relocater of a mining claim is not a discoverer of the mineral contained therein, but an appropriator thereof, and cannot hold the ground except on proof that the original locator had abandoned or forfeited his right by failure to comply with the mining laws.

3. SAME—STATUTES—COMPLIANCE—NOTICE OF LOCATION—DESCRIPTION OF CLAIM.

Where a notice of location of a lode mining claim contained a substantial, though not a literal, compliance with Comp. Laws Nev. 1900, § 208, requiring such notices to specify, among other things, the width of the location on each side of the center of the vein, etc., it was sufficient.

4. SAME—UNITED STATES STATUTES—LOCAL REGULATIONS.

Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], providing that all records of mines, as hereafter made, shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim, and providing that miners of each mining district may make regulations, not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim, etc., necessarily implies that provisions with reference to record of notice of location of such claims would be required either by the rules or regulations of miners or by the Legislature of the state.

5. SAME—STATUTES—MANDATORY AND DIRECTORY PROVISIONS.

Comp. Laws Nev. 1900, § 210, providing for the location of lode mining claims, declares that within 90 days of the date of posting the location notice of the claim the locator shall record his claim with the mining district recorder and the county recorder of the mining district or county in which such claim is situated, by a location certificate, etc. *Held* that, the statute not providing for a forfeiture for failure to record within the time specified, such failure was insufficient to work a forfeiture of the locator's rights.

6. SAME—POSSESSION—RE-ENTRY.

Where an original locator of a lode mining claim performed the necessary assessment work on the claim for the previous year, the fact that he was absent from the ground, and that during such absence some of the boundary stakes had fallen down, and that others had made a relocation of the claim, did not deprive him of the right to re-enter to do the annual assessment work for the succeeding year; his prior location not having been terminated by abandonment or forfeiture.

Action of Ejectment to Recover Possession of Mining Ground.

Mack & Farrington, for plaintiffs.

S. J. Parsons, for defendant.

HAWLEY, District Judge. This is an action of ejectment to recover possession from the defendant of certain mining ground situate in Searchlight mining district, Lincoln county, Nev., claimed by plaintiffs under what is known and designated as the "N. B. Grafter Location," and is claimed by the defendant under what is known as the "Eddie Location."

The complaint was filed July 8, 1904, and, among other things, alleges:

"(2) That plaintiff W. J. Zerres was on the 22d day of March, 1904, lawfully possessed, as owner in fee-simple title, and in the possession and entitled to the possession, of that certain mine and mining claim known as and called the 'N. B. Grafter Mining Claim,' situated in the Searchlight mining district, county of Lincoln and state of Nevada"—describing the same by metes and bounds. "(5) That, the plaintiffs being so possessed, the defendant afterwards, and on and about the — day of April, 1904, wrongfully and unlawfully and without right entered into the possession of the said N. B. Grafter mining claim and ousted and ejected said plaintiffs therefrom, and ever since has withheld and still does withhold the possession of the said N. B. Grafter mining claim from said plaintiffs."

The defendant, in his answer, denies the averments in plaintiffs' complaint. And "(6) for a further defense this defendant alleges that he is the owner, by purchase and location, in fee simple (subject to the paramount title and rights of the United States), of the Eddie Lode mining claim, situate in Searchlight mining district, Lincoln county, state of Nevada"; describing the same by metes and bounds. The greater portion of the ground covered by the Eddie claim is included within the premises claimed by plaintiffs.

It appears from the testimony on the part of plaintiffs that on January 1, 1904, Burr Jeremiah Hurley, John McDermott, W. J. Zerres, and G. H. Wright located the ground in controversy designated as the N. B. Grafter, and monumented the same by posting stakes in mounds at the corners and side centers of the claim, in compliance with the laws of the United States, and sank a shaft, as required by the statutes of Nevada (Cutt. Comp. Laws, § 209). The notice posted on the ground reads as follows:

"Notice of Relocation 'Eddie' Quartz Claim.

"Notice is Hereby Given, that the undersigned citizens of the United States, over the age of twenty-one years, have in compliance with the requirements of the Revised Statutes of the United States and local laws and customs, this day located and claim 1,500 linear feet along the course of this lead, lode or vein of mineral bearing quartz, and 300 feet in width on each side of the middle of said lead, lode or vein, together with all mineral deposits contained therein, and all timber growing within the limits of said claim, and all water and water privileges thereon or appurtenant thereto, situate in the Searchlight Mining District, County of Lincoln and State of Nevada and more particularly described as follows, to wit: Commencing at discovery shaft or monument and said lines running west to stake 2. Thence north to stake 4. Thence east to stake 3. Thence south to stake 1. Said claim is bounded on the west by the 'Santa Fé' and 'Morgan Courtney' on the north by the 'Barney Riley' and 'Bonanza' on the east by the 'Munyon.' This claim was previously known as the 'Eddie.' This claim shall be known as the N. B. Grafter quartz claim."

This notice was recorded in the district recorder's office on February 15, 1904, and in the office of the county recorder February 24,

1904. An amended certificate was posted upon the ground, and recorded the same day in the district recorder's office of Searchlight mining district, and in the county recorder's office of Lincoln county, Nevada, on February 24, 1904. It reads as follows:

"Know all men by these Presents: That we the undersigned citizens of the United States, and owners of the 'N. B. Graftor Lode Claim' do hereby make and file this our amended certificate of location upon the said lode claim, situate in the Searchlight Mining District, County of Lincoln, State of Nevada, claiming 300 feet or fraction thereof in width, on each side of the middle of said lode at the surface, and all veins, lodes or ledges, within the boundaries of said claim, with their dips, angles and variations; 1,305 linear feet on said lode running S. 41° 54' E. from this discovery post, and 195 linear feet running N. 41° 54' W. on said lode, from this discovery post.

"Said lode mining claim is bounded as follows, to wit: Beginning at cor. No. 1 S. W. Cor. of claim, thence S. 40° 18' E. 748.78 feet to the south side center post, and on same course 1,497.55 feet to cor. No. 2, thence N. 52° 10' E. 275 feet to the east end center post, and on same course 535 feet to cor. No. 3. Thence N. 43° 04' W. 751.22 feet to the North side center post, and on same course, 1,502.43 feet to cor. No. 4, thence S. 52° 10' W. 230 feet to the West end center, and on same course, 462.46 feet to cor. No. 1, place of beginning. Being the same lode to which the original location certificate (made by Burr Jeremiah Hurley, John McDermott, W. J. Zerres and J. H. Wright) relates, as filed in Book 'D' at pages No. 129-130, Searchlight Mining District Records.

"Said lode claim is situate in the North half of Section 34, Twp. 28 South, Range 63 East, M. D. M., about one-half mile N. W. of the Searchlight Post Office, and all corners, and boundaries of said claim are plainly marked with pine posts 4 inches square and five feet long, set in mound of stone and earth. A discovery shaft 4 ft. by 6 ft. 10 ft. deep has been sunk, near the discovery post, in all respects in accordance with the laws of the State of Nevada.

"This amended certificate is filed without waiver of any previous rights, for the purpose of correcting and making more specific the boundaries and description of said lode as originally located upon the ground.

"Date of original location January 1st, 1904.

"Date of amended certificate February 15th, 1904.

"Locators: W. J. Zerres. G. H. Wright."

Thereafter the plaintiff W. J. Zerres, as the owner, prepared another "amended and additional certificate of location," which, among other things, more clearly specified the markings of the posts on the Graftor claim, and their character, and specified "date of original location, January 1st, 1904, date of amended certificate, February 15th, 1904." This amended and additional certificate was recorded in the district records of Searchlight district June 3, 1904, and in the county recorder's office on June 15, 1904.

On the 3d or 4th of June, 1904, C. E. Mack, one of the counsel for the plaintiffs, was in Searchlight district, and had a conversation with Mr. Vanina, defendant herein, relative to the ground in dispute, in which Vanina stated that Zerres had no right to the Graftor claim or ground. "He said, 'It is mine, and I am going to hold it;'" and I told him we would sue him if he attempted to, and he said, 'All right,' he should hold it."

At the time of plaintiffs' entry upon the ground designated as the N. B. Graftor, the locators thereof had actual knowledge of the previous location of the Eddie. They knew that the Eddie had been staked by the defendant's grantors; that the notice of location had been recorded

in the district recorder's office; that a shaft had been sunk thereon to the depth required by law, disclosing mineral therein. The testimony shows that the plaintiffs sunk their own shaft but a few feet distant therefrom, and it is proper here to say that their own testimony as to the discovery of mineral therein is very meager, to say the least. But if they had the right to make a valid location, they could appropriate and claim the shaft which defendant sunk, and it is undisputed that mineral was found therein.

At the close of the plaintiffs' testimony, the defendant moved for a judgment of dismissal on the ground that the plaintiffs had failed to make out their case.

Ejectment is a possessory action, and, as a general rule, cannot be maintained for land of which the plaintiff is in possession. It must affirmatively be proved that there has been a disseisin of the plaintiff, and a natural ouster as well as a wrongful possession by the defendant. The contention of defendant is that he could not have constructive possession of the ground in dispute unless he had a valid location of a mining claim thereon, and if this is admitted it would defeat the plaintiffs' right to the premises, and hence the plaintiffs cannot maintain this action without showing an actual ouster and a natural, physical possession of the premises by the defendant, Vanina; and he relies principally upon the following cases: Davidson v. Calkins (C. C.) 92 Fed. 230, and Bevis v. Markland (C. C.) 130 Fed. 227.

Davidson v. Calkins was a suit in equity to quiet title and to restrain defendants from working a mining claim, and the decision was rendered upon an application for temporary injunction. The opinion calls attention to the fact of the distinction which exists between suits in equity and actions at law under the federal practice, and that the state practice is not applicable thereto.

Bevis v. Markland was an action at law to recover possession of a mining claim. The court, among other things, said:

"By bringing this action to acquire legal and actual possession of the whole of the Pioneer claim, the plaintiff has assumed the burden of establishing a right of possession superior to the rights of the defendants evidenced by their prior actual possession. * * * In this action the struggle is for possession only, and the parties cannot have a judicial determination of the question as to which shall ultimately prevail in a contest for the title. * * * The plaintiff does not pretend that there is any evidence to sustain the allegation in his complaint that he was wrongfully ousted of possession by the defendants. They have not by force or intimidation molested him, and they have not interfered with the possession of the plaintiff or his grantor otherwise than by continuing to hold possession in the same manner as before the attempted location of the Pioneer placer claim. Therefore it is essential to his success for the plaintiff to prove that the defendants are mere intruders, having no color of title or right to possession. * * * My attention has not been directed to any precedent or statute or sound reason for permitting a claim jumper to occupy the attention of the courts in litigation of actions to recover possession from a prior locator, when there is not sufficient evidence to create a positive belief with respect to the facts essential to the validity of the prior location."

In Ewing v. Burnet, 11 Pet. 42, 52, 9 L. Ed. 624, the court said:

"An entry by one man on the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it

is done. If made under claim and color of right, it is an ouster; otherwise it is a mere trespass. In legal language, the intention guides the entry and fixes its character."

See, also, *Bramlett v. Flick*, 23 Mont. 95, 105, 57 Pac. 869, and authorities there cited.

It may be that the plaintiffs did not select the most appropriate form of action or suit in which to raise the question as to which of the parties has the better right of possession to the ground in dispute. The action, however, will not be dismissed on the ground that "no actual ouster" was shown. The case will be disposed of on the merits.

Numerous objections were made pending the trial to the admission of certain documents, certificates of location, amended certificates of location, etc.; the rulings thereon being reserved until the decision of the case. The questions raised are complicated by the fact that there was a failure by both parties strictly to comply with the provisions of the mining law, which, under the decisions in some of the states, is held to be absolutely essential. It will, however, for the purpose of this opinion only, be conceded that the objections made by defendant to plaintiffs' amended certificate of location are not well taken. Some of the objections were purely technical; others become wholly immaterial under the views entertained by the court upon the merits.

The original notice of the Grafter purports upon its face to be a relocation of the Eddie claim, and in the body of this notice it is stated that "this claim was previously known as the 'Eddie.'" A relocater of a mining claim stands in a different attitude from that of an original locator. The original locator of mining ground is a discoverer of the mineral therein contained. A relocater is not a discoverer of the mineral, but an appropriator thereof, and cannot hold the ground except upon making proof that the original locator had abandoned or forfeited his right by failure to comply with the mining laws. All the authorities agree that a relocation impliedly admits that there has been a valid prior location, because there can be no relocation unless there has been a prior valid location or something equivalent thereto. There can be no relocation until there has been an abandonment or forfeiture of the ground by the first locator. *Belk v. Meagher*, 104 U. S. 279, 289, 26 L. Ed. 735; *Lindley on Mines*, vol. 1 (2d Ed.) § 404; *Snyder on Mines*, vol. 1, §§ 573, 580; *Barringer & Adams on Mines*, 306; *Wills v. Blain*, 4 N. M. (Johns.) 378, 20 Pac. 798, 802; *Providence G. M. Co. v. Burke* (Ariz.) 57 Pac. 641, 644; *Quigley v. Gillett*, 101 Cal. 462, 35 Pac. 1040. In this character of cases the burden of proving a forfeiture rests upon the party claiming it, whether it be by the plaintiff or defendant.

In *Hammer v. Garfield Mining Co.*, 130 U. S. 291, 301, 9 Sup. Ct. 548, 552, 32 L. Ed. 964, the court said:

"As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretense of a forfeiture was that sufficient work, as required by law, each year, was not done on the claim in 1882; and that the evidence adduced by him on that point was very meager and unsatisfactory, and was completely overborne by the evidence of the plaintiff. *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735. A forfeiture cannot be established except upon clear and convincing proof

of the failure of the former owner to have work performed or improvements made to the amount required by law."

See *McCulloch v. Murphy* (C. C.) 125 Fed. 147, 150, and authorities there cited.

It appears from the testimony offered on behalf of the defendant that the notice of location of the Eddie claim was posted on the ground on the 9th day of February, 1902, signed by C. A. De Berry and L. J. Kaiser, the locators, and was recorded on March 20, 1902, in the office of the district recorder of Searchlight mining district, where the claim is situate. The testimony shows that the ground was monumented and staked, and that soon after the location was made a shaft was sunk on the ground, disclosing mineral at a depth of about 14 feet, in compliance with the laws of the state of Nevada (Cutt. Comp. Laws, § 209). On June 12, 1902, the locators deeded their interest in the ground to J. E. Packard, and on May 9, 1904, Packard deeded his interest to Charles Vanina, the defendant herein. During the year 1903 there was labor expended upon the Eddie claim to the extent of over \$100. On April 23, 1904, Packard posted an amended certificate of the Eddie mining claim upon the ground, which amended certificate was recorded the same day in the office of the district recorder at Searchlight, Nev., and recorded May 2, 1904, in the county recorder's office in Lincoln county, Nev. Vanina thereafter, on the 10th day of August, 1904, posted on the ground an "amended and additional location certificate of the Eddie quartz claim," which was recorded August 10, 1904, in the district recorder's office, and on August 17, 1904, in the office of the county recorder. On the 19th day of September, 1904, Vanina posted, and thereafter recorded in the district and county recorder's office, another "amended and additional certificate of location of the Eddie quartz claim." The testimony shows that Vanina left Searchlight district in June, 1903, and returned either in February or March, 1904, and in April, 1904, he gave a contract to have work done on the Eddie claim; and he testified that over \$200 worth of work was done there in sinking the shaft in 1904, prior to the commencement of this suit.

It will be observed that the Eddie mine was located prior in point of time to the Grafter, and, if the owner of the Eddie had fully complied with the law in the location of the mine, and the kind and character of work necessary to hold the claim, it would follow that judgment should be rendered in his favor. The law is settled beyond all controversy that a party cannot locate a valid claim to a lode already located and legally possessed by others. Mining claims are not open to relocation until the rights of a former locator have been abandoned, forfeited, or otherwise come to an end. However regular in form a junior location might be, it is of no effect as against the rights conferred upon a prior locator, so long as the prior location is subsisting. *Rose v. Richmond M. Co.*, 17 Nev. 26, 57, 27 Pac. 1105; *Porter v. Tonopah North Star T. & D. Co.*, 133 Fed. 756. Did the locators and owners of the Eddie take all the steps made necessary under the law to acquire a valid title? The laws of the state of Nevada provide:

"Sec. 208. Any person, a citizen of the United States, or one who has declared his intention to become such, who discovers a vein or lode may locate a claim upon such vein or lode by defining the boundaries of the claim in the manner hereinafter described, and by posting a notice of such location at the point of discovery, which notice must contain: First. The name of the lode or claim. Second. The name of the locator or locators. Third. The date of the location. Fourth. The number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein or lode as near as may be.

"Sec. 209. Before the expiration of one hundred and twenty days from the posting of the notice of location, the locator shall sink a discovery shaft upon the claim to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode or deposit of mineral in place. A cut, or crosscut, or tunnel, which cuts the lode at a depth of ten feet or more, or an open cut of at least ten feet in length along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft. * * * or shall substantially build a monument which shall rise at least three feet above the surface, or shall erect a post at least four inches square or four inches in diameter, which must be firmly set in the ground, or in a mound of earth or rock, and must rise at least three feet above the surface. * * * The monument at each corner shall be so marked by letters, figures, or otherwise, as to indicate its purpose.

"Sec. 210. Within ninety days of the date of posting the location notice upon the claim the locator shall record his claim with the mining district recorder and the county recorder of the mining district or county in which such claim is situated by a location certificate which must contain: 1st, the name of the lode or vein; 2d, the name of the locator or locators; 3d, the date of the location and such description of the location of said claim, with reference to some natural object or permanent monument, as will identify the claim; 4th, the number of linear feet claimed in length along the course of the vein each way from the point of discovery, with a width on each side of the center of the vein, and the general course of the lode or vein as near as may be; 5th, the dimensions and location of the discovery shaft, or its equivalent, sunk upon the claim; 6th, the location and description of each corner, with the markings thereon. Any record of the location of a lode mining claim which shall not contain all the requirements made in this section shall be void."

Section 232 provides that:

"Where there is no mining district, or where a district having once existed the residence of the officers within the district and their places of business within the district where the books are kept are not publicly known, district recording shall not be required of the locator or claim owner. But recording shall be required in the office of the county recorder in all cases; as well where there is a district recorder as where there is none."

Objection was made to the introduction of the original notice of location of the Eddie on the ground that it does not give the distance on each side of the discovery point on the claim, nor the general course of the vein. This objection is, in my opinion, more technical than sound. The courts have almost universally held that a literal and a strict compliance with the law in these respects is not demanded, that a liberal construction should be given to the language used by miners in drafting their notices of location, and that a substantial compliance with the law is all that is required. Book v. Justice M. Co. (C. C.) 58 Fed. 106, 115; 1 Lindley on Mines (2d Ed.) § 355, and authorities there cited; 1 Snyder on Mines, § 368; McCulloch v. Murphy (C. C.) 125 Fed. 147, 149; Sanders v. Noble, 22 Mont. 110, 137, 55 Pac. 1037.

The notice constitutes a substantial compliance with the provisions of section 208, Comp. Laws Nev. 1900. The owners of the Eddie also complied with the provisions of section 209, Comp. Laws Nev. 1900. Did they comply with the provisions of section 210, which declares that "within ninety days of the date of posting the location notice upon the claim the locator shall record his claim with the mining district recorder and the county recorder of the mining district or county in which such claim is situated, by a location certificate"? This is the vital question upon which the rights of the defendant must stand or fall.

The laws of the United States are well understood by the miners, and care is usually exercised by them in complying therewith. Under these laws the miners are not required to have their notices of location recorded. The essential provisions are that "the location must be distinctly marked on the ground so that its boundaries can be readily traced," and that "not less than one hundred dollars worth of labor shall be performed or improvements made during each year." But it was provided in section 2324, Rev. St. [U. S. Comp. St. 1901, p. 1426], that "all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." It will thus be seen that Congress evidently anticipated when it gave the authority that "the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim," subject to the conditions therein stated, that regulations would be made in every mining district, or by the laws of the state, for the recording of the claim. While it is true that there is nothing in the United States laws requiring a record to be made of the location, still the provisions of section 2324 clearly imply that such provision will be required either by the local laws, rules, or regulations of the miners, or by the Legislature of the state.

The plaintiffs rely upon the principles announced in *Mallett v. Uncle Sam M. Co.*, 1 Nev. 188, 90 Am. Dec. 484, *Oreamuno v. Uncle Sam M. Co.*, 1 Nev. 215, and *Sisson v. Sommers*, 24 Nev. 379, 387, 55 Pac. 829, 830, 77 Am. St. Rep. 815, wherein it is said:

"To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply not only with the laws of Congress, but with the valid laws of the state, and valid rules established by the miners, in force in the district where the claim is situated upon which such right depends. Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for noncompliance or not, and the mining claim becomes subject to location by any qualified locator."

The court did not, however, have occasion to construe the provision of section 210 which is here presented. All the authorities, both national and state, agree that unless the locator substantially complies with the law in regard to the labor to be expended on the claim, in the manner and form required by the statutes, his rights may become forfeited. This provision is mandatory and must be complied with. And

this, when applied to the facts of the case, is the extent of the decision in *Sisson v. Sommers*.

Is the state statute which requires the certificate of location to be recorded within 90 days after posting notice of location mandatory? Does the failure so to record make the location void? The statute does not in terms so provide. The language of the statute is that "any record of the location of a lode mining claim which shall not contain all the requirements made in this section shall be void." These requirements are specifically numbered from 1 to 6, inclusive, and the failure of the record to show that these requirements have been substantially complied with makes the record void. While the statutes of this state prescribe the time within which the record must be made, and are mandatory on the question of a record in the first instance, they are directory merely in so far as they relate to the time for making the record, provided no adverse rights have intervened in the meantime. 1 *Lindley on Mines*, § 390; 1 *Snyder on Mines*, §§ 418, 423; *Preston v. Hunter*, 67 Fed. 996, 15 C. C. A. 148; *Faxon v. Barnard* (C. C.) 4 Fed. 702; *Van Zandt v. Argentine M. Co.* (C. C.) 8 Fed. 725; *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Craig v. Thompson*, 10 Colo. 517, 16 Pac. 24. And even where adverse rights have intervened, unless they are founded upon a valid location and compliance with the law, they will be of no avail. *Snyder on Mines*, supra; *Omar v. Soper*, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246; *McGinnis v. Egbert*, 8 Colo. 46, 5 Pac. 652. This court is of opinion that, in the absence of any provision in the statute prescribing a forfeiture for failure to record a claim within a specified time, a locator who is in the actual possession and working his claim will be protected in the same, although he failed to record his location within the time required by the statute of the state or the rules of the mining district. The mere fact that defendant was absent from the Eddie ground, and that some of the Eddie stakes had fallen down at the time the plaintiffs made their relocation of the Graft-er, did not vitiate the Eddie location. The defendant, having performed the necessary work to hold the ground for the year 1903, had the right to re-enter upon the ground at the time he did for the purpose of doing his annual assessment work for the year 1904. His entry was lawful, unless by the failure to comply with other provisions of the law he had forfeited his rights. The law is well settled that actual possession of a mining claim is not essential to the validity of the title obtained by valid location; that, until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the relocation thereof. *Belk v. Meagher*, 104 U. S. 279, 283, 284, 26 L. Ed. 735; *McCulloch v. Murphy*, supra. As to the condition of the stakes: *Book v. Justice M. Co.* (C. C.) 58 Fed. 106, 114.

The statute under consideration, while designed to give constructive notice to prospectors of ground claimed by the locators, was also intended for the benefit of the miners making location upon the public domain. It gives to the locator 90 days to record his certificate of location after posting his notice of location, tells him what it shall contain, and declares that, if it does not contain what is required, the "record"

shall be void. It does not say that, if the record is not made, his rights to the claim shall be forfeited. It is important for him to make the record, to record his certificate of location within the time required, and see to it that it contains all of the six requirements stated in section 210. Why? Because, as therein stated, "any such record or a copy thereof * * * shall be prima facie evidence of the facts therein stated." But if he fails to record his claim, it was not intended that he should be deprived of all his rights to the mining ground, provided he had substantially complied with all the other requirements of the mining laws. The record of the location is the inception of what may be called the paper title. It does not of itself constitute title, nor the possessory right to the mining ground to which it relates. As was said by the court in *Strepey v. Stark*, 7 Colo. 614, 618, 5 Pac. 111, 113:

"It is purely a creature of the statute, and, under the evident legislative intent, its purpose and functions are twofold: When duly recorded, it becomes notice to the world of the facts therein set forth, namely, a description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimant against others seeking to locate the same ground, and is thus constructive notice of the claimant's possession. In addition to this purpose which it is to serve, it would seem that by statute such certificate is made one of the steps requisite to constitute a perfected mining location."

In 1 *Lindley on Mines*, § 392, the author says:

"Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate."

Suppose the certificate of location had been filed within the time specified, and that it literally complied with all the requirements provided in the statute, but in reality that the statements therein made were "false." Such a record would not make the possessory title good. The subsequent locator, notwithstanding the fact that a perfect record had been made, would not be estopped from showing that it was false. If no record at all is made until after a subsequent locator claims a right to the ground, should not the original locator be allowed to prove, if he can, that he had in all other respects fully complied with all the requirements of the law? If he fails to properly record his certificate of location, he may be deprived of the benefits given by law, which would enable him more easily to prove and make out a prima facie case. But it was not the intention of the lawmakers to deprive him of otherwise proving that he had performed the essential acts necessary to give him the right of possession to the ground.

The statute is in these respects analogous to the statute of Nevada which requires a record to be made of the labor annually performed on the mine within a specified time after the labor is performed. *Laws Nev. 1887*, p. 136, c. 143 (*Cutt. Comp. Laws*, § 217). In *Book v. Justice M. Co. (C. C.)* 58 Fed. 106, 118, it was claimed that certain locations of mining claims were invalid because the assessment work was not recorded as required by this statute. This court, after quoting the statute, said:

"The object of this act was evidently to fix some definite way in which the proof as to the performance of the work or expenses incurred in the making of improvements might be in many cases more accessible. In all mining communities there is liable to be some difficulty in finding the men who actually performed the labor or made the improvements, and procuring their testimony, in order to establish the facts necessary to show a compliance with the mining law in this respect. The act was passed, as expressed in the title, 'for the better preservation of titles to mining claims.' Locators of mining claims would doubtless often save much time and trouble, as well as hardship, inconvenience, and expense, by complying with the provisions of this act; but the act does not prevent, and was not intended to prohibit, the owner of a mining claim from making the necessary proof in any other manner, nor does it prohibit the contesting party from contradicting the facts stated in the affidavit. It simply makes the record prima facie evidence of the facts therein stated."

There was no provision in that statute, and there is no provision in the section of the statute under consideration, "that a failure to comply with its terms will work a forfeiture." And in my opinion, the statute requiring the certificate of location to be recorded, when broadly and liberally interpreted, in order to secure the purposes for which it was enacted, is not susceptible of any such construction.

In *Last Chance M. Co. v. Bunker Hill S. M. Co.* (C. C. A.) 131 Fed. 579, 586, the court said "that the failure of the locator of the Bunker Hill claim to record his notice of location within the time prescribed by the Idaho statute did not work a forfeiture of the claim, there being no such penalty affixed by the statute."

My conclusion, arrived at after a painstaking and somewhat extended examination of all the facts and of the authorities having relation thereto, is that the plaintiffs have not established by a preponderance of evidence, which the law imposes upon them, their superior and better right to the possession of the ground in controversy, as against the defendant, and that the defendant is entitled to a judgment for his costs.

In re W. C. ALLEN & CO.

(District Court, W. D. Virginia. December 22, 1904.)

1. **BANKRUPTCY—PROCEDURE—CLAIM OF HOMESTEAD EXEMPTION.**

The determination of a bankrupt's claim to a homestead exemption by the referee before the appointment of a trustee, although informal, and not in accordance with the regular course of procedure, may be sanctioned by the court in the exercise of its equity powers, where it appears that the bankrupt has no property except that involved in the claim; so that, if the exemption should be allowed, there would be no occasion for the appointment of a trustee.

2. **SAME—JURISDICTION OF BANKRUPTCY COURT—PENDENCY OF SUIT IN STATE COURT.**

Pending a suit by creditors in a state court to set aside a conveyance by the debtor as fraudulent, and before decree or pleading by the defendant therein, the defendant obtained a reconveyance of the property, executed a deed of homestead thereon in accordance with the law of Virginia, and filed a petition in bankruptcy, on which he was adjudicated a bankrupt. The Constitution of Virginia of 1902, § 191 [Va. Code 1904, p. cclxxi], provides that the homestead exemption shall not be claimed or held "in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration."

Held, that the pendency of the suit in the state court did not deprive the court of bankruptcy of jurisdiction, nor relieve it of the duty to determine the claim of the bankrupt to his homestead exemption, since such question is not in issue in that suit.

3. HOMESTEAD EXEMPTION—VIRGINIA CONSTITUTION—EFFECT OF FRAUDULENT CONVEYANCE.

Under Const. Va. 1902, § 191 [Va. Code 1904, p. cclxxi], which provides that a homestead exemption "shall not be claimed or held * * * in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration," in view of the Virginia decisions under the prior law, where there has been a conveyance by a head of a family, a reconveyance and claim of homestead in the property made prior to a decree setting aside the conveyance as fraudulent is sufficient to make the claim a valid one, although a creditor's suit to set aside the conveyance for fraud was instituted prior to the reconveyance, and was then pending.

4. BANKRUPTCY—CLAIM TO HOMESTEAD EXEMPTION—HEARING.

The question whether a bankrupt had made a fraudulent conveyance of property which would bar his right to a discharge is not properly triable on the hearing of his claim to a homestead exemption.

5. SAME—WAIVER OF EXEMPTION—STAY OF PROCEEDINGS PENDING SUITS IN STATE COURTS.

Where creditors of a bankrupt hold obligations containing a waiver of the right of homestead exemption, the bankruptcy proceedings may be stayed until the rights of such creditors have been determined in a state court.

In Bankruptcy. On petition of W. C. Allen for review of a ruling of the referee of August 10, 1904, refusing to allow said bankrupt's claim of homestead exemption.

R. L. Gardner, for creditors.

F. W. Morton, for bankrupt.

McDOWELL, District Judge. On April 7, 1904, one W. C. Allen filed a voluntary petition in bankruptcy, alleging that he and one J. A. Allen had been partners in business under the firm name of W. C. Allen & Co., with which were filed schedules of the liabilities and assets of the firm and of said W. C. Allen. The petition prayed that the firm be adjudicated a bankrupt, but did not pray that W. C. Allen be so adjudicated. An opinion sent to counsel for W. C. Allen April 9, 1904, reads in part:

"This petition, which is filed by W. C. Allen, one of two partners composing the firm of W. C. Allen & Co., prays that the firm be adjudicated a bankrupt. J. A. Allen, the other partner, is not a party to the petition, and the petition does not contain the allegations necessary to make it proper to adjudicate the firm an involuntary bankrupt. I think it would be clearly improper to adjudicate the firm a bankrupt under this petition. Except for the fact that the petition does not pray that W. C. Allen be adjudicated a bankrupt, it is perhaps sufficient in its statements to authorize such an adjudication. However, the petition is, as above stated, informal, and, for fear I should misunderstand the desire of the petitioner, I think it best that the petition be dismissed, without prejudice to the rights of the petitioner."

And because of the doubt therein expressed an order was entered on April 9, 1904, dismissing the petition without prejudice.

On April 16, 1904 (J. A. Allen having in the meantime filed a petition and schedules, and as it was informally made to appear that the part-

ners wanted the firm and themselves as to the firm debts adjudicated bankrupts), an order was entered setting aside the order of April 9th, and adjudicating the firm and both members thereof, as to the firm debts, bankrupts. In the schedules filed with the petition of W. C. Allen is a claim of homestead in the land and personal property now in dispute, which is of less value than \$2,000, the amount allowed in this state, and is described as having been conveyed by W. C. Allen et ux. to one W. J. Allen, and reconveyed by W. J. Allen to said W. C. Allen. A proper deed of homestead was executed by W. C. Allen, and admitted to record on April 6, 1904. The deed from W. C. Allen et ux. to W. J. Allen was made January 9, 1904, and the reconveyance was made April 2d, and admitted to record April 6, 1904. Proceeding under section 2460 Code Va. 1887 [page 1214, Ann. Code 1904], certain of the creditors of W. C. Allen & Co. instituted a suit in chancery on February 13, 1904, in the circuit court of Pulaski county, to have the deed made by W. C. Allen et ux. to W. J. Allen set aside for fraud and want of consideration, and the property therein conveyed subjected to the claims of the said creditors. Later sundry other creditors filed petitions as authorized by said section of the Code. Commencing February 13th, memoranda of lis pendens were filed and docketed in the proper clerk's office. So far as appears, no defense of any sort has been set up by Allen, no evidence has been taken, and no decree has been rendered by the state court. While no stay order has been made by this court, the parties have apparently tacitly agreed not to move in the state court until some order is made in this court touching the question here raised. At the first meeting of creditors held before the referee in bankruptcy on May 14, 1904, sundry claims were filed and proved, and objections to W. C. Allen's claim of homestead were filed with the referee in behalf of the creditors suing in the state court. This paper is indorsed "Grounds of Defense." No trustee was appointed by the creditors, and the referee entered upon an examination of W. C. Allen and other witnesses in regard to the right of Allen to have his homestead allowed. Finally, by order of August 10, 1904, the referee ruled that the objections to the claim of homestead be sustained, appointed a trustee, and directed him, after having given bond, to take charge of all the property in question, and to sell it for the benefit of the creditors.

It is contemplated by section 47, subsec. 11, Bankr. Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439], and by General Order 17, that the trustee shall set apart the exemptions and make report of his actions; and that thereafter the creditors will file exceptions, if they wish, to such report. Such is undoubtedly the regular and orderly method of raising such question as is here sought to be raised. But, as was said in Kane's Case, 127 Fed. 552, 553, 62 C. C. A. 616, "A court of bankruptcy is a court of equity, seeking to administer the law according to its spirit, and not merely by its letter." In the case at bar, if I correctly understand the facts, there are no assets, if the property claimed as exempt be held to be such, and there was no reason for the appointment of a trustee if the claim of homestead was to be allowed. I think, therefore, that the informality of objecting to the claim of homestead prior to the appointment of a trustee need not

necessarily prevent an adjudication of the question presented to the referee.

In the Virginia Constitution of 1902 is a new provision, which has, so far as I am advised, never been construed by any Virginia court. The provision (section 191 [Va. Code 1904, p. cclxxi]) reads:

"The said [homestead] exemption shall not be claimed or held in a shifting stock of merchandise, or in any property, the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration."

There is, I think, room for no doubt but that this court is given by the bankrupt act (section 2, cl. 11, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]) jurisdiction to determine the contention between the bankrupt and his creditors now presented. "The courts of bankruptcy * * * are hereby invested * * * with jurisdiction at law and in equity * * * to determine all claims of bankrupts to their exemptions." Whether or not this jurisdiction is exclusive need not now be determined. My first impression was that comity might require this court to subordinate the trustee in bankruptcy to the rights of the creditors who have sued in the state court (under section 67f of the act, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), stay the proceedings in this court, and direct the trustee to intervene in the state court and pray to be allowed to carry the case in that court to a conclusion for the benefit of the estate. But on further consideration this view does not seem warranted. It is true that the suit in the Pulaski circuit court was instituted before this court acquired jurisdiction; but the right of the bankrupt to his exemption is not now, and cannot be, except by the voluntary act of the bankrupt, involved in that proceeding in that court. If the bankrupt files no pleadings in that court, the decree by default would not involve a determination of his right of exemption. A default decree rendered by the state court would not estop the bankrupt to assert his claim thereafter in this court. It is frequently said that a judgment is binding on the parties as to every question which was or might have been adjudicated. But this frequently misunderstood statement has no application to the state of fact here. No judgment can be an estoppel as to a matter entirely outside of the pleadings, as to an issue not tendered by an unopposed bill. If the creditors could file supplemental pleadings setting up the reconveyance, the filing of the homestead deed, and praying an adjudication of the defendant's right to the exemption, it would make a new case—one instituted after jurisdiction had been acquired by this court. As, therefore, the bankrupt has submitted his case to this court, and as he can render the action of the state court in the case at present pending there nugatory, it seems clear that no principle of comity requires a useless delay and previous futile action by the state court before this court determines the claim of the bankrupt to his exemption.

Under the Constitution of 1869 there were several adjudications of the Court of Appeals of Virginia giving a debtor the right to claim and have his homestead in property which he had fraudulently conveyed. In order to get a clear idea of the state of the law at the time the new Constitution was drafted, and of the change intended to be made thereby, these decisions should be considered. In *Boynton v. McNeal*, 31

Grat. 456, *Marshall v. Sears*, 79 Va. 49, and *Hatcher v. Crews*, 83 Va. 371, 5 S. E. 221, the debtor, after a decree holding that a conveyance (or bill of sale) made by him was void for fraud, claimed for the first time and was allowed his homestead exemption in the property attempted to be conveyed. The reasoning of the court in the *Boynton Case* may be briefly summarized as follows: The homestead is for the benefit of the debtor's wife and children, and it is not right that they should be made to suffer for the wrongful act of the debtor. Again, the fraudulent conveyance being void as to creditors, it stands, as to them, as though it had never been made. See *Boynton v. McNeal*, 31 Grat. 459, 462. In *Shipe v. Repass*, 28 Grat. 716, *Hurt*, who had conveyed land to his son, filed a homestead deed, whereby he claimed a homestead in the purchase-money notes executed by the son. Subsequently the deed from *Hurt* to his son was adjudged fraudulent and void, and the court allowed *Hurt* a homestead in the land. In *Mahoney v. James*, 94 Va. 176, 26 S. E. 384, a debtor took out life insurance payable to his wife and child, and until his death paid the premiums thereon. After the debtor's death the insurance money was paid to the widow and child. Thereafter creditors of the deceased husband sued the wife and child, claiming a sum at least equal to the premiums paid by the husband, on the ground that such premium payments were, in effect, voluntary and fraudulent gifts to the wife and child. Prior to suit the widow and child filed a homestead deed, claiming the insurance money, and in their answer to the bill they asserted their right of homestead. On the assumption that the husband had, in paying the premiums, defrauded his creditors, the court held the widow and child entitled to the insurance money as a homestead. In *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 218, *Mrs. Oppenheim*, being indebted and insolvent, conveyed an interest in certain real estate to her husband. Thereafter her creditors filed suit attacking this deed as fraudulent. Just before a decree was rendered holding the conveyance void for fraud, *Oppenheim* and wife filed a joint homestead deed, claiming said interest in said land as their "joint and several homestead." They then filed a petition in the above-mentioned suit claiming the homestead. The trial court held the conveyance from *Mrs. Oppenheim* to her husband void, and referred the cause to a commissioner. Before further action by the court, *Oppenheim* died. Thereupon *Mrs. Oppenheim* (not filing any new homestead deed) filed an amended petition, claiming the same homestead for herself and infant children. The creditors claimed, as the statute gave them a lien from the time of filing their bill, which was before *Mrs. Oppenheim* became a widow, and before she had a right to claim a homestead, that they had a right in the land paramount to her claim of homestead. The trial court sustained the contention of the creditors, but the Court of Appeals reversed this decision.

The language of the present Constitution, "has been set aside on the ground of fraud or want of consideration," must, of necessity, refer to an adjudication of a court. The language, "shall not be claimed or held," seems to me to mean "shall not be effectually claimed." We cannot disregard the word "claim" and read the clause as if written, "shall not be held in property a conveyance of which has been set aside." Even if the clause could be so read, there are reasons for

doubting if the creditors' contention in this case could be sustained; but it is useless to discuss the question on this supposition. We must deal with the law as it is written, and we cannot suppress the word "claim" if we would arrive at the true intent. The claim of homestead in the case at bar was made prior to any adjudication, and I am unable to avoid the conclusion that, where there has been a fraudulent conveyance by a head of a family, a reconveyance and claim of homestead made prior to a decree setting aside the fraudulent conveyance is sufficient to make the claim a valid one. Under the language used by the convention, no court having jurisdiction to allow a claim of homestead can properly decline so to do unless a fraudulent conveyance of such property has been set aside at the time the claim is asserted.

The mere fact that the creditors in the case at bar obtained an inchoate lien prior to the reconveyance and claim of homestead is not sufficient. Under the first three decisions above mentioned the householder could validly claim his homestead after a decree had been rendered setting aside for fraud a conveyance, and the lien obtained by his creditors prior to such claim was held of no avail. The new Constitution is so expressed as to change this rule only to the extent that a claim of exemption made after such decree shall be unavailing. To argue that the inchoate lien gives the creditors a right superior to the claim of homestead made prior to a decree converting the inchoate lien into a perfected right not only assumes that an inchoate lien is a perfected right, but seems to beg the question. The very point at issue is whether or not the new law authorizes the court to so decree as to convert the creditors' inchoate lien into a perfected right when the claim of homestead is asserted before such decree is rendered. So, also, as to the argument that by a reconveyance made after suit filed by the creditors the claimant takes the property cum onere. He does take it subject to the rights given the creditors by section 191; but what are those rights? The language used most plainly denies the homestead only where the decree annulling a conveyance precedes the reconveyance and claim of homestead. And an intent to invalidate the claim of homestead under the circumstances here does not seem to me to be shown. While the intent of the lawmaker should be given full effect by the courts, still the supposed intent must be either expressed or fairly inferable from the words used. And under the principle *expressio unius* a provision which is expressly applicable to only one state of fact is not to be applied to another. If the intent which the creditors contend for had existed, I think section 191 of the Constitution would have read somewhat in this wise: "The homestead exemption shall not be claimed or held in any property which has been fraudulently conveyed by the homestead claimant." Thus expressed, the fraudulent conveyance would, when judicially ascertained, prevent an exemption of the homestead whether the property were reconveyed before or after suit by creditors, and whether the claim were made before or after decree. It is true that the rather simple device of securing from the fraudulent grantee a reconveyance and making a claim of homestead prior to an adjudication leaves the householder in the position he was in under the former Constitution. But it seems fairly to be inferred that the convention had no intention, even if the possi-

bility of such action on the part of the homestead claimant was contemplated, of preventing such a result.

No very good reason suggests itself why a householder and head of a family, who owns no property in excess of \$2,000, should be denied a homestead—which is for the benefit of his family—merely because he has made a fraudulent conveyance of such property, provided his creditors are not thereby injured. I shall consider now only general creditors, and leave out of view those who have taken homestead waiver obligations and those whose claims are within the exceptions mentioned in section 190 [Va. Code 1904, p. cclxx] of the present Constitution. As to these latter creditors, the reconveyance and claim of homestead could be of no service to the debtor, and could do no harm to the creditor. Thus confining the discussion, let us first consider the case of a householder whose entire estate is of less value than \$2,000. Except in view of a fact to be mentioned later, no such householder can injure the creditors we have in view by making a fraudulent conveyance of his estate. His entire estate can be shielded by simply filing a homestead deed. Such creditors of such a debtor had no right to anticipate, when giving him credit, that they could ever subject the property. And if such debtor should make a fraudulent conveyance of his property, and should thereafter, under compulsion of a creditors' suit to set aside such conveyance, secure a reconveyance and file a homestead deed, his creditors are in no worse position than that which they must have contemplated when they extended credit. The fact adverted to above, which would afford to a knavish householder circumstanced as above a reason for making a fraudulent conveyance of his estate to some member of his family or some friend, is that by so doing he might be enabled to secure a homestead in future-acquired property, and thus, in effect, shield more than \$2,000 worth of property. But when the householder is forced to secure a reconveyance of, and to claim his homestead in, the fraudulently conveyed property, he is cut off from consummating any such dishonest purpose. And it may be here said that, if my views are sound, although a defense to such creditors' suit setting up the reconveyance and claim of homestead would prevent subjecting the property to the creditors' claims, the costs of suit would nevertheless be properly adjudged to the creditors. This, in theory, is compensation for the expense to which the creditors have gone in bringing their suit. The case of a householder whose estate is worth more than \$2,000 needs very little discussion. If he, by pleading a reconveyance and claim of homestead in fraudulently conveyed property, succeeds in preventing a loss of his homestead, he cannot thereby prevent his creditors from subjecting the remainder of his estate. And hence in this case also the creditors of the class under discussion secure all that they had a right to expect when extending credit; i. e., satisfaction out of the debtor's nonexempt estate. It is at least probable that the convention did not contemplate such a state of affairs as we have in the case at bar. A householder having an estate over \$2,000 in value would do no harm to his creditors by taking a reconveyance and asserting his right of homestead in fraudulently conveyed property. A householder whose estate is worth less than \$2,000 would rarely seek to shield it from nonwaiver creditors by the silly device of fraud-

ulently conveying it (unless to secure thereby more than \$2,000 exemption; and this intent is checked by the law as above construed). Hence it may be that the convention did not contemplate such a transaction. But, if so, there is every reason for refusing to strain the language used in the Constitution to make it apply to an un contemplated and unprovided for state of affairs.

Nor can it be said that this construction leaves the law as it was under the former Constitution, and that it practically gives no effect to the new provision found in section 191. In fact, a wise and valuable change has been made in the law. It is an old rule, nowhere better established than in this state, that he who charges fraud must clearly prove it. Under the old law the creditors who attacked a conveyance as fraudulent had usually a difficult and expensive task to sustain the burden of proof resting on them. The debtor could well afford to, and had every inducement to, resist the creditors until the final decree was rendered; for he could thereafter, if the decree were adverse to him, effectually claim his homestead. Under the present Constitution, as above construed, the debtor who has in fact made a fraudulent conveyance not only imperils his exemption by contesting the claim of his creditors until decree, but he is put under strong inducement to lighten the task of his creditors—to annul the fraud, so to speak—by securing a reconveyance, and thus save his homestead. Here surely is a change from the old rule, and one that is beneficial to the creditors, and at the same time not an undue punishment of the innocent family of the fraudulent debtor.

In the "grounds of defense" filed by the creditors it seems to be contended that the making of the alleged fraudulent deed by Allen to his son would deprive him of a right to his discharge in bankruptcy, and hence of a right to his homestead. But it must be remembered that the bankrupt does not admit that said deed was fraudulently made, and has not yet reached the stage in the case where he could properly be required to contest this point. The mere reconveyance was not necessarily an admission that the prior deed was fraudulently made. The creditors have taken before the referee evidence to prove this charge, but the bankrupt's counsel, very properly conceiving that a determination of this question was not involved in this court at present, abstained from taking counter testimony. It is true that the objections to the claim of exemption which we are now considering tendered this issue to the bankrupt. But he had a clear right not to accept the tender thus prematurely made, and he has not accepted it. If at the time a claim of exemption is presented the bankrupt court finds in the record in indisputable form matter which would prevent a discharge, it might be proper to refuse to pass on the claim of exemption. It is not necessary to express an opinion on this point now, and none is expressed. It is sufficient that the right of discharge cannot now, in the case at bar, be properly passed on, and that no just argument against the claim of exemption can be founded on an as yet undeterminable and contestable question of fact.

It follows that the ruling of the referee must be reversed, and the bankrupt's claim of exemption allowed. I am further of opinion that

the litigation in the state court should be stayed, except as to such creditors, if any, as hold homestead waiver obligations binding the social assets of W. C. Allen. If there are any such creditors, they should be allowed to subject the exempt property, and, if it be necessary, the proceeding in this court can be stayed until they have had opportunity to do so. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061; *In re Brumbaugh* (D. C.) 128 Fed. 971.

In re MOODY.

HAWKEYE LAND CO. v. EVANS.

(District Court, N. D. Iowa, E. D. February 8, 1905.)

No. 394.

1. **BANKRUPTCY—CONVEYANCE WITH INTENT TO DEFAUD—PURCHASERS IN GOOD FAITH.**

It is incumbent on a purchaser of property from one who is in fact insolvent, and subject to be adjudged a bankrupt, to exercise ordinary prudence and diligence to ascertain whether or not the seller can make a transfer of the property that will not be in violation of the bankruptcy law; and where the sale was in fact made with intent to hinder, delay, or defraud his creditors, and within four months prior to his bankruptcy, the title of the purchaser can only be sustained as against creditors of the bankrupt under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], by showing that such diligence was exercised, and that the purchase was in good faith, and for a present fair consideration.

2. **SAME.**

A bankrupt was a retail merchant in a small town, practically his entire property consisting of his stock of goods. Within four months prior to his bankruptcy, and when insolvent, with intent to hinder and delay certain of his creditors, he sold and transferred his entire stock to a firm whose members resided in the same town, receiving therefor as the principal consideration a farm, which, at his request, was conveyed to his wife. As a further consideration, the purchasers paid a debt owing by him to a local bank, of which two of the purchasers were stockholders and one was president. Such bank also held a number of collections against the bankrupt, which were unpaid. The purchasers made no inquiry as to his financial condition or his purpose in selling, and the consideration paid was less than the fair value of the stock. *Held*, that they were not protected as purchasers in good faith, but the transfer was void under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449].

In Bankruptcy. On petition of the trustee for review of the order of the referee sustaining the claim of the Hawkeye Land Company to the stock of merchandise, or the proceeds thereof, formerly owned by the bankrupt.

See 131 Fed. 525.

This matter was before the court at a former day. See 131 Fed. 525. Pursuant to the order then made, the Hawkeye Land Company, a copartnership, presented to the referee, within the time there fixed, its claim to the stock of goods owned by the bankrupt, resting such claim upon the ground

that it was a good-faith purchaser of the same from Moody on May 14, 1904, for a present fair consideration then paid. The trustee answered, in substance, that at the time of such purchase Moody was insolvent; that by such sale to the land company he intended to hinder, delay, and defraud his creditors; and that the land company so knew, or had reasonable cause to so believe. From the testimony taken upon the issues so presented it appears that at the time of such transfer Moody was indebted, as he testifies, as follows:

| | |
|---------------------------------------|----------------|
| To Myrtle Moody, his wife, about..... | \$1,700 |
| To A. Moody, his father, about..... | 2,760 |
| To a Mr. Evans..... | 240 |
| To First State Bank of Hawkeye..... | 400 |
| To mercantile creditors, about..... | 4,500 |
| Total..... | \$9,600 |

His only property was the stock of goods in question, which he valued at \$7,000. S. H. Bevins and O. N. Bevins and A. B. Peters were copartners doing business at Hawkeye, a village of 500 or 600 inhabitants, in Fayette county, where they and Moody lived. Moody was a retail dealer in clothing and men's furnishings, and the land company was dealing in lands and stocks of merchandise, trading one for the other and selling on commission. A few days before May 14, 1904, Moody met S. H. Bevins and A. B. Peters on the street in Hawkeye, and asked them if they had any lands to trade for his stock of merchandise. Mr. Bevins said they had, and would see him again in a short time. The negotiations thus opened resulted in an agreement between them a few days later whereby the land company was to take Moody's stock of merchandise at \$7,000, and convey to him 160 acres of land at \$70 an acre, subject to a mortgage for \$6,000, pay the debt of \$400 owing by Moody to the First State Bank of Hawkeye, and pay him the remaining \$1,400 in cash. An invoice of the stock was to be made, and if that, at cost price, fell below \$7,000, the difference to be paid by the land company for the goods was to be so much less. An invoice was at once begun, and completed within two or three days; S. H. Bevins, A. B. Peters, and Moody, with an assistant, taking the same. The amount of this invoice is not shown, nor is there any evidence that it was less than \$7,000, or that the goods were not of that value. At the completion of the invoice, on May 14th, a bill of sale of the goods was made by Moody to the land company; and A. B. Peters (who held the title of the land for the company) made a deed of the same, in which Myrtle Moody, wife of the bankrupt, was named as grantee; and S. H. Bevins took the bill of sale and deed to West Union, the county seat of Fayette county, nine miles away, in the afternoon of that day, and filed both for record; Moody paying the fee for recording the deed. Moody directed that the deed be made to his wife, but the testimony is in dispute as to when he did this. Bevins and Peters testify that when the deed was made Moody requested that the name of the grantee be left blank, saying that he did not then know to whom he wanted it to run, and they so left it, and authorized him to fill in the name of the person to whom he wanted the land to go. Moody, who was a witness for the land company, testified that he did not remember whether he told Bevins or Peters to make the deed to his wife or not; but on two former occasions he testified that he did tell them, or one of them, to make it to her, because he wished to protect her, or satisfy her, for what he was owing her; that she was worrying about the money she had let him have. Be this as it may, it is beyond dispute that if the name of Mrs. Moody was not in the deed when it was signed by Peters and wife, it was written therein very shortly after by Mr. Henderson, cashier of the First State Bank, who drew both the deed and the bill of sale, and before S. H. Bevins started with them to the recorder's office; and that Bevins and Peters both knew before the deal was closed or the land company had paid anything for the goods that Moody wanted the land deeded to some one other than himself, and that they consented to so deed it. The result of the transaction as closed is that the land company paid for the goods in the manner following:

| | |
|--------------------------------------------------------------------------------|----------|
| 160 acres of land (deeded to Mrs. Moody) at \$70 an acre..... | \$11,200 |
| Subject to a mortgage, exclusive of interest..... | 6,000 |
| Net equity in the land..... | \$ 5,200 |
| It assumed and paid the debt of Moody to the First State Bank of Hawkeye | 400 |
| Paid Moody in cash..... | 400 |
| Gave to Moody its note, due July 1, 1904..... | 1,000 |
| Total..... | \$ 7,000 |

The land was leased for the season of 1904 for \$400, and the land company assigned the lease, and gave Moody the notes of the tenant for such rent. Bevins says that the lease was to go with the land. It was also agreed as a part of the transaction that Moody was to stay in the store, and continue to sell the goods at retail, until such time as the land company could dispose of the stock, and for his salary he was to have all that the goods sold for above the cost price; and Moody testifies that the cost price of the goods sold was to be applied upon the note of the land company to him when it reached \$1,000. Moody remained in the store and continued selling the goods under this arrangement, until the stock was placed in the hands of the receiver, retaining as his salary all above the cost price of the goods sold, and depositing the cost price in the First State Bank of Hawkeye in the name of the Hawkeye Land Company. On May 14th, and for some time prior thereto, the mercantile creditors of Moody were pressing him for payment, and the First State Bank of Hawkeye and different attorneys had many of these claims for collection, and some had been sued. Mr. Henderson, cashier of the First State Bank, knew this, and had presented to Mr. Moody the claims received by that bank; and Moody had made various excuses to him for not paying them, and some were returned by the bank to the creditors. S. H. Bevins and O. N. Bevins were both stockholders of this bank. S. H. Bevins was its president, and was frequently in the bank, and examined its books whenever he desired or had occasion to do so. He was not its active manager, the cashier being such officer. He, his brother, and Mr. Peters all testify that they knew nothing of the claims held by the bank against Moody; that they did not know of Moody's insolvency, or of his intent to hinder, delay, and defraud his creditors in disposing of his goods; and that they made no inquiries of him or of any one else during the negotiations as to his financial condition, and made no investigation of any kind in regard thereto. Peters, when asked about this, said that he did not think they cared anything about Moody's indebtedness. Moody had the largest trade (of its kind, at least) in Hawkeye, and S. H. Bevins and Peters say they supposed he was doing a good business. He gave as his reason for wanting to sell that trade was slack, and that he wanted to get a farm. He had a short time before offered to trade the stock to another for land, and Bevins or Peters knew of this. The land company had traded for this land within a year previous; paid \$60 an acre in trade therefor; and S. H. Bevins and Peters testify that that was its fair value at the time of the transaction with Moody. Some of their witnesses estimate its value as high as \$70 an acre, especially in trade; while the estimates of other witnesses vary from \$45 to \$65 an acre. The petition in bankruptcy was filed against Moody May 24, 1904; and he was adjudged bankrupt thereon July 23d following.

Upon these facts the referee found in favor of the land company, and ordered the trustee to turn the goods, or the proceeds of such as had been sold, over to the company. The trustee petitions for a review of this order.

H. J. Kearns and Lacy & Brown, for trustee.

Ainsworth, Dykins & Estey and Hurd, Lenehan & Kiesel, for Hawkeye Land Co.

REED, District Judge (after stating the facts as above). There is but one question to be determined, and that is, is the Hawkeye Land

Company a good-faith purchaser of the stock of goods from the bankrupt for a present fair consideration? In his certificate the referee says:

"The testimony clearly shows that at the time of the transaction with the Hawkeye Land Company, and for some time prior thereto, Edwin J. Moody was insolvent, * * * and it is difficult to understand why some of the members of said land company had no more information concerning the facts of insolvency of said Moody. * * *"

Such statement has led to a careful consideration of the entire testimony, and as to the insolvency of Moody it need only be said that it is ample to support the finding of the referee. It also conclusively shows that by the sale of the stock of merchandise to the land company Moody intended thereby to prefer his wife, Myrtle Moody, his father, A. Moody, and the First State Bank of Hawkeye, all of whom were his creditors, over his mercantile creditors, and to hinder, delay, and defraud such mercantile creditors. This is not now seriously disputed by the land company, but its contention is that it did not know of his insolvency, or his purpose in making the sale of his goods; that what it gave him for the stock was a present fair consideration; and that it is a good-faith purchaser of the property within the purview of section 67e of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]. That section is as follows:

"That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration. * * *"

By the plain language of this section, if Moody intended by the sale to hinder, delay, or defraud his creditors, the conveyance is null and void as to such creditors, except as against good-faith purchasers for a present fair consideration. It is not necessary that the purchaser should participate in the fraudulent purpose of Moody to render the transaction void as against the trustee. Such purpose being shown, it must then be made to appear that the purchase was in good faith, and for a present fair consideration, paid at the time of such purchase. The standard of good faith on the part of a purchaser is the same as that of a creditor in accepting payments or transfers of property as such, or as security, from an insolvent debtor; and it is uniformly held that each, under the bankruptcy law, is required, when dealing with one who is in fact insolvent and may be adjudged a bankrupt within four months, to exercise ordinary prudence and diligence to ascertain whether or not such insolvent can make a transfer of his property to him that will not be in violation of the bankruptcy law. In *Wager v. Hall*, 16 Wall. 584, it is said, at page 601 (21 L. Ed. 504):

"Purchasers [from an insolvent] are required to exercise ordinary prudence in respect to the title of the seller, and if they fail to investigate when put upon inquiry they are chargeable with all the knowledge it is reasonable to suppose they would have acquired had they performed their duty in that regard."

In *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489, the Supreme Court, in speaking of the validity of a sale in bulk, by a retail merchant, of his entire stock of merchandise to one person, who was not a creditor, said:

"The usual and ordinary course of Mendelson's business was to sell at retail a miscellaneous stock of goods common to country stores in a small town in the interior of the state of Missouri. * * * But it is a wholly different thing when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such a business, is *prima facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase. Sumerfield seeks to overthrow the legal presumption that Mendelson intended to commit a fraud on his creditors by showing that he paid full value for the goods in ignorance of the condition of Mendelson's affairs. But the law will not let him escape in this way. The question raised by the statute is not his actual belief, but what he had reasonable cause to believe. In purchasing in the way and under the circumstances he did, the law told him that a fraud of some kind was intended on the part of the seller, and he was put on inquiry to ascertain the true condition of Mendelson's business. This he did not do, nor did he make any attempt in that direction. Indeed, he contented himself with limiting his inquiries to the object Mendelson had in selling out and to his future purposes. Something more was required than this information to repel the presumption of fraud which the law raised in the mere fact of a retail merchant selling out his entire stock of goods. * * * In choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy in case Mendelson should, within the time limited in the statute, be declared a bankrupt."

That this transaction between Moody and the land company was entirely out of the usual and ordinary course of business of Moody—a transfer by him of all his property; the giving of a preference to the First State Bank, of which two members of the land company were stockholders and one of them its president; the placing by the land company, at the request of Moody, of the entire equity in the land, which was the greater part of the consideration it paid for the goods, beyond the reach of mercantile creditors; all of which was actually known to the land company—cannot be doubted.

In *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481, it is said:

"It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. * * * The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy. * * * The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business."

Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280, *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130, and *Bank v. Cook*, 95 U. S. 343, 24 L. Ed. 412, are to the same effect.

Counsel for the land company say "that it can make no difference whether the Hawkeye Land Company knew or did not know of the financial condition of Edwin J. Moody, but, in order to set aside the conveyance, it is necessary that the evidence show that that company knew that the conveyance was being made to it with a view to effect some purpose prohibited by the bankruptcy act"; and *Tiffany v. Boatman's Institution*, 18 Wall. 375, 21 L. Ed. 868, is cited in support of this proposition. That case and the above quotation from the opinion therein must be limited to the facts upon which it is based, and of which the court was speaking, which are that the assignee in bankruptcy was attempting to recover from a creditor the full amount, principal and interest, of a loan paid by the bankrupt to such creditor upon a usurious contract, because, as he claimed, the payment amounted to a preference, was fraudulent, and that the usury rendered the whole transaction void. The loan was made by the bankrupt in an effort to continue his business, and the money borrowed was applied by him to the payment of a prior debt which was secured by a large amount of collaterals. The payment of such debt released those collaterals, and the bankrupt's estate was not diminished or impaired in the least by the transaction, but was in fact benefited thereby. The court says:

"There is nothing in the bankrupt law which interdicts the lending of money to a man in Darby's condition, if the purpose be honest and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, without any intention to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure the power to raise ready money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable, for every one is interested that his business should be preserved."

It is plain that the case is not an authority in support of the proposition that under the present law a retail merchant actually insolvent may convey his entire property, even for a present fair consideration, with a view of closing out his business, to one who, by the slightest inquiry or investigation, may know of his insolvent condition, and who does in fact know that by such conveyance the bankrupt prefers certain of his creditors, and causes the greater part of what he is to get for his property to be placed by the purchaser beyond the reach of other creditors. See *In re Pease* (D. C.) 129 Fed. 446, a case affirmed by the Court of Appeals for the Sixth Circuit. It may be conceded that mere suspicion on the part of the members of the land company that Moody was insolvent, or that he intended by the transfer to hinder, delay, and defraud his creditors, is not sufficient to avoid the transaction between them. *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971; *In re Goodhile* (D. C.) 130 Fed. 471. But, giving due weight to the tes-

timony of the several members of the land company that they did not know of the insolvency of Moody, or of his purpose to defraud his mercantile creditors by the transfer to the land company of his entire property, the conclusion from the whole evidence is unavoidable that S. H. Bevins and A. B. Peters did actually know that by the transfer Moody did give and intended to give a preference to the First State Bank of Hawkeye, one of his creditors, and of which bank both S. H. Bevins and O. N. Bevins were stockholders and S. H. Bevins president, and that the land company aided him in so doing; that Moody requested of Mr. Bevins and Mr. Peters that the land, which was the greater part of what he was to get for his goods, be conveyed by the land company to some one other than himself; that they agreed with him to, and did in fact, do so; that Moody was selling his entire property with a view of closing out and discontinuing his business. These are not mere suspicions on the part of Mr. Bevins and Mr. Peters, but facts actually known to them; and they are ample to put them, as prudent business men, upon inquiry as to the solvency and purpose of Moody in selling the goods, and whether or not he could convey them to the land company without violating the provisions of the bankruptcy law. Had they made the slightest investigation or inquiry of Mr. Henderson, the cashier of the bank of which Mr. Bevins was president, or of Mr. Moody, as to his indebtedness, and when it was due, or asked for an inspection of his books that they might ascertain this, there is no doubt that they would have discovered the hopeless insolvency of Moody, and his fraudulent purpose in giving the bank a preference, and in causing the land to be so conveyed, by the land company, as to place it beyond the reach of his creditors other than his wife and his father. By failing to make such inquiry and investigation the land company should not be held to be a good-faith purchaser of this stock of goods.

Again, the land company had possession of the invoice of this stock of merchandise which had been taken, and failed to produce it in evidence, or offer any evidence that the goods were not worth what it agreed to pay for them, to wit, \$7,000. Under any fair valuation of the land as shown by its own witnesses and by the testimony of Bevins and Peters, it cannot be held to exceed in value \$60 an acre, what it paid for it less than a year prior to this transaction with Moody. At this figure the value of the land would be \$9,600. Deduct the mortgage, exclusive of interest, \$6,000, and the value of the equity is \$3,600, but a trifle more than 50 per cent. of the value of the goods. This of itself should have led Bevins and Peters to inquire why Moody was closing out a business that both say they supposed was good, and why he was willing to sell his stock of merchandise at about 50 per cent. of its value.

It follows that the order of the referee should be reversed, and he will direct the trustee to retain possession of the goods and distribute the proceeds of their sale among the creditors of Moody as required by the bankruptcy act.

It is ordered accordingly.

PEOPLE'S SAV. BANK v. LAYMAN, County Treasurer.

DES MOINES SAV. BANK v. SAME.

(Circuit Court, S. D. Iowa, C. D. February 4, 1905.)

Nos. 2,406, 2,407.

1. TAXATION—ASSESSMENT OF SHARES OF STOCK OF SAVINGS BANKS—ASSETS INVESTED IN GOVERNMENT BONDS.

In assessing the property of a savings bank under Code Iowa, § 1322, which provides that the assessment shall be made on its shares of stock, the fact that a part of the bank's assets which go to make up the value of the shares consists of bonds of the United States, which are not taxable, does not entitle the bank to a deduction of such amount.

2. SAME—POWER TO MAKE REASSESSMENT.

Under the law of Iowa, where an assessor has made an assessment without fraud on his part or concealment on the part of the property owner, and no steps have been taken to review such assessment in the manner provided by statute, through the board of equalization and the courts, it becomes a finality; and after the taxes have been levied thereon and paid the property cannot be reassessed for the same year because the assessor, through a mistake of law, undervalued it.

3. SAME—SUIT TO ENJOIN ILLEGAL ASSESSMENT—EQUITY JURISDICTION.

A federal court of equity has jurisdiction to enjoin an illegal assessment where the taxes levied thereon will constitute a cloud on the title to property, and the court has otherwise jurisdiction of the suit.

4. FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

A federal court has jurisdiction of a suit to enjoin an assessment where a question involved is the right of the taxpayer to an exemption on account of United States bonds owned by him, regardless of the citizenship of the parties, and, having such jurisdiction, it may adjudicate other questions involved in the case, although it decides the federal question adversely to complainant.

[Ed. Note.—Jurisdiction of federal courts in suits involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.]

In Equity.

The case No. 2,406 will be first considered.

The complainant is a corporation organized under the laws of Iowa as a savings bank, and located at Des Moines. The defendant is the county treasurer. The bill alleges and the evidence shows that the assessments made by the assessor were for the years as follows: For the year 1898, \$62,320; for the year 1899, \$13,250; for the year 1900, \$40,000; for the year 1901, \$56,297. Within the time fixed by law the taxes were levied on said assessments, and in due time paid. The bill alleges that the assessments were made by the assessor on all the property of the bank, after full disclosure of its assets, and was not an assessment on the value of the shares of stock of the bank. December 15, 1902, the treasurer of the county served upon the bank a notice to the effect that it had been discovered that there was withheld, overlooked, or from some cause omitted from the assessment and tax list personal property of the bank as follows: For the year 1898, \$35,505; for the year 1899, \$74,594; for the year 1900, \$55,432; for the year 1901, \$59,341. And the treasurer notified the bank to appear and show cause why said property thus omitted as claimed should not be added to the assessment and taxes collected thereon. The bill alleges and the evidence shows that on the day covered by the assessments the bank held and owned bonds of the United States of the values as follows: For the year 1898, \$28,656.25; for the year 1899, \$80,600; for the year 1900, \$47,800; for the year 1901, \$55,000. And it is

alleged that such bonds, and the value thereof, was the only property omitted for said years from the assessments and taxation, and on which taxes were not timely paid, being the said United States bonds, a fact known by the assessor at the time he made the assessments. The complainant owns real estate in the county, on which said invalid taxes, if levied, will become an apparent lien, and will create a cloud on the title thereto. An injunction against said proposed assessments is prayed. A restraining order was issued, to remain in force until a hearing.

The answer alleges that by succession in office Charles H. Murrow is now treasurer of the county, and is made the defendant. It admits the assessment as alleged for the one year, but at the time of filing the answer is not advised as to the amounts for the other years. But denial is made that the said assessments for said years was the value of all of the personal property of complainants, or that it paid taxes on all of the personal property it owned for said years. It admits that the bank during said years owned real estate assessed, and on which it paid taxes. The answer also admits that the assessments for said four years was in form and in fact an assessment of the value of the personal property of the bank, and that neither of said four assessments was in form nor in fact an assessment of the value of the shares of the capital stock of the bank, but that in all of said four years the taxes based and collected were against the bank, on account of its property, and in collecting the taxes the same was treated, and in fact levied, collected, and paid, by the bank, as taxed against the bank, and not as against the shares of its capital stock. Defendant denies that it is his purpose to assess and collect taxes from the bank on account of any United States bonds. The evidence shows that for each of the four years the assessor handed the bank a printed form, with blanks, to be filled out and verified, as was done with other similar corporations. The forms thus filled out by the bank officer for the different years was as follows, viz.:

| 1898. | |
|---------------------------------------------------------|--------------|
| Capital and surplus | \$100,000 00 |
| Undivided profits | 634 23 |
| United States bonds | 25,000 00 |
| Real estate otherwise taxed | 4,700 00 |
| Balance after deducting the bonds and real estate | 70,934 23 |
| Assessment for the year | 62,320 00 |

| 1899. | |
|-------------------------------|--------------|
| Capital and surplus | \$100,000 00 |
| Profits | 4,658 74 |
| United States bonds | 80,600 00 |
| Real estate | 15,300 00 |
| Balance | 8,758 74 |
| Assessment for the year | 13,250 00 |

| 1900. | |
|-------------------------------|--------------|
| Capital and surplus | \$100,000 00 |
| Profits | 6,928 62 |
| United States bonds | 47,800 00 |
| Real estate | 12,300 00 |
| Balance | 46,828 62 |
| Assessment for the year | 40,000 00 |

| 1901. | |
|---------------------------|--------------|
| Capital and surplus | \$100,000 00 |
| Profits | 20,432 74 |
| United States bonds | 55,000 00 |
| Real estate | 12,000 00 |
| Balance | 53,432 74 |
| Assessment for year | 56,297 00 |

Of course, it is not claimed that the cash on hand and bills receivable were taxable, because they were offset by amounts due depositors. The real estate was properly deducted, because that was otherwise assessed. If the

bonds were exempt, then we have the following as the result of the assessor, the reviewing board, and the taxing authorities:

| | |
|---------------------------------------|------------|
| For the year 1898, underassessed..... | \$8,614 23 |
| For the year 1900, underassessed..... | 6,828 62 |
| For the year 1899, overassessed..... | 4,491 26 |
| For the year 1901, overassessed..... | 2,864 26 |

And, if the bonds are not to be deducted, then we have that the bank was not assessed as high as could have been, as follows:

| | |
|------------------------|-------------|
| For the year 1898..... | \$33,614 23 |
| For the year 1899..... | 76,108 74 |
| For the year 1900..... | 54,628 62 |
| For the year 1901..... | 52,135 74 |

The assessments demanded by the county treasurer, in round numbers, are the same as the bonds held by the bank, the precise statement for the four years being as follows:

| | |
|--------------------------------------|-----------|
| Additional assessments demanded..... | \$224,872 |
| Aggregate of U. S. Bonds..... | 212,056 |

So that it can be stated as a fact that the discrepancy contended for is the amount of the bonds.

The case of the Des Moines Savings Bank as to pleadings and evidence, excepting as to the figures given, is in all respects like the other case. I shall not set out the figures in detail. Suffice it to say that, after deducting real estate and the United States bonds, the net worth of the bank was practically for each of the four years equal to the assessment for taxation. And, as with all property, each of the banks paid taxes on 25 per cent. of the assessment.

N. T. Guernsey and George F. Henry, for complainants.
Howard Clark, for defendant.

McPHERSON, District Judge (after stating the facts). From the foregoing statement of facts, two questions arise for determination: (1) Was the bank entitled to have deducted the amount of United States bonds from the net worth of the bank, in fixing the assessment? (2) If the bonds were not properly deducted, then after the bank was assessed and the taxes paid can the treasurer now add to the assessment?

That the Constitution is the supreme law of the land need only be stated. And that the government has the power to borrow money by issuing its bonds and selling them is denied by no one. And that the bonds cannot be taxed by any state, county, or municipality is agreed to by all, and by none with more emphasis than by counsel for defendants herein. Men often deny this, for the reason, as it appears to them, that it allows the bondholder to escape taxation. But all informed men well know that the power to tax is the power to destroy, and if a state or any subdivision thereof could tax United States bonds then the power of the government to borrow money would either be destroyed or impaired, accordingly as the rate of taxation would be fixed. In any event, the ability of the government to borrow money at a nominal rate of interest is because of three things, all of which are controlling: (1) The length of time before the bonds mature. (2) The integrity of the government in observing its contracts. It never repudiates. It never flunks, as do so many states, political, municipal,

and other corporations. It pays its debts as agreed. (3) The fact that its bonds are never taxed. The government is greater than any state. Its implied powers, as well as its express powers, are supreme. This is not at all times, with all people, popular, but it is at all times patriotic, and the recognized law of the country. All of which Mr. Clark, counsel for the county treasurer, indorses. But he contends that the question is not in the case, and whether it is in the case is now to be considered.

Section 1322 of the Iowa Code provides that all shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located; but shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies, and not to the individual stockholders. And the Iowa Supreme Court four times within the last two years, and once within the last few weeks, has held that the general exemption from state taxation with which the bonds of the United States are clothed does not entitle the bank to deduct the amount of such bonds from the value of the shares of their stock which are assessed to it for the purpose of taxation under Code § 1322. *Savings Bank v. Burlington*, 118 Iowa, 84, 91 N. W. 829; *National State Bank v. Burlington*, 119 Iowa, 696, 94 N. W. 234; *National Bank v. Independence*, 123 Iowa, 482, 99 N. W. 142; *Savings Bank v. Des Moines (Iowa)* 101 N. W. 867. The Iowa Supreme Court, in the cases cited, relied upon the following by the Supreme Court of the United States: *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229; *National Bank v. Kentucky*, 9 Wall. 358, 19 L. Ed. 701; *Farrington v. Tennessee*, 95 U. S. 686, 24 L. Ed. 558; *Palmer v. McMahon*, 133 U. S. 666, 10 Sup. Ct. 324, 33 L. Ed. 772. But under the second question above recited, it will be observed that in all four of the Iowa cases cited the Iowa Supreme Court was dealing with cases on appeal from the local equalization board—one of the steps pointed out by statute for the original assessment. As before stated, both the plaintiffs herein are savings banks, created, having their existence, and doing business under Iowa statutes. It is not claimed, and cannot be, that this court is, or should be, controlled by the decisions of the Iowa Supreme Court with reference to a federal question, and particularly the taxation or exemption of United States bonds. The decisions of the federal Supreme Court are alone controlling, however persuasive the opinions of the state Supreme Courts may be. And yet it would be very unfortunate if this court would feel compelled to hold that, under a given state of facts, exemption from taxation should be allowed, while all other parties with taxes less than \$2,000—the necessary amount to give jurisdiction to this court—should be compelled to pay taxes upon the same state of facts. And this court should not so hold unless driven to that conclusion by reason of the decisions of the United States Supreme Court. That United States bonds are not taxable is not and has not been disputed since John Marshall wrote the opinion in the case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. It is no longer debated. If the individual has his resources invested in govern-

ment bonds, he cannot be taxed. If the capital stock of these banks were being assessed, deductions could be made of all such bonds. But the capital stock is not being assessed. It cannot be presumed that the assessor did that which he had no authority to do. The shares of stock are what are assessed. The difference between taxing capital stock and the shares of stock may or may not be easily discernible. But that there is a difference one need only go to the decisions of the United States Supreme Court. And recognizing such difference it has been held that a corporation can be taxed in several ways if there are statutes allowing it: (1) Its accumulated earnings; (2) profits and dividends; (3) its real estate; (4) its franchise; (5) its capital stock; (6) its shares of stock. That a statute allowing all these would be oppressive and unfair does not meet the question as to the power. In Iowa, in case of a state savings bank, it is the shares of stock that are assessed. And the value of the shares is made up of the assets; and the fact that one of the assets is government bonds does not change the situation, and does not give it the right of an exemption. So that I conclude that under the Iowa statute and under the federal cases hereinbefore cited it was the shares of stock that were assessed, and from such shares of stock the bank could not deduct its United States bonds. And I agree with the Iowa Supreme Court in its four times announced conclusion.

2. The bank was assessed on the supposed value of the shares of stock. The assessor made his returns to the county auditor. There was no review, as might have been, by the local board of equalization; and that board having taken no action, of course there was no review by the state district court. The auditor made up the taxbooks, and annexed thereto his warrant directing the county treasurer to make the collections on 25 per cent. of the assessors' assessment, multiplied by the tax levy. And this the treasurer did, and gave his receipts therefor. In making the assessments there was no fraud practiced upon the assessor. The assessor was acquainted with all the facts. The assessor furnished the forms on which the bank should make its reports. All the facts were truthfully disclosed on the verified statement by the cashier of the bank, which the assessor carried to the auditor's office. The cashier called attention to the asset of the government bonds, and claimed the exemption. The assessor, through a mistake of law, conceded the claim. Now, can the treasurer, acting in the capacity of an assessor, correct the mistake? That the assessor, in part at least, acts judicially, there can be no doubt. He administers an oath to the bank officer. He takes his evidence. He considers such other facts as come to his notice. He calls for and examines the assets. He inspects the books. He gets, or tries to get, all desired information. And after hearing the testimony, and seeing all the evidence, he makes his findings and adopts his conclusions. Surely that is a judicial act. And if that is so, then how can it be impeached, excepting for fraud, or by the statutory mode of review by the local equalization board, and then by appeal to the state court? The whole method of taxation, so far as now

considered, aside from the question of the government bonds, is regulated, directed, and controlled by the Iowa statutes. The county treasurer can perform the duties only as allowed by the state statutes. And under the rule of general recognition the construction given those statutes by the Supreme Court of the state will be and must be observed by this court. But before noticing what the Iowa Supreme Court has said and has held I deem it proper to say that as an original question I would hold that, when neither the assessor nor the property owner is guilty of a fraud, when the assessor has seen the property, or considered, or had the opportunity to consider, the assets, bills receivable, and choses in action, and has made his assessments, and there is no review by the local board, such assessment is a finality. The assessor assesses a house or stock of merchandise at \$5,000. In fact it is worth \$7,500. But the assessor saw it. He looked it all over. He acted with an honest purpose. The owner concealed nothing. All that can be said is that he erred in his conclusions. Or, suppose he knew it was worth \$7,500, but that the \$5,000 was proportionately as high as all his other assessments. And suppose there is no review by the local board, and, of course, no appeal to the state court. It cannot possibly be said, in my judgment, that a county treasurer, on the motion of a tax ferret five years thereafter can reassess the property, and again collect the taxes. If this is not so, then the harvest for the tax ferrets is more abundant than the most ardent champion of the law ever hoped for. Half the homes and half the farms, and nearly all the stocks of goods in Iowa, can again be assessed, and a second time, for the same year, subjected to taxation. And in principle there is no sort of difference between a home, or farm, or stock of goods, and either a bank or the shares of stock of a bank. In the case at bar the bank did not escape the attention of the assessor. The bank was not withheld. It was not overlooked. And, whether this is sound or not, the Iowa Supreme Court has said that it is, and that ends the discussion. In *Galusha v. Wendt*, 114 Iowa, 597-611, 87 N. W. 512, 517, Judge McClain said:

"There is some authority for the position that in case of gross undervaluation the state may reassess the property and collect taxes on the real value thereof; the right to do so being put on the ground that such gross undervaluation constitutes or shows fraud on the part of the officer. * * * On no question is there opportunity for so great diversity of honest judgment as on the question of value. When the property owner has once honestly returned his property for assessment, and been assessed on such property, he should not be reassessed for the same year on the property merely because another officer may think the first assessment was inadequate."

While what was said by Judge McClain was dictum only, yet I am fully persuaded he correctly stated the rule. Of course, if the value fixed by the assessor is so grossly inadequate as to evidence fraud on the part of the officer, then there can be a reassessment. And this was so held in *State v. Weyerhauser* (Minn.) 71 N. W. 265. And same case in 176 U. S. 550, 20 Sup. Ct. 485, 44 L. Ed. 583. But in the case at bar the evidence does not show fraud. The assessor did his work honestly, although, in my judgment, he was

mistaken in deducting from the value of the shares of stock the value of the United States bonds. And the same is true of the bank officers. There was no fraud practiced by the cashier. He exhibited the true situation of his bank. He recited under oath that he for the bank held the bonds. The whole case is this: The shares of stock were not correctly valued. But the mistake was one of law. The taxes have been paid on the shares of stock, and, there being no fraud, they should not again be assessed. And, as it seems to me, there is no doubt but that this proposition was squarely so ruled by the Iowa Supreme Court in the case of *Bank of Manning v. Trowbridge County Treasurer* in July of last year, as reported in 100 N. W. 333. Also, see a discussion of this question in *Bank v. Lander County Treasurer* (C. C.) 109 Fed. 21.

3. It is said that a court of equity cannot give relief. To this there are two complete answers. The one is that, if the assessment is made, it would be an apparent lien and cloud on the title to the real estate owned by the bank. The other is that a state legislature cannot, by giving a procedure, oust a federal court of its equity jurisdiction. Both principles are so well recognized that a discussion thereof would be academic.

4. The jurisdiction of this court attaches because of the federal question, viz., should the reduction from the value of the shares of stock be made because of the United States bonds? That question, regardless of the citizenship of the parties, gave this court power to take the case and adjudicate the matters in controversy. And the fact that this court has adjudicated the federal question adversely to the bank does not deprive the court of jurisdiction over the other question. The rule is correctly stated in the decision of *Judge Brewer in the case of Street Railway Company v. Cable Company* (C. C.) 32 Fed. 727.

There will be a decree for the plaintiffs.

THE SUSQUEHANNA.

THE NACOOCHEE.

(District Court, E. D. New York. January 13, 1905.)

1. COLLISION—STEAM VESSELS CROSSING—CHANGE OF COURSE BY PRIVILEGED VESSEL.

The steamship *Nacoochee* and the ferry boats *Princeton* and *Susquehanna* were all passing down the North river in the daytime, on intersecting courses, the *Nacoochee* in the center and the *Susquehanna* on the west, thus being the privileged vessel. By agreement, understood by all, the *Princeton* crossed ahead of the *Nacoochee*; but, having no agreement with the *Susquehanna*, ported to pass under her stern, when the latter swung to port to pass under the stern of the *Nacoochee*, in accordance with an agreement between them not known to the *Princeton*. This movement was not made until the *Princeton* was within 400 or 500 feet, and to avoid collision she went astern, and was struck by the *Nacoochee*. *Held*, that the *Susquehanna* was in fault for changing her course in violation of the starboard hand rule without agreement with or notice to the *Princeton*, and that such fault was the proximate cause

of the collision, the Princeton having no other course open to her after the movement was made than to back as she did; that the Princeton was not in fault, such as to relieve the Susquehanna from full liability, her fault, if any, in failing to avoid the Nacoochee having been committed when in extremis, through the prior fault of the Susquehanna.

In Admiralty. Suit for collision.

Robinson, Biddle & Ward, William S. Montgomery, and Henry Galbraith Ward, for libellant.

Wheeler, Cortis & Haight and Charles S. Haight, for the Nacoochee. Wilcox & Green and Herbert Green, for the Susquehanna.

THOMAS, District Judge. In the daytime three vessels started to go down the North river on intersecting courses. The steamship Nacoochee reached the middle of the river, and was descending on a course S. by W. or S. S. W. The ferryboat Princeton was going from Desbrosses street to Jersey City, on a S. W. course. The ferryboat Susquehanna was going from her slip on the New Jersey side, at a point about opposite Desbrosses street, to Chambers street, and her usual course was S. E. The Nacoochee's bow struck the starboard side of the Princeton about amidships, doing injury to the latter vessel, for which the libel was filed. The Princeton had passed safely the bows of the Nacoochee, and, to escape an impending collision with the Susquehanna, had gone astern across the Nacoochee's bow, stopped, and while trying to get in forward motion the collision occurred. Before the ferryboats changed their courses, as hereafter stated, the Susquehanna was on the starboard hand of the Nacoochee, while the Princeton had the Nacoochee and Susquehanna both on her starboard hand. Hence, as regards rights of way, it was the duty of the Princeton, the eastward vessel, to yield both to the Nacoochee and Susquehanna, and it was the duty of the Nacoochee, farther to the westward, in the center of the river, to yield to the Susquehanna. But it happened that the Susquehanna, upon a second signal of two whistles from the Nacoochee, yielded to the Nacoochee, while the Princeton, with the apparent consent of the Nacoochee, passed ahead of the latter. The Princeton signaled, to give the Susquehanna the right of way, and ported; but the Susquehanna swung to port, to yield to the Nacoochee. As a result, the bows of the Princeton and Susquehanna came within a few feet of each other, at about the center of the river, whereby the Princeton was compelled to go back, and did go back so far that she came in the way of the Nacoochee.

The Nacoochee blew two whistles. The Princeton thought they were for her, and probably answered them. The Susquehanna also considered that they were for the Princeton, and did not answer them. The Nacoochee blew two more. The Susquehanna thought that these signals were for her, and answered them. The Princeton assumed that they were for her, and alleges that she answered them, but probably did not. In any case, the Princeton, Susquehanna, and Nacoochee understood that the Princeton was to go ahead of the Nacoochee, as she did. But the Susquehanna arranged with the Nacoochee, by answering with two whistles the Nacoochee's last two whistles, to go under her stern, but made no arrangement to go under the Princeton's stern, and

she had no right to go under her stern without an understanding. In fact, the Susquehanna had no intention of signaling the Princeton, and did not signal her until the latter blew one whistle, and the boats were within some four or five hundred feet of each other.

The Susquehanna's proposition is that, even if the starboard rule had been applicable, it had ceased to be applicable by the Susquehanna swinging to port, and that the Princeton should have appreciated the Susquehanna's departure from her course, and have crossed the latter's bow on the flood tide. If the Susquehanna wished the Princeton to go ahead of her she should have signified it, unless the relation of the vessels had so changed as to demand that the Princeton should go ahead. The Susquehanna charges that the Princeton was trying to force her across the Nacoochee's bow, after the Susquehanna had agreed with the Nacoochee not to go there. But the Princeton was not a party to this agreement, nor was she aware of it. If the Susquehanna could not carry out her agreement with the Nacoochee, the Princeton was not bound to aid her, unless she was in some way advised in due time. If the Susquehanna was afraid of the Nacoochee's bow, if she went across the Princeton's bow, it was her duty to take measures that would insure her safety, and at the same time give the Princeton her due opportunity with reference to the starboard rule. But that was a problem for the Susquehanna to solve. She could not expect the navigators of other vessels to take the risk of crossing her bow, and justify her unexpressed expectation, on the ground that she would otherwise violate her agreement with another vessel by crossing such vessel's bow. If the Susquehanna was in a predicament it was of her own making, and if she wished the Princeton to take the right of way she should have notified her. The fact is that she never notified her before the Princeton whistled to her, and the Princeton did what vessels usually do under such circumstances, viz., kept prudently away from a privileged vessel's bow.

The foregoing has been written upon the assumption that the Susquehanna and Princeton were, when the Princeton blew one whistle, pursuing such courses that the Princeton was bound to observe the starboard rule. But the Susquehanna claims that at the time the Princeton blew the one whistle the Susquehanna was above the Princeton, and had the latter a little on the starboard hand, and bases this assertion on the alleged fact that the Susquehanna had already swung to port, to go under the stern of the Nacoochee, and that the Princeton, having timely notice of this change of relations, should have kept her course across the Susquehanna's bow. The pivotal question is whether, when the Princeton gave one whistle swinging to starboard, the relation of the vessels had changed so that the Princeton should, in the use of due diligence, have been aware of it, and have kept her course. If so, the Susquehanna is acquitted of initial fault; otherwise not. The chart shows that the course of the Susquehanna between her two stations was southeasterly; that the course of the Princeton was southwesterly. They were regular ferryboats, each operated on one of the busiest lines crossing the river. Many times each day each plied between New York and New Jersey. The master of each was a skilled pilot of many years experience. Each had been accustomed to see

the other and pass her presumptively on innumerable occasions. Each knew that when the boats were on their regular courses the Susquehanna had the right of way. Indeed, the pilot of the Susquehanna, not by any statement extracted by the court and assented to by him, but of his own accord, stated:

"I had the same right over the Nacoochee that I had over the ferryboat. Q. So that under the law you had the right, both as to the Nacoochee and the ferryboat, of holding your course right to Chambers street? A. Exactly."

He does not pretend otherwise, except as his swinging changed the relation. So it comes back to this: Did he swing in time to give the Princeton notice? He says that the master of the Princeton—

"Ported his wheel just at the time he blew the one whistle. Q. At that time you were under the swing to starboard? A. I was swinging up river; I was swinging up river when he blew the one whistle to me, and I stopped my boat and backed under a jingle. * * * Q. How much before he blew you the whistle—how long before that—did you begin to swing? A. Half a minute, perhaps. Q. 'S 1' is the position before you began to swing, and 'S' is the position of swinging at the time you got the one whistle? A. Yes, sir."

The reference is to a diagram made by him. The diagram places the Susquehanna on a practically easterly course, while the Princeton's bow is somewhat southward, and well to the eastward of the Susquehanna, on a course slightly south of west. He further testified:

"Just as I saw the position the ship (the Nacoochee) was in—the swing he had—I slowed down immediately after ringing up full speed, and ran slow almost straight out of my slip, calculating to go astern of the ship before any whistles were exchanged."

Again he testified:

"Q. How were you heading when you began to swing? A. S. S. E. I had got a slight swing down river from my slip towards the Chambers street slip. I had hauled down about that much, and was swinging the other way."

This shows that the Susquehanna headed below her usual S. E. course, and other evidence shows that she maintained her speed, for she started one minute later than the Princeton, and they met about opposite Beach street, in the center of the river, some four blocks below their starting point. There is no pretense of diminished speed on the part of the Princeton. The diagram shows the Susquehanna's heading as almost E. when she began to swing. How did the Susquehanna, on a flood tide, get where she was on the course indicated "S 1" in the diagram? Moreover, the Princeton was not heading, as the diagram shows, slightly south of west. Her course was S. W. Capt. Richardson himself states that the Princeton was heading for her slip when she blew one whistle. In another place he states that when the Susquehanna blew two whistles to the Nacoochee the Princeton was "a little on my starboard hand; a little bit on my starboard hand—not very much; almost ahead." He further testified:

"Q. How near was the Princeton to you when she blew one whistle? A. I judge she was two boat lengths away from me, if not more perhaps. Q. So you kept going on? A. I had a starboard swing—swinging to port at the time under a starboard wheel. I had a starboard wheel, and my boat was swinging up river towards the stern of the steamship, and when he blew

the one whistle it was impossible for me to overcome that swing—put my wheel hard aport and swing the other way.”

He further explains:

“At that time it didn't appear to me the Princeton was interested in that at all, because as he was coming towards Jersey I was swinging away from him in answer to two whistles from the ship. If he watched me he would know just exactly what I intended to do. It didn't appear to me he was coming near me at all at the time, until he gave one whistle.”

Capt. Day, of the Princeton, states:

“I didn't notice him swing until after I blowed the one whistle. I couldn't see his wheels, but at the moment I blew one whistle I saw him coming on the swing. Q. Did he swing before he blew? A. There was no swing I could notice before I blew the one whistle. He blew after me, answered with two whistles, and swung. Q. Did he swing before he blew his two whistles? A. About at the time I blew him one whistle I see she commenced to sheer towards me.”

He further says:

“He was on my starboard, and he would be to the northward of me a little.
* * * When I blew one whistle to the Susquehanna, and he answered with two, I put my helm aport, the moment I blowed the one whistle.”

These captains agree that the Susquehanna was a little to the northward. It may be accepted that the Princeton blew one whistle to the Susquehanna when the boats were 400 or 500 feet apart; that the Princeton's pilot immediately thereafter discovered that the Susquehanna was swinging to port; that before that the Susquehanna had starboarded, and had begun to swing to port. Assume that, as the Susquehanna's captain states, the boats were three lengths or more (three of the Susquehanna's lengths would be 636 feet) apart when he began to swing, and that the Princeton's captain did not notice it until they were 400 or 500 feet apart, what should be the decision? It is considered that even then the Susquehanna was at fault, because she changed her course without signal to the Princeton. Considering the knowledge of the Princeton's captain of the destination of the Susquehanna, her customary course, the usual duty that rested on him, the presence of such duty until he discovered, using due vigilance, that the Susquehanna had swung, his just expectation that the Susquehanna would do what she usually did and what the law required her to do, viz., keep her course, it appears that the Susquehanna did not do her duty in swinging out of her course without informing the opposite boat, and that the Princeton's captain was not at fault that he did not in time appreciate the Susquehanna's intention and the fact that she had begun to swing out of her course. Of course, all this was well known to the Susquehanna's pilot. He knew that he had starboarded. He knew that his boat begun to respond to the starboard wheel. But this was not plain to the Princeton's master. He states that he did not see the swing until he had swung. It was a surprise to him. It was something that he did not and would not expect under the existing conditions. He was attentive to what the law required of him and was prepared to do it. The courses of the vessels up to the moment

justified his thought. He was justified in doing what he did. It would be a dangerous rule that would require a burdened vessel to avoid another by going under her stern, and yet condemn her because she did not perceive, when the vessels were so near together, that the privileged vessel had begun to change her course, and that such change was to be continued so as to reverse his duty. The rule would in such case be: "Watch the privileged vessel—the vessel bound to keep her course—and if when some six hundred feet away she change her course, instead of keeping it, as the law demands, cross her bow, or omit it at your peril." This puts too great a burden on the Princeton. It subjects her, and yet makes her responsible if the burden is suddenly lifted. A vessel on an adverse tide may swing slightly from her general and regular course. It may not mean that she intends to abandon her course. The burdened vessel must be treated fairly, in view of her fixed obligations. If it is intended that she shall depart from her known duty, she must have signals or fair warning. The Susquehanna made no signal. She expected that the Princeton would be governed by her swinging out of the course she was pursuing. If there is any value in the starboard rule, that requires the privileged vessel to keep her course, it should be observed, unless she give full and fair notice that she intends to depart from it. The fault of the Susquehanna was not in yielding to the Nacoochee; it was not in her changing her course; it was in her changing it without due signal, when so near by. It was done too near the time when the Princeton would be expected to go to starboard. The change itself was not a timely announcement. The Susquehanna kept the Princeton in bond until it was too late to release her, and when the Princeton tried to discharge her obligation she found that the Susquehanna had left her course and stood in the way. It is too much to say that the Princeton should have grasped the situation. The situation was not made plain to the Princeton in time by the Susquehanna swinging. The Princeton acted as she was bidden; the Susquehanna acted as she was forbidden. If the Susquehanna's act was necessary, she should have arranged therefor with the Princeton. The Princeton was not obliged to appreciate the situation, and perceive that the Susquehanna was going to do, from necessity or otherwise, what ordinarily she would not do, and that the Princeton should on that account reverse her usual conduct.

These views lead to the conclusion that the Susquehanna brought the Princeton in peril of collision, and that to extricate herself the Princeton must back. If in going astern the Princeton, using such caution as the exigencies of the case and the excitement of the moment permitted, collided with another vessel, the Susquehanna's negligence would be the proximate cause. It would be like a person springing out of the way of a negligently driven wagon and striking another object (*Coulter v. A. M. U. Express Co.*, 56 N. Y. 585), or a passenger jumping from a train, negligently brought into danger (*Dyer v. Erie R. Co.*, 71 N. Y. 228). Such cases are numerous.

The Susquehanna wrongfully barred the way, and suddenly intercepted the Princeton's passage, whereby the Princeton, to avoid damage, turned aside, to her injury. But did the Princeton use the care demandable of a man of good judgment and prudence, under the circumstances? If she did not, her negligence intervened between the negligence of the Susquehanna and the injury, and was the proximate cause. It is difficult to escape the conclusion that after starting to back the navigators of the Princeton did not take notice of the Nacoochee until it was too late to avoid the collision, the flood tide and the Nacoochee's speed forward tending to bring the vessels together.

It is considered that the Princeton did not see the Nacoochee until a collision with her was inevitable, and when the Nacoochee was discovered an effort, probably duly vigilant, was made to pull forward out of her way. Hence the question is, was the Princeton excusable for not keeping in mind that she was backing across the Nacoochee's bow? The Princeton had passed the Nacoochee, so that the backs of those in the pilot house were turned to her, and unless such persons turned to look over their right shoulders they would not see the Nacoochee. But should a prudent man, a man of good judgment, be so disturbed by the collision just escaped that he would not look back to see whether anything was in the way of his going astern, especially as he did in fact know that another vessel was coming across his course astern? The navigators on the Princeton had a right, for the few seconds when the threatened collision was before their eyes, to put all their thoughts on that; but, as the gap widened between the ferryboats, should even an excited captain consider that he was backing right across the bows of a steamer which he had just passed, and that he should use some care to guard against her?

While it is concluded that the Princeton had passed the bow of the Nacoochee, it is not probable that the former's stern had cleared the Nacoochee's course more than 100 feet, and perhaps not so far, although the distance can be only approximately determined. When the Princeton's pilot saw a collision with the Susquehanna impending, what was before, and not what was behind or above, taxed all his faculties. His first duty was to go back instantly and with all power. There was no time for circumspection; there was no time to adjust distances with nicety; and that his vigorous action should carry him too far astern, and that his mind should be centered wholly upon his escape and the movement therefor, seems not inconsistent with what a competent pilot, even a pilot of requisite judgment and suitable mental poise, would do in such crisis. Looking back from the undisturbed survey of the events, it is easily seen how it all might have been better done; but at the moment of menacing catastrophe there was scanty opportunity for forethought, and in the present instance the wrongdoer should not be allowed to complain successfully that the unoffending person did not deliver himself more skillfully from the consequences of the wrong.

The libelant should have a decree against the Susquehanna, with costs. The libel as to the Nacoochee is dismissed, with costs.

THE H. S. BEARD. THE EDITH BEARD. THE SCOW NO. 10.

(District Court, E. D. New York. December 7, 1904.)

1. COLLISION—YACHT AND SUBMERGED SCOW IN TOW—FAILURE TO MAINTAIN LOOKOUT.

The failure of a steam yacht navigating New York Harbor at a speed of 16 miles an hour to maintain a lookout was a fault and a contributing cause of a collision between the yacht and a submerged scow in tow, where a vigilant lookout might have seen the scow or noted her position from the hawser with which she was being towed.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 211.]

2. SAME—DANGEROUS TOW—DUTY OF TUG TO MARK POSITION OR GIVE WARNING.

Two tugs towing a submerged scow in New York Harbor, which moved forward in an erratic course, not at all times following directly behind the tugs, held in fault for a collision between the scow and a meeting yacht on the ground that their tow was a dangerous obstruction to navigation, and they were negligent in not placing a signal upon it, or giving notice to the yacht of its presence and position, otherwise than by the blowing of an alarm signal when the yacht was approaching and the shouting of the crew as she passed, neither of which was intelligent to the master of the yacht, but rather calculated to distract his attention from the obstruction ahead.

In Admiralty. Suit for collision.

William M. Ivins and Joseph Kling, for libellant.

Albert A. Wray and Charles D. O'Connell, for claimants.

THOMAS, District Judge. The steam tugs Henry S. Beard and Edith Beard, lashed together and heading about south, were towing scow No. 10, submerged. The bow of the yacht Arrow, heading about north one-half west, collided with a corner of the scow, on the port side of the tugs. For the injury received this libel is filed. The accident happened about 1,000 feet southerly of Red Hook, and about half way between the Erie Basin Gap and Red Hook Point, Brooklyn, and about 600 feet off shore. The day was clear, the tide was flood, the hour was 5:10 p. m., the date August 8, 1903. The Arrow was going at the rate of 16 miles per hour, her maximum speed being 45 miles per hour. The tow was proceeding very slowly, probably not to exceed one mile per hour, as the scow was lying approximately athwart the channel and towed with erratic movement. This position of the scow arose from the fact that earlier in the day the hawser parted, whereby the scow was lost, and the tugs, sweeping the channel with a line, encompassed her in the line, and continued to carry her along without further adjustment of the hawser. The scow was 110 feet long, and it is concluded that, in addition to her own lateral projection across the stern of the tug, she also dragged the hawser to port as the towing proceeded. The towing began in the forenoon, and, with vicissitudes and interruptions, had lasted to the time of the accident, and was then incomplete. While the towing proceeded, after the scow was picked up after sinking in the channel, parts of her at times showed above the water, so that approaching vessels could see her without

difficulty, and at times she was completely or mostly submerged, her appearance and disappearance varying in degree and duration. At the time of the collision, to a casual observer or to a person not strictly attentive to her, she probably appeared to be submerged entirely; but it is inferable that at the place and time of collision a small part of her showed above or appeared near the surface of the water. As to this there is a conflict of evidence; but it is believed that the question whether her corner could be seen depended upon proximity, opportunity to observe, and attentive observation. A person knowing where she was, and following her with the eye, as she disturbed the surface of the water, could probably have seen her corner rising slightly above the surface. Kelean, on the Arrow, states that he saw her just before the collision, and there is no occasion to doubt his evidence in the matter of honesty, although he was not a lookout and of no value as a navigator. Packard, the Arrow's master, testified:

"Q. Can you give me any idea of the height that the object rose above the water? How did it appear to you to be? A. The scow? Q. How much out of water? A. There wasn't any portion of it that I could see out of water possibly. In salt water you can see two or three feet below the surface when you are directly over it. Q. When you were over it, you saw it through the water? A. Yes, sir; through the water."

The Arrow nearly cleared her, but struck the corner nearest the shore, as Packard states, about 18 inches below the water line. The claimant urges that the scow was towing end forwards, nearly straight behind the tugs, and that the Arrow hit her only because she changed her course to the westward while or after passing the tugs. The master of the Arrow states that he did not change his course, and his excellence as a witness leaves no room to doubt his statement. It is true that the witnesses for the claimant testify that the Arrow changed her course, Capt. Nevins stating that she changed to the westward several points, even placing her at the time of the collision at right angles to the course of the tugs. The libel charges that she changed slightly to the westward. But, if it becomes a matter of credibility or accurate statement of fact, the court unhesitatingly accepts the evidence of the master of the Arrow as to what he did on his own vessel; for his capacity is undoubted, and his integrity on the witness stand was manifest. Therefore it must be concluded that the Arrow passed the nearer tug at a distance of about 100 feet; that she did not change her course before the collision; that the hawser swung enough to port to allow the already laterally projecting scow's end to obstruct slightly the Arrow on the course she was pursuing. It may be remarked, however, that whether the Arrow starboarded does not appear very important, except as it does or does not emphasize the negligent interruption of the channel by the tugs and their tow.

Were either or both of the parties negligent? The Arrow was going at a high rate of speed for harbor navigation. That in itself was not negligent; but it is an important fact as bearing upon the question of the means used by her to safeguard herself and other vessels with which she came in relation. She carried no lookout

by day, although she had a full crew. Kelean was on deck, but he was useless and was not used. Capt. Packard does not even entertain the idea that Kelean had any such function or ability to perform it. Here there is an acknowledged violation of law. It cannot be excused. The effect of the omission cannot be ascertained, but it places the burden upon the libelants of showing that the accident would have happened had the injunction of the law been fully met. This burden they have not fulfilled. But, if the hawser led to port, a vigilant lookout might well have seen it leading almost directly in front of his vessel, on a bright August day. If the inert and unobservant Kelean saw something of the wreck before the collision, a dutiful and keen lookout, such as this swift boat demanded, might have seen it earlier, or earlier caught view of the line and the place to which it led. The value of a lookout is especially emphasized by the fact that Capt. Packard kept his head towards the persons on the tug, seeking no doubt to understand the significance of their cries and gestures. He had then ceased to be a lookout. Another man, with eyes ahead, might have performed the duty from which for the moment he was diverted. Hence it is decided that the failure to maintain a proper lookout on the Arrow was one proximate cause of the collision.

Were the claimants also guilty of neglect that contributed to the injury? What did the tugs omit? They placed no signs, buoys, or other warnings on the submerged tow. It is urged that the captain of the Arrow would not have seen them if present, as he was looking at the people on the tug. That is by no means certain. As he was approaching the tugs he might well have seen such signals. In any case, if it was the duty to place signals on the scow the claimant should not be relieved from failure to do so, on the plea that the Arrow's lookout would not have seen them, because he was diverted by the substituted warnings on the tugs. But it is stated and proven that it is not usual to place signals on submerged vessels in tow. There is no reason for omitting practicable signals on submerged vessels, towed in a used navigable channel, unless some other suitable means of warning be employed. If a tow is hid by darkness, its existence must be foretold by lights. If a tow is hidden in the water, some equivalent warning should be given. The outlying hawser is not warning. The vacillating and occasional or even continued appearance of a corner of the vessel out of the water is not a sufficient warning. But the persons on the tug shouted. Nevins, master of the Henry S. Beard, testified:

"Q. After you blew these alarm signals to her what next occurred? A. As soon as she got about abreast of us I run out of the pilot house, and all were shouting on the Edith and on our boat to 'Keep off! We have got a scow in tow!' Q. Did they do anything else besides shout? A. Mr. Hurley was shaking a newspaper in his hand, and they were all hollering about the same time."

Now, consider the situation. The tow was not over 300 feet away, measuring from the bow of the tugs. There was an unconcerted cry to keep off. The words must have been utterly unintelligible. Hence what was said had no significance then or now.

Therefore the master of the Arrow is to be judged as one who saw men gesticulating and calling incoherently to him on two tugs safely out of his way. Such actions and speech were but vain antics and confusing noises, given to a rapidly passing vessel, in whose way was being dragged a substantially concealed scow. Some later allusion will be made to them. But the claimant urges that alarm whistles were blown. Capt. Packard testified that there was no whistle. Kelean testified that he "did not hear any signal." Johnson, employed on the wrecking steamer Reliance, and waiting near by to raise the scow, testified that he did not hear any signals or whistles; and Frank Smith, mate of the Edith Beard, testified that no signal or whistle was given by the Beard. His evidence as to his actual presence on the Beard is burdened by the attempted corroboration of the unbelievable witness McCormick. On the other hand, several persons, all at some time employés of the claimants, testified that whistles were blown at the several distances named by each.

Harrigan, master of one of Beard's dredges, testified that he was on the after deck of the Henry S. Beard's house:

"Q. Did you see or hear anything done on either of the tugboats in the way of giving warning to her? A. Yes; I heard the lookout on the head of her sing out to the captain of the Arrow. Q. Then what happened? A. I heard him blow his whistles. Q. Heard whom? A. Somebody in the pilot house. Q. Of the Henry S.? A. Yes, sir. Q. What kind of whistles did he blow? A. Short toots—blasts. * * * Q. When the shouting first began how far away down the bay from you was the Arrow? A. Oh, 400 or 500 feet ahead of the boats—abreast of the boats—coming towards us when they first commenced to make signals to holler to him. He was off the gap when they commenced tooting the whistle; about halfway on the breakwater. Q. How far would that be away from where the tugs were? A. Quarter of a mile."

He says that he first saw the Arrow when about 400 feet away. This witness states further that:

"I see him after he (Arrow) passed the gap; that is the first I seen him. Q. Did you see him coming around the breakwater? A. No, I didn't; I see him when he passed the gap. Q. How far is the gap from the breakwater? A. 300 feet. * * * Q. How far was he away when you saw him? A. 500 or 600 feet ahead of us."

The evidence of this witness as to the distance of the Arrow away at the time of the whistles is not very satisfactory.

Nevins, the master of the Beard, testified that he saw the Arrow.

"Q. Where did you see her—where was she? A. Coming up along the breakwater. Q. Whereabouts? A. About halfway between Crane's and the mouth of Erie Basin Gap. Q. About how far away should you say that to be? A. I guess that would be 1,500 or 1,600 feet; maybe a quarter of a mile or little over. Q. What did you do when you saw her, if anything? A. We blowed alarm signals at her. Q. At once? A. Yes, sir; we were just after blowing again at the South Brooklyn, a 39th street ferryboat coming along."

This is the witness who stated that the Arrow sheered within 50 feet of the stern of the tugs, across their sterns.

"Q. I understand you to say the Arrow struck you—your scow—at right angles? A. Yes, sir; she changed her course as soon as she went under our stern. Q. How many points? A. She must have changed it three or

four points. Not quite at right angles, but more on the bluff. * * * Q. He was looking back at you all the while? A. Yes, sir; never took his head off us."

The recollection of such witnesses must be taken with considerable allowance.

Edwardson, a deck hand on the Henry S. Beard, and a person of dull appearance, testified that he noticed the Arrow when she swung around the breakwater coming from Tebo's 400 or 500 fathoms away, and that he said to the captain of the Henry S. Beard, "There comes the Arrow."

"Q. What did the captain do, do you know? A. He signaled out to him."

Johnson, who was a deck hand and in the pilot house of the Henry S. Beard, a person apparently honest but not of quick intelligence, testified that he saw the Arrow, a "little after he passed Crane's Shipyard," at the mouth of Gowanus; that Edwardson sung out, "There comes the Arrow."

"Q. What was done then? A. Captain blew the alarm whistle. Q. How far do you think that is down there to Crane's yard, or where the Arrow was at that time? A. That distance— I can't measure that; it is a good ways off. Q. An eighth of a mile, quarter of a mile, half a mile, or a mile? A. It is about quarter of a mile."

Barker was the master of the Edith Beard. He says that when he first discovered the Arrow—

"Her tugs were abreast of Burtis's; that is, half way between Burtis's and the Erie Basin Gap. * * * Q. That is how near to the gap? A. I should judge about 500 or 600 feet. * * * Q. At this time, when you first discovered the Arrow, where was the Arrow? A. She was pretty close to the gap—about 500 or 600 feet, I should judge—when I first saw her. Q. 500 or 600 feet what—from where? A. From the head of the boat. Q. From your boat? A. From our boat. Q. She was about 500 or 600 feet away from you when you first observed her; is that it? A. Yes. Q. What did you do when you saw her? A. The deck hand on the Henry S. hollered, 'Here comes the Arrow.' Q. Is that what called your attention to it? A. That called my attention to it. * * * Q. As she came up to you, what took place on the Edith and the Henry S.? A. The Henry S. blew signals, tooted her signals—that is, alarm signals—and the man on the bow of the Henry S. drew my attention, and I got out of the port side of my pilot house, and I hollered at him to keep off. He was abeam then. Q. He was abeam of you then? A. He was abeam of us then; yes. Q. When was the first shouting to the Arrow? Where was the Arrow then? A. She goes so quick she was little bit ahead; and she was abeam when we commenced to holler to her. * * * Q. Did you continue to observe the master of the Arrow as he passed you? A. I did. Q. And after he passed you? A. Yes. Q. What was he doing all the time you were shouting? A. He kept turning and looking over and shaking his hand—shaking his left hand over his left shoulder."

McGowan, deck hand on the Edith Beard, testified that he first saw the Arrow—

"When she turned right around from Crane's and come up the bay. * * * Q. What was done on the tugs when you saw the Arrow coming up there by Crane's? A. He got a signal to keep off. Q. What is that signal? A. An alarm whistle—alarm signal. Q. Did the Henry S. or Edith blow it? A. The Henry S. * * * Q. Was anything else done on the Edith or Henry S. to attract his attention? A. We hollered to keep off. Q. Was he up alongside of you at that time? A. He was right abreast of us. Q.

Was that the first time you hollered to keep off? A. Yes. * * * Q. What was he (master of the Arrow) doing all the time he was passing you? A. He was standing at the rail, his two arms folded, and right arm like that on his breast, and he kept looking back and still waving, and then he would fold his arms again; he didn't have his arms on the tiller at all. * * * Q. Didn't he make any change of course—sheer any? A. No, sir. * * * Q. How did he ever get over to the scow, do you know? A. How did he get to the scow? Q. Where was the scow—astern of the Henry S.? A. Astern of the Henry S. Beard. Q. Leading directly astern or to one side? A. Directly astern. Q. How did the Arrow get over there to strike it? A. He never changed; he kept right on straight. Q. Did he keep his hands folded that way all the time, to the time of the accident? A. Yes, sir. You know that boat can go along without being touched at all. Q. She can change her course without being touched? A. No; she strikes, and then she runs into Merchants' Stores. Q. Did you notice whether she kept her course or changed it—do you know? A. I didn't watch whether she changed her course or not; she came right up."

Henry R. Smith, once in the employ of the claimants, stated that he was on the end of the pier at the foot of Conover street, and gave this evidence:

"Q. What first attracted your attention to the Arrow? A. An alarm whistle blown by the tug Henry S. Beard. Q. Did you look to see what was coming? A. Yes. Q. And you saw the Arrow? A. I did. Q. Where was the Arrow—how far down was the Arrow? A. She was about between 200 and 300 feet apparently ahead of the two tugs with—as though to pass the tugs on the port side. * * * Q. Did you hear any one shouting? A. Yes, sir. Q. Do you know who shouted? A. I couldn't say who it was, but I heard it distinctly. Q. Did you hear from where you were standing any words? A. Any more than hollering, 'Keep off.'"

He states that the Arrow changed her course to the westward as she came head to head with the Edith Beard, so that by the time he struck the scows he had changed about three points. This is the witness who thought that the flood tide caught the Arrow's stern and swung her into the scow, and that if there had been no collision, and the Arrow had continued her course, she would have hit the end of Merchants' Stores, and that she was heading for Brooklyn at the time of the collision. Hurley, claimants' paymaster, testified that at the time of the collision the tugs were about off Conover street.

"When was your attention first called to the Arrow in any way that afternoon? A. I heard a lot of men on deck—several men—shouting, 'Here comes the Arrow;' and I looked around, and I saw the Arrow possibly a couple hundred feet ahead of me, or 200 or 300 feet—something like that. Q. That was the first you saw of the Arrow, was it? A. Yes, sir. Q. What was done on the tug in connection with seeing her? A. I heard the men shout, and I shouted myself. Q. Shouted what? A. 'Keep off! Look out!' and I waved a newspaper I had in my hand for them to keep off towards the shore, so we could get by all right."

He further states that he saw a man at the wheel on the Arrow, and then:

"Q. What was the man at the wheel doing as he came along by the tugs? A. He was looking over his left shoulder, and looking back at us. Q. Did you see him do anything with the wheel or make any motions of any kind? A. No, sir; I did not. * * * Q. Did the tug give any signal to the yacht? A. That I couldn't say positively. I heard him blow several blasts of the whistle; whether he was blowing to the yacht or not I couldn't say positively. Q. You mean before you saw her you heard blasts of the whistle? A. Yes, sir. Q. They were blowing them all the time for passing

vessels, weren't they? A. Yes. Q. After the yacht came up, and you sighted her, and they were calling to her, can you say whether the tug blew any whistles? A. I think there were some; I won't be positive."

It may be noticed that the masters of other vessels that passed during the day testified, and that some stated that signals were sounded to them by the tugs, and others testified that such signals were not given. Taking into consideration the entire testimony, it is probable that tugs did at some time blow an alarm signal to the Arrow, but not at so great a distance, as stated by Capt. Nevins and some other witnesses for the claimants. The rapidity with which the Arrow was going makes the ascertainment of the distance more difficult. But assume that they were blown when the Arrow was 500 or 1,000 feet away. What should the Arrow have done upon receiving an alarm whistle from tugs working forward? What should the master of the Arrow think they meant? What were they intended to mean? For some hours the tugs had been navigating, and claimed to have signaled other approaching craft. It appears that some vessels received the signal and some did not. None stopped, probably for the reason that they, especially the ferryboats, going and returning, saw the scow at the time rising from the water. But it is not understood that the signal was to make the opposite vessel stop. If the tugs relied upon a signal to warn approaching vessels, it should have been a signal whose purpose was or should have been known to the opposite vessel. If a vessel, whatever her relation to an approaching and opposite vessel, should stop whenever the latter sounds an alarm, then the Arrow should have stopped, and the tugs did all that was required. But the Arrow saw nothing ahead save the tugs; she was well off from them, and apparently could injure them only by her swell. Why, then, were the tugs authorized to expect that the alarm would stop the Arrow when the tugs themselves were working ahead, and no steering signals were given? Such a demand does not seem reasonable. Nor is it believed that the alarms were blown for such purpose, but rather to attract the attention of the Arrow to the tugs, in the hope that it would lead to the discovery of her submerged tow and the hawser leading thereto. The tugs were engaged in a work quite liable to do injury to other vessels. Any obstruction to navigation that is unusual is apt to prove injurious in a busy harbor. A sunken stationary vessel is recognized as dangerous, and must bear warnings by day and by night. If that same object be set in motion, its dangerous nature is not diminished. It becomes an ambulatory peril. Clamorous shouts and warnings and gesticulations to vessels well clear of the towing tugs, alarms that mean nothing when passing vessels are well clear of each other, are not sufficient. The manner employed to warn should have a meaning, either technical, or, in the nature of the case, necessarily understood. Precisely what it should be need not be decided; it is for those skilled in the art to determine it. Ordinary prudence demands that something appropriate be done or provided. It is impossible to escape the conclusion that the tugs were doing a dangerous thing; that their way of calling the attention to approaching and passing vessels to the capsized and aberrating scow was haphazard, unconventional, confusing, and quite as apt to lead astray as to instruct concerning the

danger. It is not strange that the captain of the Arrow looked at those on the tugs with continuing wonder or curiosity, and that his attention was diverted rather than directed towards the scow.

The damages and costs should be divided.

THE NICETO.

(District Court, S. D. New York. January 4, 1905.)

1. SHIPPING—SHORTAGE OF CARGO—TIME FOR PRESENTING CLAIM.

A provision of a bill of lading that the carrier shall not be liable for any claim for loss or damage "unless presented within 48 hours after landing of or failure to deliver the goods," does not preclude a recovery for shortage of cargo, although no claim therefor was made within the specified time after discharge, where the ship placed the cargo in store, taking receipts therefor, and as soon as the shortage came to the attention of the consignee it presented a claim therefor to the agent of the line in whose name the bill of lading was issued, who admitted liability.

2. SAME—DAMAGE TO CARGO—ALLEGED IMPROPER STOWAGE.

Damage to a cargo of sugar shipped in bags from a Cuban port to New York held to have been due to the sweating of the cargo and ship, for which the vessel was not liable, and not to any lack of care in stowing.

In Admiralty. Suit to recover for shortage of cargo and damage to other portions.

Black & Kneeland, for libellant.

Convers & Kirlin and John M. Woolsey, for claimant.

ADAMS, District Judge. This action was brought by the Hormiguero Central Company against the steamship Niceto, to recover for a shortage of 8 bags of a sugar cargo and alleged damage to some 2212 of the bags of the same, through being wet. The sugar was laden on the steamship on the 10th day of June, 1903. She was then lying in the port of Cienfuegos, Cuba. The sugar was to be delivered in New York in the like good order and condition in which it was received, perils of the seas etc., excepted. The steamship arrived in New York on or about the 26th day of June and was duly discharged.

It is alleged by the libellant that the damage was not caused or due to any lawfully excepted peril but was owing to fault and neglect in the loading, stowing, care and custody of the sugar; particularly to the want of care in the stowage, in that wet logs of mahogany and other woods were stowed upon and in contact with the sugar, without sufficient dunnage to prevent injury.

The answer, after some formal denials, admits the shipment and that the bills of lading recited that the sugar was shipped in apparent good order and condition and then sets up the exceptive provisions contained in the contract, some of which are as follows:

"2. It is also mutually agreed that the carrier shall not be liable either as carrier, bailee or otherwise, for any loss or damage occasioned: by * * * heating, shrinking, effects of climate, * * * or any loss or damage aris-

ing from the nature of the goods or cargo, * * * nor for articles perishable in their nature; * * *

4. It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled 'An Act relating to the navigation of vessels, etc.'; and anything contained herein repugnant thereto is hereby waived.

11. Also, that the carrier shall not be liable for any claim for loss or damage, even if arising from negligence, unless presented within 48 hours after landing of, or failure to deliver, the goods."

The answer, after reciting the exceptions contained in the bill of lading, further alleges that the sugar was properly stowed and dunnaged and that all due diligence was used to have the steamship properly equipped and in every way seaworthy and fitted for the voyage and if there was any damage to the sugar, it was due to some cause within the exceptions of the bill of lading, and that by reason thereof the steamship is not liable.

The answer further alleges, among other matters not necessary to consider, that if there was any damage to the sugar not within the excepted perils, it was due to sweat or the nature of the goods and to the insufficiency of their packages and further that no notice of any claim was given within 48 hours after the landing of the sugar, and that the claim is barred by the express terms of the contract.

There are only two questions involved in the case, viz: (1) whether the libellant is entitled to recover for the nondelivered sugar and (2) whether there can be any recovery for the damage to the sugar.

1. It appears that there was a shortage in the delivery of 8 bags of sugar. The facts in this connection seem to be, that a claim for the damage was made almost immediately but none at the same time for the short delivery. The claimant contends that this claim for damages did not include notice of a claim for short delivery. That seems to be so, but obviously no claim of the kind could be made until the cargo was discharged, and an opportunity given to ascertain the extent of the delivery. It appears that the cargo was put into store and receipts taken therefrom by the ship. When the matter of short delivery came to the attention of the libellant, notice was duly given, dated July 20, 1903, to James E. Ward & Co., incorporated. It wrote a letter dated the same day to the libellant stating:

"As regards the shortage of 8 bags, we will pay for same upon receipt of your bill, with the understanding that if the eight bags should turn out when this sugar is taken out of store, you will return us value of same, as per bill rendered."

The claimant of the steamship, however, defends the claim upon the ground that Ward & Co. were not authorized to waive the notification clause, contained in the 11th clause of the bill of lading, and could not in any way vary the rights of the ship. Although the ship was sailing on the owner's account, the bill of lading is that of the N. Y. & Cuba Mail S. S. Co. and contains the name of Jas. E. Ward & Co., as its agent. The contract of carriage was with that line and I fail to see any merit in the claimant's contention. Excepting Ward & Co.,

there was apparently no one to whom the libellant could look in such a matter. In this respect the libellant is entitled to succeed.

2. With respect to the damage, there is no real controversy save as to its character, that is whether the damage arose from some failure to exercise proper care on the part of the ship or was due to the inherent quality of the cargo. That it was damaged from some cause to a considerable extent is made clear by the testimony. The cause is a matter of sharp conflict, the libellant contending that it arose through the loading of wet logs of mahogany in the hold, close to, or in contact with, the sugar, and from contact of the sugar while wet from the logs with fustic, a yellow dye wood. The claimant contends on the other hand, that the damage was a pure case of sweat, incident to such cargoes.

It appears that the sugar was taken aboard at Cienfuegos from lighters. At Manzanillo certain mahogany logs which were rafted out to the ship, were lifted out of the water over the side of the ship by her winches, and stowed in No. 3 between decks, being put there through No. 3 main deck hatch. These logs were squared and cleared of bark. Other wood which was loaded there was brought to the ship by lighters. This included the fustic, which was stowed in the square of No. 1 hatch.

The deck hatches were kept open in the day time during the voyage, excepting a few days of bad weather. There is no substantial question about the proper ventilation of the ship. There was an air space of 2 or 3 feet between the forward end of the mahogany logs and the sugar. Contact was not permitted in the stowing. When the cargo was discharged there was still the same space between the mahogany and the sugar. The logs went aboard wet so that several buckets of water drained off them on the deck, but the water was sponged up and none reached the cargo in this way. The mahogany, being a close grained wood, held very little, if any, water; moreover, the hatch of the between decks was carefully covered and secured with tarpaulins, which protected the sugar beneath from any drippings from the logs, even if they exuded any water after they were loaded.

When the steamer was loaded she drew 23 feet 6 inches forward and 24 feet 4 inches aft. Upon arrival in New York, after having burned the coal necessary for the voyage, she drew the same forward and 23 feet 8 inches aft, so that at all times the drainage from the logs, if any, was towards the after end of the steamer and away from the sugar, forward of the machinery, so that any moisture from the logs, if there were any, would not reach the sugar.

When the ship reached New York, she was discharged by the employees of the Ward Line, who have had great experience in handling Cuban cargoes. They testify that the damage was merely a stain, to no greater extent than usual, and due to the pressure and heating common to all sugar cargoes. They all testify that the practice of stowing mahogany logs, taken out of the water from along side the ship, was also common and not attendant with any risk to the sugar, provided there was no contact between the wet logs and the sugar. The question is, they say, one of contact, not of absorption through the atmosphere. They say that from every hold of the ship, whether there

were mahogany logs there or not, stained bags came out from beside clean ones and it was attributed by them to the sweating of the sugar itself, and the pressure of the bags.

The testimony on behalf of the claimant appears to be entitled to credit.

It is also shown by the expert testimony adduced on behalf of the claimant, that it is common and believed to be good stowage to put fustic in contact with sugar bags and that no bad results follow, according to their experience.

It seems clear that the stains on the bags were owing to the heating of the sugar and the sweat of the cargo as well of the ship, and was not due to any negligence in stowing. The testimony shows that damage of this kind is not at all unusual in Cuban cargoes, which are subject to change from warm to colder weather north of Hatteras. It was also probably somewhat due to the necessity of closing and battenning down of the hatches on account of the adverse weather met with on the voyage. I conclude that the damage arose from sweat, largely due to the inherent nature of the sugar, for which the ship is not liable.

There should be a decree in favor of the libellant for the lost bags of sugar, with an order of reference.

GILMORE et al. v. BORT et al.

(Circuit Court, N. D. Iowa, W. D. February 11, 1905.)

No. 236.

1. EQUITY—VOLUNTARY DISMISSAL—RIGHT OF COMPLAINANT.

A complainant has the right at any time before the final hearing, on payment of costs, to dismiss his bill without prejudice, subject to the exception that, where such dismissal would be manifestly prejudicial to the defendant, it will not be permitted; but, to constitute prejudice which will authorize the court in its discretion to deny complainant's right to dismiss, the cause must have progressed so far that defendant, upon answer or cross-bill, is entitled to a decree, or the injury or prejudice to him because of a dismissal is of a character that deprives him of some substantial rights concerning the matter of the original bill which will not be available to him in a second suit, and the mere fact that he may be subjected to a second suit is not sufficient.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 749-756.]

2. SAME—CROSS-BILL—NATURE AND OFFICE.

A cross-bill is auxiliary to the original suit and a dependency upon it, and it cannot introduce new controversies between the defendants to the original bill, the decision of which is in no way necessary to a complete determination of the controversy between complainant and the defendants over the subject-matter of the original bill. If it does, it is not a cross-bill, but an original bill, and should be dismissed.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 446, 447.]

3. SAME—RIGHT OF CROSS-COMPLAINANT TO OBJECT TO DISMISSAL.

In a suit for the cancellation of a bond given by complainants to indemnify defendants, who were a corporation and its treasurer, against loss by reason of a deposit of moneys of the corporation by the treasurer in a certain bank, on the ground that it was obtained through the fraud of the corporation, defendant treasurer filed a cross-bill against com-

plainants and his codefendant, alleging the validity of the bond and asking a recovery thereon, also alleging that if it was invalid because of fraud of the company he had no knowledge of it, and praying that in such case he be released from liability on his own official bond given to the company for a loss arising from his having deposited its money in such bank. *Held*, that such pleading did not entitle him to object to the dismissal of the suit by complainants before any evidence had been taken, being in no true sense a cross-bill, since the matters alleged against complainants were either available in defense to the original bill or cognizable at law, and those alleged as ground for relief against his codefendant were not germane to the matters alleged in the original bill, but set up a cause of action which had not accrued and in which complainants had no interest.

In Equity. On motion by complainants for leave to dismiss the bill and objections thereto of A. N. Bort, cross-complainant.

W. E. Johnston and Hubbard & Burgess, for complainant.
Wright & Call, for cross-complainant Bort.

REED, District Judge. This suit was commenced in the district court of Iowa in and for Ida county March 22, 1904, to set aside and cancel a certain bond signed by complainants as sureties for E. H. McCutcheon & Co., bankers, as principals, in the penal sum of \$200,000, to secure the payment by said McCutcheon & Co. to the Modern Woodmen of America, a corporation organized under the laws of Illinois, as a fraternal beneficiary society, and A. N. Bort, as its head banker, for all moneys that might be deposited by said Modern Woodmen of America, or A. N. Bort, as its head banker, with said McCutcheon & Co., while said bond was in force. The grounds upon which complainants seek to have such bond canceled and set aside are that they were induced to sign the same by the fraudulent conduct of the Modern Woodmen of America, for whose benefit it is alleged the said bond was in fact made. The defendants removed the suit to this court upon the grounds of the diverse citizenship of the parties, and in this court filed answers to the bill of complaint, denying the allegations of fraud charged therein, averring the validity of such bond, and praying the dismissal of the bill.

The defendant Bort on August 20, 1904, filed a cross-bill against the complainants and his codefendant, the Modern Woodmen of America, and two amendments thereto, the last on October 4, 1904, in which he alleges the execution of the bond, alleged by complainants to have been fraudulently procured from them, as sureties for said E. H. McCutcheon & Co., to him and the Modern Woodmen of America; that he, as the head banker of said Modern Woodmen of America, is the legal custodian of the moneys belonging to said association, and that as such banker he has executed a bond to the Modern Woodmen of America to indemnify it against any loss it may sustain by reason of moneys coming into his custody as such head banker and not accounted for by him; that as such head banker he did in the month of July, 1903, deposit with said E. H. McCutcheon & Co. the sum of \$100,000, the repayment of which was secured by the bond so signed by the complainants as sureties; that the said McCutcheon & Co. are insolvent, and they and complainants have failed to repay or to account to him or to the Modern Woodmen of America for the money so deposited with

said McCutcheon & Co., though due demand has been made upon them to do so; that until the filing of the bill of complaint in this case he had no knowledge or notice that the complainants or either of them were induced to sign the said bond through any fraud or misrepresentations, or that it had been wrongfully or improperly procured from them by the said Modern Woodmen of America. He asks judgment against the complainants, as sureties upon said bond of E. H. McCutcheon & Co., in the sum of \$100,000 and interest thereon, and that if, through any fault not his own, the right to recover on said bond has been impaired or lost, his own liability upon his bond to his codefendant, the Modern Woodmen of America, be construed and determined, and that he be absolved from all liability thereon to the Modern Woodmen of America to the extent of such loss.

To this cross-bill the Modern Woodmen of America on October 4th voluntarily appeared and filed an answer, denying the allegations of fraud in procuring the complainants to sign the bond of E. H. McCutcheon & Co., and averring the validity of such bond and also of the bond of the cross-complainant to it as its head banker. No subpoena has been served upon the complainants as defendants in said cross-bill, and they have not appeared to nor answered said cross-bill, and no evidence has been taken or other proceedings had upon the original bill or the cross-bill.

In this state of the record the complainants on October 4, 1904, moved the court for leave to dismiss their original bill as of course, without prejudice; also upon the ground that their remedy at law is complete, and that this court as a court of equity is without jurisdiction of the subject-matter of the bill. A. N. Bort opposes this motion upon the ground that, if granted, his cross-bill might fall with the original bill, and, if complainants in some other action or suit should escape liability upon their bond because of the fraud of the Modern Woodmen of America in procuring the same, the cross-complainant might be driven to defend an action by the Modern Woodmen of America upon his bond to that society in this or some other jurisdiction.

Whether or not the complainant's remedy for the matters alleged in the bill is complete at law, and not of equitable cognizance, it is not necessary to determine, for the general rule is that the complainant in an original bill has the right at any time before the final hearing, upon payment of costs, to dismiss his bill without prejudice. This rule, however, is subject to the exception that, where such dismissal would be manifestly prejudicial to the defendant, it will not be permitted. The prejudice, however, to the defendant, that will authorize the denial of the complainant's motion to dismiss his bill, must be some plain, legal prejudice, other than a mere prospect of future litigation rendered possible by the dismissal of the bill. *Railway Co. v. Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; *Pullman Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; *Stevens v. Railroad (C. C.)* 4 Fed. 97; *City of Detroit v. Railway Co. (C. C.)* 55 Fed. 569. In the last-named case the rule and the exceptions thereto are stated as follows:

"The general rule is, as contended for, that the plaintiff at any time before decree, perhaps before the hearing, may dismiss his bill as of course upon the

payment of costs; but certainly it cannot be said that the rule is without exception. The exception, stated in general terms, is that it is within the discretion of the court to refuse him permission to do so if the dismissal would work a prejudice to the other parties; and I gather from the cases, compared with each other, that it is not regarded as such prejudice to a defendant that the complainant, dismissing his own bill, may at his pleasure harass him by filing another bill for the same matter. But whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a codefendant, and the dismissal would put him to the expense and trouble of bringing a new suit and making his proofs, anew, such dismissal will not be permitted"—citing *Bank v. Rose* (S. C.) 1 Rich. Eq. 294.

And it is said that if a case does not come within the exception the court is without discretion to deny the motion to dismiss the bill.

The purpose of a cross-bill is either (1) to obtain a discovery in aid of a defense to the original bill, or (2) to obtain full relief to all the parties touching the matters of the original bill. Story's Eq. Pl. par. 389. And it must be made to appear that a settlement of the controversy presented by the cross-bill is fairly necessary in order to enable the court to fully dispose of the matter of the original bill. It is auxiliary to the original suit, and a dependency upon it, and should not introduce any new or distinct matter not embraced in the original bill. Neither may it introduce new controversies between the codefendants to the original bill, the decision of which is in no way necessary to a complete determination of the controversy between the complainant and the defendants over the subject-matter of the original bill. If it does, it is not a cross-bill, but an original bill, and should be dismissed. *Cross v. De Valle*, 1 Wall. 5, 17 L. Ed. 515; *Rubber Co. v. Goodyear*, 9 Wall. 807, 19 L. Ed. 587; *Stuart v. Hayden*, 72 Fed. 402, 18 C. C. A. 618.

Tested by these rules, what is the nature of the pleading filed by the defendant Bort as a cross-bill? In so far as it denies knowledge of the fraud alleged in the original bill in procuring the bond which the complainants seek to have canceled, and avers (by implication at least) the validity of that bond, it is purely defensive to the matters charged in the original bill, and every fact alleged may be shown in defense of that bill. In so far as it asks for judgment against the complainants upon their bond for the amount deposited with *McCutcheon & Co.*, it is purely a legal demand, and entirely within the competence of a court of law. Story's Eq. Pl. (8th Ed.) par. 398. In so far as it seeks to obtain relief from his own bond to the *Modern Woodmen of America*, in the event that complainants should escape liability upon their bond (conceding, without deciding, that this is of equitable cognizance), it introduces new matter in no way germane to the matters alleged in the original bill, and wholly unnecessary to enable the court to fully determine the controversy between the complainants and the defendants to the original bill; and the complainants are not necessary, or even proper, parties to such controversy between the cross-complainant and the *Modern Woodmen of America*, have no interest therein, and it is not properly a cross-bill, but an original bill.

As before stated, no evidence has been taken and no proceedings had which would in any manner affect or prejudice the rights of either the defendants or the cross-complainant, if the original bill should be

dismissed, save that they might be subject to future litigation in regard to the same matter. Whenever the complainant has been denied leave to dismiss his bill, it appears that the suit has progressed so far that the defendant, upon answer or cross-bill, is either entitled to a decree, or the injury or prejudice to him because of the dismissal is of a character that deprives him of some substantial rights concerning the matter of the original bill which would not be available to him in a second suit; and it is uniformly held that mere liability to or the inconvenience of future litigation against him regarding the subject-matter of the suit is not of that character. *Pullman Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; *Stevens v. Railroad (C. C.)* 4 Fed. 97. *Electrical Co. v. Brush Co. (C. C.)* 44 Fed. 602; *Detroit v. Detroit City Ry. Co. (C. C.)* 55 Fed. 579.

The general rule is that the dismissal of the original bill before the final hearing carries with it the cross-bill, in so far as that bill alleges matters that are defensive to the original bill. *Railway Co. v. Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; *Lowenstein v. Gildewell*, 5 Dill. 325, Fed. Cas. No. 8,575; 1 Bates Fed. Eq. par. 386; 2 Daniell, Ch. Pr. (5th Ed.) p. 1553, note 3. As the possible future controversy between the cross-complainant and the Modern Woodmen of America cannot properly be introduced into this suit by a cross-bill, that should be dismissed for this reason alone. *Cross v. De Valle*, 1 Wall. 5, 17 L. Ed. 515; *Rubber Co. v. Goodyear*, 9 Wall. 807, 19 L. Ed. 587; *Dows v. City of Chicago*, 11 Wall. 108, 112, 20 L. Ed. 65; *Stuart v. Hayden*, 72 Fed. 402, 18 C. C. A. 618.

In *Dows v. City of Chicago*, above, it is said, at page 112, 11 Wall., 20 L. Ed. 65:

"The cross-bill filed by the bank presents different features. That institution insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the state, or if the shares were sold, it would be subjected to a multiplicity of suits by the shareholders; and were it an original bill the jurisdiction of the court might be sustained on that ground, but as a cross-bill it must follow the fate of the original bill."

It seems plain that the injury or prejudice to a defendant or cross-complainant that will deny to the complainant his right to a dismissal of the bill cannot be predicated of the present suit. In fact, the alleged cause of action in favor of the cross-complainant, Bort, against the Modern Woodmen of America, will not accrue until complainants have been adjudged not liable upon their bond, because of the alleged fraudulent or wrongful conduct of the Modern Woodmen of America in procuring the same. Should the bill be dismissed, complainants stand *prima facie* liable upon their bond. If the Modern Woodmen of America should attempt to enforce it by legal proceedings, and are defeated because of its wrongful act in procuring it, then, and only then, would the alleged cause of action of the cross-complainant against the Modern Woodmen of America have accrued; and he could then defend an action or suit, if one were brought against him by the Modern Woodmen of America, upon his own bond to it, or bring an action at law or suit in equity against that association, according as his rights against it might be of legal or equitable cognizance; and in no way can the dis-

missal of this suit prejudice him in the defense of such an action or in the prosecution of such a suit. The case does not, therefore, seem to be within any of the exceptions to the general rule that will warrant the court in denying to complainants the right to dismiss their bill.

The motion of complainants for leave to dismiss their bill is therefore granted, and the bill and cross-bill will both be dismissed, without prejudice, upon payment of costs by complainants.

It is so ordered.

AMERICAN ALKALI CO. v. KURTZ.

(Circuit Court, E. D. Pennsylvania. January 20, 1905.)

No. 49.

1. CORPORATIONS—STOCKHOLDERS—LIABILITY.

The real owner of corporate stock standing by his procurement in the name of a dummy, and never having been in his own name on the books of the company, is liable to be charged as a shareholder with either the statutory liability for debts or for unpaid assessments on the stock.

[Ed. Note.—Stockholders' liability to creditors in equity, see notes to Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 23 C. C. A. 315; Scott v. Latimer, 33 C. C. A. 23.]

2. SAME—AGENTS—UNDISCLOSED PRINCIPAL—LIABILITY.

The rule that an agent of an undisclosed principal is equally liable with the principal has no application where there is no contract relation induced and entered into between the plaintiff and the agent.

3. SAME—BROKERS—LIABILITY—EVIDENCE.

A stock subscription contract provided that after payment of 20 per cent. of the par value of the stock the subscribers should no longer be liable for any balance on their subscriptions, except on such shares as stand of record on the books of the company in their names at the time any subsequent assessments were made, but that the holders of such shares of record at that time should only be liable therefor. The corporation's charter also provided that after payment of \$10 per share on the preferred stock, the subscribers should not be liable for any balance of their subscription, except on the shares standing of record on the company's books in their names, etc., at the time subsequent assessments were made. *Held*, that where, after the issuance of certain shares of preferred stock on which the initial payment of 10 per cent. had been made, the shares were transferred by defendant, a broker, who purchased the stock for others, to one M., who was the corporation's transfer clerk, as a mere dummy, and defendant was not requested to inform the corporation as to the identity of the real owners of the stock, he was not liable for subsequent assessments levied thereon.

Judgment on a Case Stated.

Burr, Brown & Lloyd, for plaintiff.

Rudolph M. Schick, for defendant.

HOLLAND, District Judge. This is a suit by Arthur K. Brown, surviving receiver of the American Alkali Company, against the defendant, for an assessment of \$2.50 a share on 3,700 shares of preferred stock of the American Alkali Company standing in the name of H. C. Magee on the books of the company now and at the time the assessment was made. The facts in the case are agreed upon in a case stated, which are as follows:

The American Alkali Company is a corporation organized under the laws of the state of New Jersey April 20, 1899, with a capital stock of \$30,000,000, of which \$6,000,000 is preferred, of a par value of \$50 per share. This preferred stock was all subscribed for and issued to subscribers who paid the first 20 per cent. installment, which was then issued and sold to the public subject to assessments of 10 per cent. each for the balance due upon 30 days' notice. On September 12, 1901, a call of \$10 per share on the holders of the preferred stock of the plaintiff company of record on September 16, 1901, was made according to law, the first installment of \$2.50 per share of which was made payable November 11, 1901. Subsequently, on September 9, 1902, Henry I. Budd, Jr., and Arthur K. Brown were appointed receivers of said company, and duly qualified. The receivers, on November 14, 1902, were authorized by the District Court of New Jersey to proceed against the preferred stockholders to collect the first installment, in consequence of which this suit was brought by the surviving receiver against the defendant.

One of the terms of the subscription agreement was as follows:

"Upon payment of the first installment of 20% the full paid certificates of common stock and partially paid certificates of preferred stock, setting forth that 20% has been paid thereon, shall be delivered to the subscribers hereto and as subsequent installments are paid they shall be endorsed on the latter.

"Provided, however, that after the payment of the 20% provided for above amounting to a total of \$10 per share, the subscribers hereto shall no longer be liable for any balance on their subscription excepting upon such shares as shall stand of record on the books of the Company in their names, at the time any subsequent assessments or calls are made, but the holders of such shares of record on the books of the Company at that time, and they only shall be liable for the same."

The charter or certificate of incorporation contained the following clause:

"After payment of \$10 per share on the preferred stock, the subscribers thereto shall not be liable for any balance of their subscription excepting upon such shares as shall stand of record on the books of the Company in their names at the time when any subsequent assessments or calls are made, but the holders of such shares of record on the books of the Company at that time and they only shall be liable for the same."

The defendant is a banker and broker, doing business in the city of Philadelphia, and on November 17, 1900, was in possession of 37 certificates, representing 100 shares each, of the preferred stock of the plaintiff corporation, registered on the books of the company in the names of various persons other than the defendant, each certificate accompanied with a power of attorney to transfer the same, duly executed by these various persons in whose names they were registered, but in blank as to the name of the attorney who was to execute the transfer. The stock, or any part of it, represented by these certificates, was not the property of the defendant, but all belonged to various other persons, and the defendant was in possession of the certificates as agent for various persons who were the owners thereof. On this date the defendant, acting therein as an agent for and on behalf of the various persons who owned the stock, delivered to the officers of the defendant company the certificates

for 3,700 shares, together with the power of attorney to transfer the same, and requested that they be transferred, and new certificates therefor be issued to H. C. Magee, which was accordingly done, and the said shares stood of record on the books of the company in his name, and so continued from the 17th day of November, 1900, to the 16th day of September, 1901. At the time the shares were transferred by the defendant he did not inform the American Alkali Company of the names of the various persons to whom the stock belonged, or for whom the defendant acted on requesting the transfer thereof to H. C. Magee, and he (the said defendant) was not asked to so inform the company. Magee, in becoming the holder of record of the said shares of stock, acted at the request of the defendant, and had no ownership, interest, or property in the shares, and at this time was the clerk of the said American Alkali Company for the transfer of stock. Demand was made to pay this assessment, and payment was refused by defendant.

Upon these facts, if the court be of the opinion that the defendant is liable to pay the said assessment, then judgment be entered for the plaintiff for the sum of \$9,250, with interest from December 11, 1901; but, if not, then judgment be entered for defendant. The costs to follow the judgment, and either party reserves the right to sue out a writ of error or appeal therein.

Upon this statement of facts the question is whether or not the agent of an undisclosed principal, who places stock certificates in the name of a dummy, is liable for assessments thereon. Magee was selected as the record owner by the defendant for an undisclosed principal. The defendant has never been requested by the plaintiffs to disclose the real owner, and it does not appear that he has ever refused. There is no doubt about the fact that in law both Magee and the real owner are liable for the assessments sought to be recovered against the defendant in this suit. The cases are uniform in holding that the real owner of stock, standing by his procurement in the name of a dummy, and never having been in his own name on the books of the company, is liable to be charged as a shareholder with either the statutory liability for debts or for unpaid assessments upon the capital stock. *Pauley v. State Loan & Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844; *Dunn v. Howe*, 107 Fed. 849, 47 C. C. A. 13; *Houghton v. Hubbell*, 91 Fed. 453, 33 C. C. A. 574; *Davis v. Stevens*, 7 Fed. Cas. 177; *Case v. Small* (C. C.) 10 Fed. 722. There are decisions too numerous to mention in the state courts to the same effect, but my attention has not been directed to a case, and I have not been able to find a case, which decides that, where stock is placed in the name of either an agent, trustee, or dummy, by an agent of an undisclosed principal who is the real owner, there is any liability for unpaid assessments on the stock on the part of the agent of the undisclosed owner in so registering the stock.

It is contended by the plaintiffs that the defendant is estopped from denying liability because he acted as agent in procuring the issuance of the stock in the name of Magee, upon the principle that the agent of an undisclosed principal is equally liable with the prin-

cipal. This is a salutary principle of law enforced against an agent acting for an undisclosed principal in cases where his action is such as to induce the other party to extend a credit on his account; or where one enters into a contract with the agent without knowing him to be such, upon discovery of the principal he may elect between them which to sue; and in contracts the rule is the same where he states himself to be an agent without disclosing the name of his principal. But this principle has no application where there is no contract relation induced and entered into between the plaintiff and defendant, as in this case. Kurtz appeared as agent for the actual owner of the stock, and, without misleading the plaintiffs or practicing any deception or fraud upon them, selected their own transfer clerk, in whose name he placed the certificates, with the permission of the corporate officers of the plaintiff company, with full knowledge on their part of the provision in their charter, and issued the certificates accordingly, knowing at the time that the defendant was not the owner of the stock.

While the case of *Bean et al. v. Alkali Company* (recently decided by the Circuit Court of Appeals in this district) 134 Fed. 57, is not directly in point, the reasoning in the case is decisive of the question here involved. Bean signed the subscription agreement for 9,700 shares of this preferred stock, and at the bottom of the subscription he made a memorandum as follows: "Make cts. 100 shs. each name of Geo. W. Mactague, 521 Morris St.," which was accordingly done. Mactague was the dummy and record owner of this stock when suit was brought against Bean & Co. for the first installment of the assessment—the same assessment involved in the case at bar—and it was alleged in the statement that "the shares were placed in the name of Mactague for the convenience and accommodation of the defendants for the purpose of concealing the real ownership thereof, escaping liability for possible assessments, or for other reasons unknown to the plaintiffs; and that Mactague acted in the premises at the request of and on behalf of the said defendants, but without any interest whatever in the said shares." Bean & Co. disputed their liability and denied ownership of the stock standing in the name of Mactague, and offered to prove that they were brokers acting for their clients, who were real owners, to whom they had transferred the certificates, and that they had no interest in the stock whatever. The court below struck out this evidence, and directed a verdict for the plaintiff, which was held to be error. The Circuit Court held that the agent was entitled to show that he was not the real owner of the stock that stood in the name of the dummy, Mactague (a fact which is admitted in the case at bar), the logical result of which is that, if the jury believed that evidence, and found the fact offered to be proven, to wit, that the agent was not the owner of the stock, then the verdict should have been in his favor. In view of the provision above set forth in the charter of the plaintiff company, and the fact that they knew Kurtz was not the owner of this stock at the time he placed it in the name of Magee, and that he was acting only for his clients, who were customers of his, and they so registered the stock without any ob-

jection or inquiry whatever from him at the time, they cannot now be permitted to hold him responsible for these assessments. *Bean v. Alkali Co.*, supra.

The court being of opinion that the defendant is not liable, judgment is entered in his favor. Costs to follow the judgment, and either party to have the right to sue out a writ of error and appeal herein.

In re NEELY.

(District Court, S. D. New York. August 5, 1904.)

1. **BANKRUPTCY—DISCHARGE—STATUTES—AMENDMENT.**

Bankr. Act July 1, 1898, § 14b (30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3427]), as amended by Act Feb. 5, 1903, § 4, subd. 5 (32 Stat. 797, c. 487 [U. S. Comp. St. Supp. 1903, p. 411]), providing that a bankrupt's discharge shall be denied if the bankrupt in voluntary proceedings has been granted a discharge in bankruptcy within six years, is not retroactive, but applies to cases begun after amendment took effect.

2. **SAME—PREVIOUS DISCHARGE IN VOLUNTARY PROCEEDINGS.**

Bankr. Act July 1, 1898, § 14b (30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3427]), as amended by Act Feb. 5, 1903, § 4, subd. 5 (32 Stat. 797, c. 487 [U. S. Comp. St. Supp. 1903, p. 411]), provides for a bankrupt's discharge unless he has in involuntary proceedings been granted a discharge in bankruptcy within six years. *Held*, that such amendment applied to voluntary as well as involuntary proceedings, and that a bankrupt having been discharged in voluntary proceedings within six years could not receive a second discharge in involuntary proceedings.

3. **SAME—DEEDS—ASSETS—FAILURE TO SCHEDULE—INTENT—FRAUD—EVIDENCE.**

Where a bankrupt failed to schedule a piece of real estate of small and uncertain value, and under the advice of his attorney omitted from his schedules a debt which was a family affair and never intended to be enforced, such acts were insufficient to justify a finding of fraudulent concealment warranting the withholding of a discharge.

On Hearing of Application for a Discharge.

The following opinion of Special Commissioner Dexter states the case:

The issues on specifications of the grounds of objection to the bankrupt's discharge having been referred to me as special commissioner to ascertain and report the facts, and the respective counsel for the bankrupt and the objecting creditors having appeared before me on due notice, and the proofs offered by them respectively having been heard and considered, and a copy of the testimony returned herewith, and the matter having been submitted by George C. Coffin, Esq., attorney for the bankrupt, and by Henry S. Sanford, Esq., attorney for the objecting creditor, and due deliberation having been had, I hereby report that the facts relevant to the objections are as follows:

On July 28, 1903, upon the petition of three creditors, Frank Tennyson Neely was adjudicated an involuntary bankrupt in this proceeding, he consenting thereto. On August 24, 1903, he filed his schedules, showing a total indebtedness of \$12,481.12, and assets claimed to be of the total value of \$8,527.63. At the first meeting of creditors Mr. Marshall S. Hagar was appointed trustee, and the bankrupt fully examined. On September 28, 1903, the bankrupt was granted leave to file an amended schedule, setting forth, among his liabilities, a judgment for \$111.90 obtained by one Walker, and a certain claim alleged to be due Hurlburt, Hatch & Co. on a stock transaction. No further amendments were applied for.

The examination developed the fact that the bankrupt had been previously discharged in voluntary proceedings (No. 1,608), petition filed October 21, 1899; discharge granted February 4, 1901. The trustees appointed in the previous proceeding were discharged by order of Mr. Referee Wise, August 22, 1902. Specifications in opposition to the bankrupt's discharge were filed on behalf of William T. Hallett and the Stanley Works, respectively, which in substance oppose the discharge: (1) On the ground that the bankrupt had been granted a discharge in voluntary proceedings within six years; (2) charging sundry false oaths with reference to his failure to schedule an indebtedness to one Mary R. Cooke, and an interest in certain Nebraska real estate, and fraudulent concealment with reference to said property.

The first ground presents an issue of law, which will be considered before proceeding to discuss the remaining specifications, which rest upon questions of fact. The first-mentioned specification is as follows: "II. That such application should not be granted because of the following facts constituting an additional ground, which the undersigned, on information and belief, charges to be true, viz.: That on or about the 21st day of October, 1899, said Frank Tennyson Neely was, upon his voluntary petition filed in this court, duly adjudged a bankrupt; and that thereafter, and on the 29th day of January, 1901, said Frank Tennyson Neely was granted a discharge in said proceedings by this court; and that thereafter, and on or about the 16th day of July, 1903, said Frank Tennyson Neely caused to be filed a petition in bankruptcy against him; and thereafter, and on the 28th day of July, 1903, said Frank Tennyson Neely consented to be adjudged a bankrupt; and thereafter, and on or about the 18th day of November, 1903, and within six years since his previous discharge in bankruptcy, said Frank Tennyson Neely presented to this court a petition praying for a discharge from his debts in the above-entitled proceeding, contrary to provisions of section 14, subdivision 'b,' of the act of Congress in relation to bankruptcy."

Assuming the facts to be as stated in the specification, the interesting point is raised by the bankrupt that the specification is insufficient in law to defeat the discharge, for the reason that the amendatory act of February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 409], (1) is not retroactive in respect to any of the added subdivisions of section 14 (32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411]); and (2) in any event has no application to an involuntary proceeding.

So far as my examination goes, the questions involved have not as yet received judicial construction, and the subject must be considered as a case of first impression.

(1) Are the amendments to section 14 retroactive? It is a settled principle that no act of a bankrupt committed prior to the bankruptcy law is available as an objection to his discharge. Hence the decisions, both under the act of 1867 and the act of 1898, agree that such offenses as the concealment of books or assets prior to the enactment of the bankruptcy law cannot bar a discharge. *In re Webb*, 3 Am. Bankr. R. 386, 98 Fed. 404; *In re Shorer*, 2 Am. Bankr. R. 165, 96 Fed. 90; *In re Lieber*, 3 Am. Bankr. R. 217; *In re Moore*, Fed. Cas. No. 9,751; *In re Hollensshade*, Fed. Cas. No. 6,610; *In re Delavan*, Fed. Cas. No. 3,758.

The concealment of assets is made an offense punishable by imprisonment under section 29 (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]), and is necessarily limited to acts committed subsequent to the act. The destruction or concealment of books must have been "in contemplation of bankruptcy"; a false oath must have been in relation to "a proceeding in bankruptcy." By the letter and spirit of the act nothing could be made an offense or objection to a discharge which took place prior to the passage of the act. Furthermore, discharge proceedings are quasi criminal, in the strict construction placed on them, and the reluctance of the courts to refuse a discharge (except upon a clear preponderance of evidence) which may result in convicting the bankrupt of a crime. In all such cases the courts have very properly held that no retroactive effect can be given to the discharge features of the law.

But the reasoning does not apply with the same force to an amendment creating a new ground of objection to a discharge, for a bankruptcy law is already in existence, and the amendments are engrafted upon an existing statute. Restrictions upon discharge affect the remedy only. The right to a discharge is not an absolute vested right. It was not originally a feature of bankruptcy legislation either in this country or in England. The fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property equally among his creditors. Originally this was its only purpose, and it was confined to traders as a purely commercial regulation. Latterly a second element was added in the provisions for discharge upon such terms and conditions as the act may provide. In *re Gutwillig*, 1 Am. Bankr. R. 78, 90 Fed. 475. There is therefore no constitutional right to a discharge, and regulations concerning discharge do not make the law unconstitutional. *Hanover National Bank v. Moyses*, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, 8 Am. Bankr. R. 1. Under the act of 1867, as amended by the act of June 22, 1874, it was held that the new section 9 (Rev. St. U. S. § 5112a), relieving involuntary bankrupts from the conditions affecting other discharges, was not retrospective in the legal sense, and applied to pending cases. In *Re Griffiths*, Fed. Cas. No. 5,825, Judge Lowell says: "A law which discharges debts already contracted may well be called retroactive; and this law, if retroactive at all, would be not merely as to cases begun, but as to contracts entered into before its passing. But it is well settled that a mere modification of the condition upon which a discharge shall be granted to bankrupts is not retroactive." He refers approvingly to the language of Wilde, J., in *Re Lane*, 3 Metc. (Mass.) 213, where the learned judge states, construing the Massachusetts insolvency act: "It is clear that the appellant had no vested right to a discharge at the time of filing his petition. Such a right could be acquired only by proving, at the time of applying for a certificate of discharge, that he had in all respects complied with statutes 1838 and 1841 (the latter of which was passed after he had been adjudged an insolvent), by which only a right could be acquired. The latter statute, therefore, is not to be considered a retrospective act, disturbing vested rights, but as altogether prospective in its operation, although it (the discharge) might depend, in some cases, upon acts done before it took effect." Judge Lowell further states: "This law neither creates new frauds nor relieves the bankrupt from the consequences of any which he has committed, but merely lightens somewhat the arbitrary conditions before imposed on honest bankrupts as a preliminary to obtaining a certificate. Such a law is always held to be remedial." In *Re King*, Fed. Cas. No. 7,781, Miller, Circuit Judge, stated: "I think the general rule is that such remedial provisions do apply to pending cases, unless there is something to show that the Legislature intended to exclude them, and I can discover no such intention in the ninth section, or any part of the act of 1874."

The decisions under the amendatory act of 1874 are not uniform, and are of uncertain authority perhaps. But the reasoning upon which they are based seems to warrant the conclusion that, if an amendatory law is silent as to its effect, it, generally speaking, affects all pending proceedings, and that the restrictions and conditions upon which discharges may be granted are remedial only. By section 19 of the amendatory act of 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 801), its provisions are expressly stated as not applying to existing cases. If Congress can change the conditions with respect to discharges, and make them applicable to pending cases, a fortiori there can be no question of retroactive legislation in regard to cases begun since the amendment of February 5, 1903, as in the case at bar. I am therefore of the opinion that the amendment contained in subdivision 5 of section 14b is not objectionable on the ground that it is retroactive legislation.

(2) Is the amendment in question applicable to subsequent involuntary proceedings? Here, again, I find no adjudicated case. Mr. Referee Hotchkiss, in the fourth edition of *Collier on Bankruptcy* (page 174), states that "as originally drafted it referred to both voluntary and involuntary bankruptcy. The Senate, however, so modified it that this objection is available only to creditors of voluntary bankrupts." But Mr. Brandenburg states

with less ambiguity in his work on Bankruptcy, third edition (section 371): "The fact that the bankrupt has been adjudged a voluntary bankrupt will not prevent involuntary proceedings from being instituted at any time, though the discharge on the involuntary petition would not be granted within the six years. The purpose of the act is simply to prevent the frequent filing of voluntary petitions."

Mr. Hotchkiss would seem inclined to the view that creditors of involuntary bankrupts cannot raise the objection of prior discharge, while Mr. Brandenburg confidently asserts that discharges in involuntary proceedings cannot be granted within six years after a discharge once granted in a voluntary proceeding. With such diversity of opinion on the part of recognized experts, I approach the subject with much diffidence as to the value of the conclusions which I have reached.

The history of the amendment may be instructive. The "Ray Bill," so called, incorporated certain amendments recommended by the referees in bankruptcy, and as originally drawn provided that a second discharge be refused in all cases where a previous discharge had been granted within six years. The amendment proposed was: "Sec. 14b. * * * Or (7) been granted a discharge in bankruptcy within six years." Amended by the Senate, the act as passed was made to read: "Or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years." The only ambiguity of construction lies in the relation of the words "in voluntary proceedings." On the one hand, it is contended that if the first proceeding is voluntary a second discharge must be denied, whether the second proceeding is voluntary or involuntary. If such is the law, this bankrupt's petition must be denied. On the other hand, the learned counsel for the bankrupt argues with much force that the intention of Congress was merely to prevent the mischief of repeated voluntary bankruptcies on the part of failing debtors, and that this reason for the amendment does not exist in cases of involuntary bankruptcies, where the creditors and not the bankrupt are responsible for initiating the proceedings, and they cannot, on equitable principles, be heard to object to an application for a discharge which they themselves made necessary. The learned counsel calls attention to the use of the plural "proceedings" as necessarily referring to two proceedings, both of them voluntary.

Upon questions of construction reference to the provisions of the former act are often enlightening. Under the act of 1867 (section 30) no person who shall have been discharged, and shall afterwards become bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay 70 per cent., without the assent of three-fourths in value of his creditors. This was amended by section 33 (as amended by act of July 27, 1868), which provided that no discharge shall be granted to a debtor whose assets do not pay 50 per cent. without the assent of a majority of his creditors. By section 9 of the act of June 22, 1874, a new section was added (Rev. St. § 5112a), providing that in cases of involuntary bankruptcy the provisions of the act requiring the payment of any proportion of the debts or the assent of any portion of the creditors as a condition of discharge shall not apply. There can be no doubt that it was the intention of the act of 1867 that involuntary bankrupts were excepted from the restrictions placed upon voluntary bankrupts. But does the same intention appear in the present act?

The amendatory act of 1903 is silent where the acts of 1867 and 1874 were explicit. It is a familiar canon of construction that language will not be given a forced or extended meaning merely to correct supposed errors, or because it leads to incongruous or unexpected results. *People, &c., v. North*, 72 N. Y. 124, 133; *Tompkins v. Hunter*, 149 N. Y. 123, 43 N. E. 532. Language is to be interpreted according to its natural and most obvious import. *McCluskey v. Cromwell*, 11 N. Y. 593. Such construction only will be departed from to avoid manifest absurdity, or to reconcile it with an unquestionable intent appearing elsewhere in the statute. *People, &c., v. Wemple*, 115 N. Y. 307, 22 N. E. 272.

There can therefore be no deductions from the policy of the former act, unless the language of the present amendment indicates similar intent. If

Congress had intended to exempt involuntary bankrupts from the restriction as to a prior discharge in voluntary proceedings, it could have used language clearly indicating such purpose. It seems to me a forced construction of language to argue from the use of the plural "proceedings" an intent to qualify the words "discharge the applicant" in section 14b so that it should read: "In voluntary proceedings, discharge the applicant unless he had in voluntary proceedings been granted a discharge." Such an interpolation would, strictly speaking, prevent the granting of discharges in involuntary cases at all. Rather must we construe the amendment in its natural sense and in its natural collocation. The use of the plural "proceedings" is without significance, as the singular and plural of the word are used interchangeably in the act, and the canons of construction in section 1 (subdivisions 29, 30) negative any presumptions from the use of the singular or plural numbers.

The collocation of the words "in voluntary proceedings" naturally qualifies what follows, rather than what precedes. Read in this light, the section, so far as applicable to the case at bar, declares: "(b) The judge shall hear the application for a discharge * * * and discharge the applicant unless he has (5) in voluntary proceedings been granted a discharge in bankruptcy within six years." He may have been discharged in involuntary proceedings more than once; but that would not prevent his discharge in subsequent proceedings, voluntary or involuntary, if otherwise entitled thereto. But having once been granted a discharge in proceedings instituted by himself, and to serve his own purposes, he precludes himself from again seeking the benefit of a discharge in voluntary or involuntary proceedings for a period of six years.

It has been already pointed out that the right to a discharge is not a vested right. It is a mere privilege granted to the bankrupt under certain conditions, which Congress may alter from time to time, or Congress may even entirely deprive the bankrupt of the right to a discharge without violence to its constitutional powers over bankruptcies. The justice or injustice of doing so is for legislative consideration, and not for judicial comment. The inconsistency of allowing repeated discharges in involuntary proceedings, while restricting them in voluntary proceedings, is no greater than the restrictions which except certain classes of persons from the involuntary features of the act. It is the declared policy of Congress and within its constitutional powers. What was probably aimed at was a check on the repeated filing of voluntary petitions, which still constitute by far the larger number of bankruptcy proceedings. Once discharged on his own petition, a bankrupt cannot again obtain a discharge for a period of six years.

The law prevents his discharge, even if the proceedings are involuntary, for it will not allow that to be done by indirection which cannot lawfully be done directly; otherwise it would be a simple expedient for the bankrupt to act in such a way as to force his creditors to put him into a bankruptcy a second time, or to collusively procure their co-operation for that purpose, and thus evade the plain terms of the statute. I therefore report and recommend that the second specification is sustained, and the bankrupt's discharge should be refused.

The remaining specifications can be briefly disposed of. In 1885 the bankrupt, then a resident of Chicago, bought of John R. Kennedy three town lots in the town of Alma, Harlan county, Neb., described as Nos. 11 and 12, in block 15, in Brown's addition, and 14 in block 10, in original town of Alma, for an expressed consideration of \$350, but for which the bankrupt testified that he gave the owner a finger ring, value not stated. He sold lots 11 and 12 in 1887 for \$250, but the record title of No. 14 still remains in him, although he had supposed that he had sold this lot too. In 1890 the bankrupt purchased of Kennedy four additional lots in the same town, known as Nos. 13, 14, 15, and 16 in block 11, Brown's addition, the record title to which still remains in him. The consideration expressed is \$1,350, but the bankrupt testifies that he gave the owner in exchange therefor a piano, value not stated. No reference to these lots appears in his schedules,

and this omission is claimed to constitute a false oath and fraudulent concealment.

In the previous bankruptcy proceedings (No. 1608) the four lots last mentioned were scheduled under Schedule B (1), real estate at an estimated value of \$1,200. No mention was made of the remaining lot 14 in the original town of Alma, as he did not remember that he owned it. The property, however, was apparently considered of such slight value that it was not included in the inventory and report of the appraisers appointed in that proceeding, and no record or transfer was made to formally vest the record title in the trustees. Upon their discharge no mention was made of any real estate as undisposed of. The bankrupt retained or procured the return of the deeds, and considered himself revested with title; for he subsequently delivered the deeds to one Mary R. Cooke, as he testifies, "for money which I had borrowed in excess of the value of the lots." He further testifies: "A deed was to be executed when I could pay the taxes, * * * not knowing what the value of the property might actually have been at that time or that it might improve and become of value." No deed was in fact executed. He had borrowed from Mrs. Cooke some \$700, but did not schedule the debt, as it was a personal transaction, not appearing on his books, and for the further reason that his relations to Mrs. Cooke were of a filial nature, and he considered the obligation a mere moral one, and not a legal debt. No claim therefor was filed by Mrs. Cooke. The bankrupt further claims to have disclosed this loan to his counsel, and to have been advised by him that under the circumstances it was unnecessary to refer to it in his schedules. The present value of the lots appears to be small—not exceeding \$25 each, or \$100 for all, and incumbered with taxes.

The conduct of the bankrupt in not disclosing this transaction is lacking in frankness, and his explanations not altogether satisfactory. But I cannot find from the circumstances that he concealed the property or made a false oath either knowingly or fraudulently. In regard to Mrs. Cooke's claim it was apparently a family affair, and never intended to be enforced. He disclosed the fact to his counsel, and acted on legal advice in omitting the claim from his schedules. Such advice tends to deprive the alleged false oath of its element of fraud. *In re Berner*, 4 Am. Bankr. R. 383; *In re Blalock*, 9 Am. Bankr. R. 266, 118 Fed. 679.

As to the Nebraska lots, the bankrupt did not, in fact, own the lots. The title, so far as appears, is still in the former trustees, and as soon as he was informed of the status of the lots he tendered the deeds to the trustee in the present proceeding, they having been surrendered by Mrs. Cooke. His disposal of the deeds is not consistent with his explanations that he did not consider that he owned the lots; but on considering the circumstances affecting the title, and their nominal value, I am not disposed to attach undue importance to this transaction.

In view of the conclusions I have reached upon the question of the prior discharge, I give the bankrupt the benefit of the doubt as to his intent in the above transaction. I therefore report that the specifications, other than that previously considered, are not sustained, but that, having received a discharge in a voluntary proceeding within six years, the present application should be denied.

George C. Coffin, for bankrupt.

Henry S. Sanford, for objecting creditor.

THOMAS, District Judge. Report confirmed.

THE AMIRAL CECILLE.

THE MULTNOMAH.

(District Court, D. Washington, W. D. January 10, 1905.)

No. 455.

1. ADMIRALTY—SUIT IN REM—DAMAGES FOR DETENTION OF LIBELED VESSEL.

Where a suit in rem for collision was brought in good faith, and there has been no abuse of the court's process, the respondent vessel cannot maintain a cross-libel for damages caused by her seizure and detention.

2. COLLISION—STEAMER AND ANCHORED BARK IN FOG—VIOLATION OF HARBOR REGULATIONS.

A steamer which came into collision with an anchored bark in passing out of the harbor at Tacoma in a dense fog *held* in fault for her failure to exercise the extraordinary care required of her under the circumstances, in view of the fact that there were a large number of vessels in the harbor at all times, it appearing that she was allowed to deviate from her true course through the channel, which would have taken her past the bark in safety. The bark also *held* in fault for being anchored, without a permit from the harbor master, in a part of the harbor where anchorage without such permit was prohibited by the harbor regulations.

3. SAME—IMPROPER ANCHORAGE—LIABILITY FOR ACT OF TUG.

Where a tug acting as local pilot for a bark anchored her in a harbor in violation of a reasonable harbor regulation, the bark is responsible for the act, and liable for a resulting collision.

4. SAME—NEGLECT OF HARBOR MASTER TO ENFORCE REGULATION.

The fact that a harbor master, whose permit was required to authorize a vessel to anchor in a certain part of the harbor, saw a vessel anchored without a permit within the prohibited zone, and made no objection, or that he habitually neglected to enforce the regulation, is not the equivalent of a permit, and does not exonerate the vessel from liability for the consequences of its violation.

In Admiralty. Cross-libels to recover damages for injuries to the Multnomah, caused by colliding with the French bark Amiral Cecille in Tacoma Harbor in a dense fog; and for the loss to the owner of the bark from her detention by the marshal pursuant to a writ of attachment in this suit. Decision on the merits in favor of the libellant for half damages and costs. Cross-libel dismissed, with costs.

James M. Ashton, J. W. Robinson, and Frank H. Kelly, for libellant.
Hughes, McMicken, Dovell & Ramsey, for cross-libellant.

HANFORD, District Judge. The owner of the steamboat Multnomah commenced this suit to recover damages for injuries to her hull and cabins caused by the steamer colliding with the French bark Amiral Cecille under the following circumstances: The Multnomah is a carrier of passengers and freight, making regular trips on a route between Olympia and Seattle via Tacoma, her berth at Tacoma being on the west side of a dredged-out waterway 600 feet wide, which is one of the improvements of Tacoma Harbor, and it was necessary for her to enter the waterway twice each day in making her daily runs. An ordinance of the city of Tacoma prescribing harbor regulations contains a section prohibiting the anchoring of vessels within a prescribed zone, including the waterway and the entrance thereto, without a per-

mit in writing from the harbor master, the manifest object being to maintain an unobstructed fairway for vessels going in and out of the waterway. For the convenience of shipping, the city of Tacoma provided several buoys in the harbor for mooring ocean going vessels, and the ordinance referred to contains a section authorizing ships to moor at said buoys by permission of the harbor master and upon payment of a fee of \$10 for 15 days' use; one of said buoys, commonly called the "Government Buoy," being situated within the zone in which vessels are prohibited from anchoring without a permit, and which, for convenience, will be hereafter referred to as the "prohibited zone." On the 9th day of November, 1904, the bark, having completed the taking on board of her cargo from her berth in the waterway, was towed by a local tug to the place where she was anchored at the time of the collision on the evening of the following day, the towage service being performed under the personal direction of the manager of the tug-boat company, and the bark dropped her anchor by his direction at a place selected by him within the prohibited zone near the location of the government buoy. He was influenced to some extent, if not entirely, in choosing that location, by the prevalence of a dense fog which settled down upon the harbor while the bark was being towed out of the waterway, and by finding some parties with a pile driver engaged in lifting the anchor and chain of the government buoy, which had become severed and drifted away, and by the further facts that vessels had theretofore frequently anchored within the prohibited zone without permits from the harbor master, and that the city authorities habitually neglected to enforce the regulation prohibiting vessels from anchoring there without permits. The fog continued to envelop the harbor and surrounding country from the time the bark anchored until the collision, with the exception of a short interval during the afternoon of November 10th, when it lifted so that the bark was visible to people on the docks and wharves, and during that time she was noticed and her position observed by the harbor master, who, as a witness in this case, testified that he considered her to be in a safe position, and took no steps to have her removed. While the bark was at anchor in the position described, and before the happening of the collision, the Multnomah passed her, in making her regular runs, five times, without coming near enough to raise an alarm of danger from collision on either vessel, and according to their testimony the officers of the Multnomah did not see her on either occasion, nor locate her position. The accident happened at about 7:15 p. m., as the Multnomah was coming out of the waterway and being steered towards Brown's Point on her run from Tacoma to Seattle, the starboard bow of the Multnomah striking the starboard bow of the bark a glancing blow, and as she continued forward with her momentum she was raked and her cabins damaged by the bark's cathead.

The libel charges that the bark was in fault and responsible for the collision, because (a) she failed to give warning of her presence by ringing a bell or otherwise signaling, as it was her duty to do when she could not be seen on account of prevailing fog; (b) she was anchored, without necessity, in the fairway, without a permit from the harbor master of Tacoma, in violation of the harbor regulations prescribed by

a city ordinance; and (c) she was anchored, without necessity, in a navigable channel, in violation of the act of Congress of March 3, 1899, c. 425, § 15, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543]. The answer makes an issue as to all of the faults charged by the libel, and places the blame wholly upon the Multnomah, on the ground that her officers and crew were negligent, and that she was going at a dangerously high rate of speed when it was impossible to see objects at any distance ahead of her. The bark was not injured, but in the cross-libel damages are claimed on account of the detention of the bark by her seizure under the process of this court issued in this case at the instance of the libelant. The court being satisfied that the suit was commenced in good faith, and that there has been no abuse of judicial process, the cross-libel has been heretofore dismissed, under the rule stated in the case of Portland Shipping Company v. The Alex Gibson (D. C.) 44 Fed. 371. The libelant having the affirmative side, and the Multnomah being herself the active force which caused the injury, she must sustain the burden of proof to establish the legal liability of the bark for damages; and, this being so, it is proper to first consider the conduct of the Multnomah, and determine whether she is blameworthy for the accident. By reason of the peculiar conditions of the weather at the time, and the large number of vessels at all times afloat in the harbor, it was the duty of the captain and crew of the Multnomah to be vigilant and cautious to an extraordinary degree to avoid accidents in operating the steamer. As she had passed and repassed the bark at anchor several times in going in and out of the waterway without a collision, it is certain that the bark, located as she was, did not necessarily constitute such an obstruction of the entrance to the waterway as to prevent ingress and egress in safety by vessels navigated with the required degree of extraordinary prudence. It is extremely difficult to determine satisfactorily the precise position of the bark on account of the conflicting evidence given by the different witnesses, but, assuming her position to have been as indicated by reference to the figures "H. 2" on the map introduced in evidence and designated as "Libelant's Exhibit 1," and accepting as true the testimony of the Multnomah's captain to the effect that in backing and curving to get away from her berth and out of the waterway just previous to the collision, and in taking her course to pass Brown's Point, the Multnomah described the lines indicated upon libelant's Exhibit 1 by the letters "m, m, m, m, m," and assuming that her course towards Brown's Point is correctly indicated upon said map, I must conclude that she was not steered with the degree of extraordinary care and precision which the exigencies of the situation made necessary; for, if she had been held steadily upon the true course towards Brown's Point from the time of coming to the position indicated by the fifth letter "m," she would have passed the ship without harm. Therefore it is a fact proven by the evidence, most favorable to the libelant, that the Multnomah was permitted by her helmsman to swing too far to the eastward, instead of being held upon the course which her compass must have indicated as her habitual course towards Brown's Point. By clear and convincing evidence it has been proved to my satisfaction that the equipment of the bark included an excellent bell, and that, instead of the bark being

in fault by reason of failure on the part of her officers and crew to give warning of her presence, as the libel charges, said bell was rung faithfully at short intervals during the time when the Multnomah was in the vicinity preceding the collision, and that, if they had been alert, the officers and crew of the Multnomah could not have failed to hear the bell and determine the location of the bark in sufficient time before the collision to have enabled them to keep the Multnomah away from harm by handling her with skill; and I am constrained to decide that there was inexcusable negligence on the part of the captain and helmsman of the Multnomah in steering her, without which the collision could not have happened. This fault, being sufficient to account for the accident, brings the case within the rule which denies to a libellant the right to recover damages for injuries caused by a collision when his own vessel is an offender in running against a vessel at anchor, unless a fault on the part of the other vessel, which was a contributing cause of the accident, can be proved by clear and convincing evidence. *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; *The Newburgh* (C. C. A.) 130 Fed. 321.

As already stated, the evidence proves that the officers and crew of the bark were not guilty of negligence in failing to ring her bell, and the court cannot, upon the conflicting evidence, find that she was anchored in the entrance of a navigable channel, or so near thereto as to constitute an actual obstruction to navigation, in violation of the act of Congress above cited; and the evidence proves that the Multnomah could have passed her, even in a dense fog, without harm, by the exercise of extraordinary care. This leaves no ground for a division of damages other than the fact that the bark was anchored within the prohibited zone without a permit from the harbor master, and whether she is, by reason of that fact, legally liable for one-half the loss caused by the collision is the only question in the case now remaining to be decided. In reaching the conclusions above stated, I have proceeded upon a theory that the Multnomah's fault was in the failure of her helmsman to steer her with the degree of extraordinary care and precision which the peculiar conditions then existing made necessary, but in adopting this theory I have not intended to decide that she was not guilty of other faults contributing to the accident. One fault sufficient to account for the accident having been proved to a certainty, it is not necessary to devote time and labor to consideration of the questions raised by the pleadings and arguments with respect to other alleged faults on her part. And I will say further that I have not intended to decide or intimate that it was necessary or proper to anchor the bark within the prohibited zone.

The evidence introduced in behalf of the respondent locates the bark at the time of the collision approximately 400 feet from the place indicated by "H. 2" upon libellant's Exhibit 1. Both locations are unnecessarily near to the track of vessels entering and leaving the waterway, and this is so because there is in the harbor of Tacoma an abundance of room for anchorage at a safe distance from the track of vessels coming into and leaving the wharves and docks; and the circumstances above narrated do not, in my opinion, afford a reasonable excuse for the action of the tugboat manager in anchoring the

bark within the prohibited zone. He knowingly violated a reasonable regulation prescribed by lawful authority, and for the consequences of his act while in the service of the bark as a local pilot the bark is liable to respond in damages. *The Robert Rickmers* (D. C.) 131 Fed. 638. There is no probability whatever that the accident would have happened if the ordinance had not been violated by anchoring the bark in that part of the harbor which I have referred to as the prohibited zone. It is true that, if a permit had been applied for, it might have been granted by the harbor master; but it is not fair to assume that he would have granted such an application, and it is sufficient for the purposes of this case to find that the permit was not obtained, and without it the bark was prohibited from anchoring at the place where she was anchored. It is my opinion that the mere failure of the harbor master to exert his authority to enforce the city ordinance is not the equivalent of a permit in writing, and does not condone the offense. In the case of *Wilhelmsen v. Ludlow* (D. C.) 79 Fed. 979, this court refused to award damages claimed against the commanding officer of a public war vessel of the United States for injuries to a steam vessel caused by colliding with the war vessel at anchor, in clear daylight, in the harbor of Seattle, which claim was based upon the ground that the war vessel was anchored in the harbor without a permit from the harbor master, in violation of a city ordinance which required a permit to anchor anywhere within the city limits. The court questioned the right of the city to exact compliance with such an ordinance by vessels of the navy, but the decision was grounded upon the allegations of the libel, which frankly disclosed misconduct on the part of her officers in bringing an unmanageable steamer into such near proximity to a vessel at anchor in clear daylight that the collision could not be prevented by the use of her machinery and anchors; and there being no reason for presuming that, if a permit had been applied for, the commanding officer would not have been allowed to choose for himself a location in the harbor, the court decided that there was no contributing fault on the part of the defendant. By the ancient codes of maritime law, if a vessel under way collided with another vessel at anchor without a willful or intentional fault on the part of the moving vessel, the loss had to be shared equally by the owners of both vessels. *Laws of Oleron*, art. XIV; *Ordinances of Wisbuy*, art. XXVI, and article LXX; *Fed. Cas.* vol. 30, *Append.*, pp. 1178, 1191, 1195. In this case there is no evidence to justify a finding that the captain or crew of the *Multnomah* caused the collision willfully or intentionally. In the case of *The Pennsylvania*. 19 Wall. 125, 22 L. Ed. 148, the Supreme Court declared the law as follows:

"But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

This was repeated and declared to be the settled rule in collision cases by the Supreme Court in *Richelieu Nav. Co. v. Boston Ins. Co.*, 136 U. S. 422, 10 Sup. Ct. 934, 34 L. Ed. 398. The same rule was again re-

iterated in the case of *Belden v. Chase*, 150 U. S. 699, 14 Sup. Ct. 264, 37 L. Ed. 1218. And in the case of the *United States v. St. Louis & Miss. Transportation Co.*, 184 U. S. 255, 22 Sup. Ct. 350, 46 L. Ed. 520, the Supreme Court held that local harbor regulations are necessary aids to commerce, and must be obeyed, like other statutory requirements, and that, where a vessel "anchors in an unlawful position, or fails to observe the statutory requirements and such other precautions as good seamanship would suggest, it must suffer the consequences attending a violation of the law." In this the court quotes, with approval, *Spencer on Marine Collisions*, §§ 99, 106.

These decisions of the Supreme Court are controlling, and, in accordance with the law thus declared, I feel bound to decide that in this case the *Multnomah* and the *Amiral Cecille* are equally responsible for the collision. Unless the parties agree upon the amount, the case will be referred to a commissioner to make a computation of the damages, and a decree for one-half thereof and half costs will be entered in favor of the libellant.

In re SOLVAY PROCESS CO.

(Circuit Court, N. D. New York. January 18, 1905.)

No. 25.

1. CUSTOMS DUTIES—PROTEST—DEFINITENESS—NEED TO SPECIFY OBJECTIONS.

Under section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1933], requiring that a protest against the decision of a collector of customs regarding the duty on imported merchandise shall state "distinctly and specifically * * * the reasons for" importer's objections to such decision, the Board of General Appraisers and the courts should pass only upon the correctness of the allegations in the protest, rather than on the merits of the case, and, where merchandise is classified incorrectly, may not impose the correct duty unless the importer has specifically pointed out in his protest, in substance or effect, the error made, and the provision of law under which the assessment should have been made.

On Application for Review of a Decision of the Board of General Appraisers.

This case involves the question of the sufficiency of a protest against the assessment of duty on imported merchandise, and requires a construction of section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1933], which provides that a protest against the assessment of duty by a collector of customs must set forth "distinctly and specifically * * * the reasons for" the importer's objections to the assessment.

This is an appeal by the Solvay Process Company for a review of the decision of the Board of United States General Appraisers imposing a duty of 35 per centum ad valorem, under Tariff Act July 24, 1897, c. 11, § 1, par. 97, Schedule B, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], upon fire brick over 10 pounds in weight, designed for linings to retort coal ovens. This duty was assessed, and the Board of General Appraisers affirmed the action of the collector at Syracuse, N. Y., in imposing this rate of duty, notwithstanding the decision of the Circuit Court, Southern District of New York, in *Wing et al. v. U. S.*, decided December 10, 1902, and reported 119 Fed. 479, and from which decision the United States did not appeal.

James R. Ely, for importers.
George B. Curtiss, U. S. Atty.

RAY, District Judge. This court follows the decision of Townsend, Circuit Judge, in *Wing et al. v. U. S. (C. C.)* 119 Fed. 479, holding that the merchandise in question is dutiable under subdivision 87, § 1, Schedule B, c. 11, of the Tariff Act of 1897, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1632], as "fire brick, weighing not more than ten pounds each, not glazed, enameled, ornamented or decorated," but cannot apply that decision to this case, for the reason that the protest is insufficient to raise the question. The protest says:

"We hereby protest against your decision and assessment of duties as made by you at 35 per centum ad valorem on our importations of pieces of wrought clay or earth, being clays or earths, wrought or manufactured, ex S/S St. Cuthbert overland from New York entered at your port on the 30th day of March, 1899 (Consumption Entry No. 181), claiming that under existing law the said merchandise is not dutiable at 35 per centum ad valorem, or at any rate of duty whatsoever under the provisions of any law now in force, and that such merchandise should have been admitted by you free of duty; and further protesting against your decision and assessment of duties as made by you, as hereinabove set forth, we claim that, if said goods are dutiable at all, they are dutiable as 'clays or earths, wrought or manufactured,' at two (2.00) dollars a ton, under paragraph 93 of an act approved July 24, 1897, entitled 'An act to provide revenue for the government and to encourage the industries of the United States,' and not at 35 per centum ad valorem, as charged by you; and we give notice," etc.

There is no suggestion in this protest of a claim that the duties on the merchandise in question should have been assessed under paragraph 87 of the act, but it is claimed, first, that they should be admitted free of duty, and, second, that the duty should have been assessed at two dollars a ton under paragraph 93. It was on this protest that action was taken, and in the matter of this protest the Board of United States General Appraisers said:

"In these cases the surveyor reports that the merchandise consists of fire brick for lining coke ovens. The goods were assessed for duty under paragraph 97 of the tariff act of 1897. The importers claim that the goods are free, or that they are dutiable as clays or earths, wrought or manufactured, under paragraph 93 of said act. These claims are manifestly untenable, and are overruled. The decision of the collector is affirmed. *In re Solvay Process Co.*, G. A. 5,261 (T. D. 24,159)."

In *Herrman v. Robertson*, 152 U. S. 531, 14 Sup. Ct. 686, 38 L. Ed. 538, the court held, in an action brought by the importer to recover the excess of duties demanded and collected, that the protest was defective in that it failed to point out or suggest in any way the provision of law which actually controlled the assessment of duties, and that such protest in effect only raised the question which of two clauses, under the one or the other of which it was assumed that the importation came, should govern as being most applicable.

In *U. S. v. Bayersdorfer*, 126 Fed. 732, 62 C. C. A. 16, the Circuit Court of Appeals, Third Circuit, held that a protest cannot be amended, and that, where several protests relating to the classification of certain merchandise were before the Board of General Appraisers, one of which stated objections not appearing in the others, that the presence of this protest stating the additional objections was of no moment as

affecting the consideration of the other protest. It was also held that a protest must be overruled, even though the assessment of duty is clearly erroneous, where the protest made points out the wrong paragraph, clause, or section of the act as the one under which the assessment of duty should have been made. The same doctrine was held in *U. S. v. George Knowles & Son*, 126 Fed. 737, 62 C. C. A. 62. We find the same doctrine enunciated in the following cases: *In re Sherman* (C. C.) 49 Fed. 224, affirmed in *Sherman v. U. S.*, 55 Fed. 276, 5 C. C. A. 101; *Tuska v. U. S.* (C. C.) 84 Fed. 442. See, also, *In re Guggenheim Smelt. Co.*, 112 Fed. 517, 50 C. C. A. 374. In the case at bar the protest fails to point to the proper subdivision under which the duty on these goods should have been assessed, and does not name the correct rate of duty as fixed by Townsend, Circuit Judge, in *Wing et al. v. U. S.*, supra. The case is not within *U. S. v. Shea, Smith & Co.*, 114 Fed. 38, 51 C. C. A. 664, nor is it within *U. S. v. Salambier*, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167.

It is stated that the case at bar was held up by the Board of General Appraisers pending the decision of *Wing et al. v. U. S.* (C. C.) 119 Fed. 479, above referred to, and that, as the case was not decided by the Board of General Appraisers until after that decision was made, the Board of General Appraisers should have disregarded the defect in the protest, and should have sustained the same, even though it failed to comply with the provisions of the customs administrative act. The record upon which this court is called to act does not show such a holding up of the case. The court is impressed with the fact that the Board of General Appraisers knew at the time it rendered its decision in the case now under consideration affirming the action of the collector that the rate of duty assessed was not the correct rate; that the collector erred; and that the duty assessed and collected should have been imposed under paragraph 87, above referred to, and fully quoted in *Wing et al. v. U. S.*, supra; but, notwithstanding this fact, cannot disregard the holdings of the courts in the cases cited, or the provisions of the customs administrative act to which attention is called in those cases. It does not seem to be left to the Board of General Appraisers on appeal from the collector to impose the correct rate of duty when they know what the correct rate is, even as established by decisions of the court, unless the importer has pointed out specifically, in substance or effect, the error made, and the section, clause, or subdivision of the law under which the assessment ought to have been made. It seems to be the policy of the law, as enunciated in the decisions, to have the Board of Appraisers and the Circuit Court pass upon the correctness of the allegations of the protest, rather than on the merits of the case, even when the merits are perfectly apparent and gross injustice will be done by failing to correct the action of the collector. In this case the government has acquiesced in the correctness of the decision of Judge Townsend in *Wing et al. v. U. S.*, supra, as no appeal was taken, and the Board of General Appraisers, when they affirmed the action of the collector in this case, knew that the merchandise in question ought to have been held liable to duty under paragraph 87, and not under paragraph 97. However, under the decisions quoted, the board was not at liberty to sustain the protest, inasmuch as the importer had made

a mistake in pointing out the paragraph under which duty ought to have been assessed. Were it not for these decisions, this court would unhesitatingly reverse the decision of the Board of General Appraisers overruling the protest and sustaining the collector, but as it is feels bound reluctantly to affirm that action.

So ordered.

In re OLMAN et al.

(District Court, S. D. Ohio, W. D. November 1, 1902.)

No. 3,226.

1. BANKRUPTCY—COMPOSITION—FAILURE TO KEEP BOOKS—DISPOSITION OF ASSETS.

Where, on an application for confirmation of a composition by a bankrupt tailoring firm, it appeared that they kept no cash book, journal, or ledger, and the only books produced by them before the referee were two bankbooks, it being claimed that all the other books relating to the business which they had kept were lost, and the only disclosure with reference to an alleged loss of some \$30,000 of capital was that it was lost because of a tailors' strike, which lasted five or six weeks, and was followed by botch work when they returned to duty, compelling the bankrupts to sell their goods at 50 per cent. of the cost, it appearing that they employed only 15 tailors, and that such explanation could not be true, the confirmation would be denied on the ground that they failed to keep books for the purpose of concealing their true financial condition, etc.

In Bankruptcy.

Frank Seinsheimer, for bankrupts.

F. F. Oldham and Charles B. Wilby, for American Woolen Co.

THOMPSON, District Judge. The bankrupts offered terms of composition to the creditors, which were accepted by a majority of them, representing a majority in amount of the claims allowed, and the bankrupts then filed their application for the confirmation of the composition, and thereupon the American Woolen Company, one of the creditors, filed specifications in opposition thereto. The application and specifications were referred to the referee to ascertain and report the facts. The referee reported the facts and his conclusions of law thereon, and recommended the approval of the confirmation. Exceptions to the report were filed by the American Woolen Company, and the matter is now submitted upon the report and the exceptions.

The confirmation of the composition is opposed on the following grounds: (1) That with fraudulent intent to conceal their true financial condition, and in contemplation of bankruptcy, the bankrupts, for a year prior to the filing of their petition in bankruptcy, failed to keep books of account, or any record from which their true condition might be ascertained; (2) that the bankrupts knowingly and fraudulently concealed property from the trustee; and (3) that the bankrupts made false oaths in relation to the proceedings in bankruptcy.

In July, 1900, the bankrupts removed from Cincinnati to New York,

where they engaged in the manufacture and sale of clothing. Their cash capital was about \$5,000. On the 1st day of July, 1901, their financial condition, as shown by statement made as of that date, was as follows:

| | | |
|--------------------------|-------------|-------------|
| Merchandise on hand..... | \$14,670 00 | |
| Book accounts | 6,328 00 | |
| Cash on hand..... | 350 00 | |
| Indebtedness | | \$ 9,055 00 |
| Assets | | 12,293 00 |
| | <hr/> | <hr/> |
| | \$21,348 00 | \$21,348 00 |

In March, 1902, the bankrupts removed from New York to Cincinnati, bringing with them their stock of goods for the purpose of resuming business here, and secured a room or building on Pearl street for that purpose. But upon unpacking their goods they realized, as they claim, for the first time, that they were insolvent; and after the rejection of a compromise, which they proposed to their creditors, they, on May 31st of this year, filed their petition in bankruptcy, their schedules showing their indebtedness to be \$20,120.08, their assets \$2,502.10, leaving a balance of indebtedness of \$17,617.98. The only books kept by the bankrupts were bankbooks, checkbooks, order books, a memorandum book containing the outstanding accounts and the accounts against them, a book of samples, a memorandum book of the goods sent out to tailors, and a book for the manufacturing room. They did not keep a cashbook, journal, or ledger. The only books produced by them before the referee were two bankbooks—one showing an account with the Columbia Bank of New York, covering the time from December 3, 1901, to March 21, 1902; the other showing an account with the Market National Bank of Cincinnati, covering the time from March 26 to April 4, 1902. It is claimed that all the other books were lost. In a few months they stepped from prosperity into bankruptcy. If the figures given by them in the statement of July and their schedules in bankruptcy be correct, they lost during the eight months from July to March nearly \$30,000. The bankrupts do not show, nor undertake to show, what their receipts and expenditures were during this period. The bankbooks, however, show deposits from December 3, 1901, to March 27, 1902, both inclusive, to the amount of \$20,289.02. All of this amount was checked out during the same period, except \$23.64. The bankbooks do not show the names of the persons to whom the checks were made payable, and but 13 of the checks have been produced. Twelve of these checks were made payable to various persons, presumably in payment of accounts which they had against the bankrupts. The other check was made payable to the Columbia Bank, and represented moneys which Adolph Olman received from the bank, and which he claims to have used in paying the claims of tailors. In short, these books and the 13 checks show that \$1,221.08 of these moneys were used in paying debts of the firm; that on March 27, 1902, there was a balance on hand of \$23.64; but there is nothing to show what became of the remainder, amounting to \$19,044.30, except the general statement of the bankrupts that it was used to pay the claims of tailors and other debts of the firm, but they do not give the name of a single cred-

itor to whom any part of this large sum was paid, except Olshewitz and Linch, cousins of Nat Olman, to whom it is claimed they paid \$2,275 for borrowed money. Upon all the evidence the account stands as follows:

| | |
|---------------------------------------------------------------|--------------------|
| July 1, 1901, assets..... | \$12,293 00 |
| Deposits from Dec. 3, 1901, to March 27, 1902, inclusive..... | 20,289 02 |
| Money borrowed of the cousins..... | 2,275 00 |
| Total | \$34,857 02 |
| Assets shown by schedule in bankruptcy..... | \$ 2,502 10 |
| Debts paid out of the deposits..... | 1,221 08 |
| Borrowed money returned to the cousins..... | 2,275 00 |
| Balance unaccounted for..... | 28,858 84 |
| Total | \$34,857 02 |

This statement does not include the receipts and expenditures of the firm from July to December, because there is no evidence tending to show what they were, and the statement assumes that the assets on hand are of the value of \$2,502.10, although Adolph Olman says he thinks that they are worth \$1,000. In view of the capital invested and the extent and character of the business, this unaccounted for balance is so large as to require explanation from the bankrupts. The explanation offered is that they lost \$30,000 because of a strike by the tailors, which lasted five or six weeks, and was followed by botch work when they returned to duty, which compelled the bankrupts to sell their goods at 50 per cent. of the cost value. Now, in order to lose \$30,000 upon this basis, it would be necessary to sell goods of the cost value of \$60,000, thereby compelling the bankrupts to increase their indebtedness either for borrowed money or goods to the amount of about \$48,000 over and above the assets shown by the July statement. A sale of goods of the cost value of \$60,000 at 50 per cent. of that value would involve a loss of \$30,000 and produce \$30,000, and the \$30,000 received would reduce the indebtedness to about \$18,000 or \$20,000. But the statement cannot be accepted as true. It is unreasonable and incredible. It cannot be supposed that the strike of the tailors for five or six weeks could produce such results. They employed but 15 tailors, and certainly their botch work after their return to duty cannot be regarded as an inducement to such an extraordinary expansion of the business, especially when it involved the sale of the goods at 50 per cent. of the cost value. The absurdity of the explanation offered compels the belief that the bankrupts failed to keep books from which their true condition might be ascertained, and withheld such books as they did keep for the purpose of concealing their true financial condition, and to enable them to conceal property from their creditors, and that it was done with a view to force a profitable compromise with the creditors, or ultimately to secure a discharge from their debts through proceedings in bankruptcy.

The application to confirm the composition therefore will be refused.

CARROLL v. CENTRAL R. CO. OF NEW JERSEY.

(Circuit Court, E. D. Pennsylvania. January 26, 1905.)

No. 59.

1. MALICIOUS PROSECUTION—ACQUITTAL—EVIDENCE—COMPROMISE.

In an action for malicious prosecution, evidence that the direction of plaintiff's acquittal in the prosecution was the result of a compromise in the disposition of a case against plaintiff and certain others, not tending to contradict the record, was admissible as bearing on the question of probable cause.

2. SAME—PRIMA FACIE EVIDENCE.

Where, in an action for malicious prosecution, there was evidence that plaintiff's acquittal, which was directed by the court, was the result of a compromise in a prosecution against plaintiff and others, such acquittal was not conclusive of plaintiff's innocence or of want of probable cause.

3. SAME—CHARACTER—EVIDENCE.

In an action for malicious prosecution, plaintiff was not entitled to introduce evidence of his good character before his character had been attacked.

4. SAME—DIRECTION OF VERDICT.

Where, in an action for malicious prosecution, the facts as proved were sufficient to rebut the presumption of want of probable cause arising from plaintiff's acquittal, the court would have been warranted in directing a verdict for defendant.

T. Foster Thomas, for plaintiff.

Arthur G. Dickson and William A. Glasgow, Jr., for defendant.

HOLLAND, District Judge. Winfield Carroll, the plaintiff in this case, was arrested for an alleged larceny of goods from a freight train of the defendant company on the 13th day of July, 1903. A hearing was had before a magistrate in Bethlehem, Lehigh county, Pa., and he was held for court upon the charge made against him. Subsequently a grand jury indicted him for this offense, and he was tried, with four other persons, before a jury of that county. At the trial of the case, after the evidence had been submitted for the prosecution, by agreement with the district attorney the court instructed the jury to acquit the defendant. Two of the other defendants were convicted of the offense. Carroll then brought suit in this district against the defendant railroad company, whose agent made the arrest, for malicious prosecution; and at the trial of the case all the facts in connection with his arrest, trial, and acquittal were given by the plaintiff and his witnesses for the purpose of showing the termination of the criminal prosecution and the want of probable cause. The evidence for the defense was to the effect that Carroll had been seen in this vicinity by the agent who swore out the warrant, in company with the men who had been arrested and tried with him on the criminal charge, near the railroad, about a fire, warming themselves, a day or two before the car was robbed, and was in company with these men when arrested. It was also established by the agent who made the arrest that upon his investigation he ascertained from a reputable witness, a citizen and resident in the town of Bethlehem, that he was sitting at his window

the night of the robbery, and saw Carroll, about 3 o'clock in the morning, in company with three other men, who had the goods in their possession, and saw him divide some of the goods with one of them, in front of witness' window. It was also shown that Carroll was a resident of Philadelphia, and his presence and associations at the place of robbery were such as to fairly warrant the agent in assuming the correctness of the information obtained in his investigation prior to the arrest. In fact, the evidence fully established the fact that the officer acted with prudence and caution, and was fully justified in swearing out the warrant and arresting Carroll. This was fairly submitted to the jury on the question as to probable cause, and the jury found in favor of the defendant.

The reasons assigned for a new trial are: (1) The verdict was against the law and the weight of the evidence. (2) Error to the ruling of the court in permitting the defendant to show what occurred at the trial of the criminal case against the plaintiff in Allentown, and that the court instructed the jury in that case to acquit the defendant; two of the other defendants changing their plea from that of not guilty to that of guilty. (3) Error to the charge of the court in instructing the jury as follows: "It is not necessary, after he has been arrested and tried, that that person shall secure a conviction, because the matter of a conviction is entirely outside of the question of probable cause." (4) In refusing to allow the plaintiff to prove his good character. (5) Because the court emphasized the defendant's, and slighted the plaintiff's, evidence, in its charge to the jury.

As I am of the opinion that the verdict was justified by the evidence and according to law, it is not necessary to make further comment upon the first reason for a new trial.

As to the second reason, the court permitted the defendant to show the facts and circumstances as to how it came about that the judge directed a verdict of acquittal to be rendered against Carroll in the criminal prosecution, as it did not in any way contradict the record, which showed that fact; and as the evidence tended to show that there was something of a compromise in the disposition of the whole case—two of the defendants pleading guilty, and, as to Carroll and another defendant, the court directing the jury to acquit them—we think this evidence competent to show how this acquittal came about, as bearing on the question of probable cause. *Auer v. Mauser*, 6 Pa. Super. Ct. 618.

Third: The fact of Carroll's acquittal in Lehigh county, and the manner of its being accomplished, together with all the facts, were submitted to the jury, and he had the advantage of the prima facie effect of his acquittal in his effort to establish want of probable cause. The acquittal is not conclusive of his innocence, or want of probable cause. It is a matter more to be proven for the purpose of showing a favorable termination of the case, as an unfavorable termination of a criminal prosecution is a bar to an action for malicious prosecution, unless fraud or irregularity in the conviction be established. And while it is true that it is held in the Pennsylvania cases that an acquittal, if there be no compromise, is prima facie evidence of want of probable cause, yet the best considered cases are those which hold that an ac-

quittal is simply evidence for the purpose of establishing a favorable termination of the criminal prosecution, which is necessary prior to the institution of a suit for the recovery of damages. We do not think that the plaintiff was injured in the instructions given to the jury, complained of in the third reason for a new trial.

Fourth and fifth: There was very little evidence submitted by the plaintiff to show a want of probable cause. In fact, some of it corroborated the defendant's contention.

The offer of evidence on the part of the plaintiff to prove good character before it had been attacked was properly ruled out. The plaintiff was a resident of Philadelphia, not known to the parties in Allentown, and the arrest was made after a thorough investigation and ascertainment of the incriminating facts and circumstances, all of which were established by the evidence at this trial. The evidence to show good character was immaterial, under the circumstances, and was ruled out for the reason that the law presumed he had a good character until it was attacked. This ruling is in accordance with Elliott on Evidence, § 324; McIntire v. Levering, 148 Mass. 546, 20 N. E. 191, 2 L. R. A. 517, 12 Am. St. Rep. 594; Skidmore v. Bricker, 77 Ill. 164.

The question of probable cause is a mixed question of law and fact. Where the facts as proved at the trial are sufficient to rebut the presumption of want of probable cause arising from the termination of the transaction favorably to the plaintiff, it is the duty of the court to direct a verdict for the defendant; and in this case there was really no dispute either as to these facts and circumstances being in the possession of the agent of the defendant before he brought the criminal prosecution, or as to there being sufficient in law to justify his actions. The court in this case would have been warranted in directing a verdict for the defendant. *Ruffner v. Hooks*, 2 Pa. Super. Ct. 278; *Sutton v. Anderson*, 103 Pa. 151.

Motion for a new trial overruled.

In re JOHN MORROW & CO.

(District Court, S. D. Ohio, W. D. October 31, 1901.)

No. 3,000.

1. BANKRUPTCY—PREFERRED CLAIMS—SURRENDER—CASH TRANSACTIONS—USAGES.

Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], provides that a person shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property, the effect of which will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class; and section 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], declares that the claims of preferred creditors shall not be allowed unless the preferences are surrendered. *Held*, that a sale of goods by a creditor to a bankrupt firm, to be paid for in 10 or 30 days, could not be regarded as a cash transaction within such statutes either by agreement of the parties or by usage, so as to entitle the creditor to retain payment and prove the balance of his claim against the bankrupt's estate.

2. SAME—PREFERRED CREDITORS—SUBSEQUENT CREDIT—SET-OFF—GOOD FAITH.

A bankrupt firm's indebtedness to one of its creditors was settled by the giving of three notes payable in one, two and three years, with in-

terest, and thereafter, for the purpose of enabling the bankrupt to continue business, the creditor supplied the firm with goods under its agreement to pay therefor within ten days from delivery, such payments not being intended to be applied on the pre-existing indebtedness. *Held*, that indebtedness for such goods was a new credit, which the creditor was entitled to set off against previous preferences under Bankr. Act July 1, 1898, c. 541, § 60c, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446], providing that if a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind, etc., the amount thereof remaining unpaid at the time of bankruptcy may be set off against the amount otherwise recoverable from him.

Petition for Review.

Kiefer & Kiefer, for petitioners.

Bowman & Bowman, for bankrupt.

John L. Plummer, for Parke, Davis & Co.

THOMPSON, District Judge. The adjudication of bankruptcy was made on the 19th of January, 1901. In the first part of August, 1900, the bankrupts, being insolvent, and being indebted to Parke, Davis & Co. in the sum of \$6,825, an agreement was entered into between the bankrupts and Parke, Davis & Co., by the terms of which the bankrupts were to give Parke, Davis & Co., in settlement of their indebtedness, their three promissory notes for \$2,275 each, payable in one, two, and three years, with interest, and thereafter all shipments of goods by Parke, Davis & Co. to the bankrupts were to be paid for within ten days from delivery. In pursuance of this agreement the notes were given on the 4th of September, 1900, and eight shipments of goods were made to the bankrupts, beginning with the 20th of August and ending with the 26th of November, 1900, and payments were made by the bankrupts from time to time covering these shipments, some of which were made within 10 days and some more than 10 days after delivery. The first payment was made August 31, 1900. The trustee contends that these shipments of goods were upon credit, and to the extent thereof increased the indebtedness of the bankrupts already existing, and that the payments made by the bankrupts operated as preferences in favor of Parke, Davis & Co., within the meaning of paragraph "a" of section 60 of the bankrupt law of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. Parke, Davis & Co., however, insist: (1) That these shipments, under the agreement as understood by the parties, and according to the usage of merchants, were sales for cash, and not upon credit, and that the payments made by the bankrupts must be treated as cash payments, and stand upon the same footing as if the money had been paid immediately upon the shipment and delivery of the goods. (2) That if the payments be regarded as preferences, and the shipments as sales on credit, yet it was a new credit, entitling them to a set-off, within the meaning of paragraph "c," § 60, of the bankrupt law, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446].

If the parties, by agreement, can treat a sale of goods on 10 days' time as a cash transaction, they may also, by agreement, treat a sale on 30 or 60 days' or longer time as a cash transaction, and practically defeat the operation of sections 57g and 60a of the bankrupt act (30 Stat.

560, 562 [U. S. Comp. St. 1901, pp. 3443, 3445]). Sections 57g and 60a of the bankrupt act do not contemplate a usage of merchants or a conventional arrangement between the parties which would enable any one of the creditors of a bankrupt to obtain a greater percentage of his debt than any other of such creditors of the same class. A sale of goods to be paid for in 10 or 30 days is not, in fact, a cash transaction, and cannot, by agreement of the parties, or a usage of merchants, be regarded as such within the meaning of the bankrupt law.

But although it was not a cash transaction, but a credit, yet it was a new credit, without security of any kind, for property which became a part of the bankrupt's estate, and which, if given in good faith, would, within the meaning of paragraph "c," § 60, of the bankrupt law (30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), entitle them to set it off against the amount of the alleged preferences which otherwise would be recoverable from them. As shown by the testimony of Hall, the credit man of Parke, Davis & Co., it was given in view of the insolvency of the bankrupts, in the hope that it might enable them, in the language of the witness, to "eventually work out." Three years were given in which to pay the then existing indebtedness, and to keep the business going the bankrupts were to be supplied with goods from time to time, upon short credit, and, as the evidence shows, the goods so supplied were, in fact, used in carrying on the business. The payments were not intended to be applied upon the pre-existing indebtedness, the time for the payment of which had been extended one, two, and three years, but were for goods which became a part of the bankrupt's estate. No advantage was sought or obtained as against other creditors, and under these circumstances the court cannot find that there was a want of good faith which could defeat the right of set-off. Allowing the set-off, therefore, and accepting the figures of counsel for the creditor, the balance which must be treated as a preference is \$110.15, upon the surrender of which the claim of the creditor should be allowed.

The order of the referee, therefore, will be reversed, with instructions to allow the claim of Parke, Davis & Co. upon payment to the trustee of \$110.15, or upon their refusal or failure to do so, within a reasonable time to be fixed by the referee, to reject and disallow the claim.

LACH v. BURNHAM et al.

(Circuit Court, E. D. Pennsylvania. December 22, 1904.)

No. 32.

1. MASTER AND SERVANT—INJURY OF SERVANT—NEGLIGENCE OF FELLOW SERVANT.

The foreman of a gang of workmen employed by defendant, of which plaintiff was one, directed them to remove a pile of iron braces, weighing 80 or 90 pounds each. The piles were about five feet high, and unstable. Instead of acting on the suggestion of some of the men, and pushing the pile over, taking the braces from the ground, the foreman ordered them taken from the top of the pile, which fell during the work, and plaintiff was injured. *Held* that, while the foreman was negligent, it was not negligence in the performance of the master's duty to furnish the men a safe place to work, but in the performance of his

own duty to direct the work to be done in a proper and safe manner, as to which he and plaintiff were fellow servants, and for which negligence defendant was not responsible to plaintiff.

[Ed. Note.—Who are fellow servants, see notes to *Northern Pac. R. Co. v. Smith*, 8 C. C. A. 668; *Flippin v. Kimball*, 31 C. C. A. 286.]

At Law. On motion for new trial.

George Demming, for plaintiff.

John G. Johnson, for defendants.

J. B. McPHERSON, District Judge. That the foreman or boss of the gang of day laborers of which the plaintiff was a member was a fellow servant of his subordinates, save in some exceptional situation, cannot be successfully questioned, I think, since the decision in *New England R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. See, also, *Kelly v. Jutte & Foley Co.*, 104 Fed. 955, 44 C. C. A. 274, and the cases cited in 12 *Rose's Notes to U. S. Reports*, 402, 403. No doubt, the situation would be exceptional, and he would be regarded as a vice principal, whenever he might be called upon to discharge the master's duty "to exercise due care respecting the safety of the place and of the instrumentalities for doing the work" (*Kelly v. J. & F. Co.*, supra), and it is his negligence in this character that is insisted upon as the plaintiff's ground of recovery. It is averred in the statement that the defendants, acting through their agent, the foreman, "put plaintiff to work in such an unsafe and dangerous place, and negligently compelled him to work in such a dangerous and improper place, and neglected to take such reasonable and proper precautions against the peculiar dangers incident to the kind of work at which plaintiff was engaged, and employed such a willfully careless and negligent foreman, under whom plaintiff worked, that on said August 4, 1903, plaintiff, while attending properly and carefully to the performance of his duties, was struck and knocked down and crushed by a large piece of iron, whereby he was seriously, frightfully, and permanently injured," etc. In my opinion, however, the testimony did not establish these averments of fault. It was not the place that was proved to be dangerous. The real peril to which the plaintiff was exposed arose from the manner in which the foreman ordered the work to be done, and this, I think, was negligence in his character as a fellow servant, and not in his character as a vice principal.

The plaintiff, with others of the gang, was set to removing from one place to another certain iron braces, of a peculiar shape, that were piled to a height of about five feet. They were in three piles, containing 50 or 60 braces each, narrow and long and crooked. Each brace is said to weigh about 80 or 90 pounds, and some of the workmen complained to the foreman that these irregular and unsteady masses might fall and do some injury if the braces were removed while the piles were standing. There is evidence that the piles were unstable, and the jury would have been justified, I think, in finding that the safest way to do the work would have been to push the piles over, and pick up the braces from the ground. The foreman insisted, however, in taking them off singly from the top; thus running the risk of knocking or jarring the pile over while the work of removal was going on, and while the la-

borers were necessarily close to the ends of the braces. This was apparently an error of judgment on his part, and is now to be regarded as negligence; but I repeat that it does not seem to me to be negligence in performing the master's duty to furnish his servant a safe place to work, but negligence in performing his own duty to take down the piles of iron in a proper and careful manner. It was in this aspect that the case presented itself to me at the trial, and my opinion has not been changed by argument and further reflection.

A new trial is refused.

CRAMP et al. v. PHILADELPHIA CONST. CO.

(Circuit Court, E. D. Pennsylvania. January 9, 1905.)

No. 44.

1. CONTRACT—ACTION TO ENFORCE—SUFFICIENCY OF AFFIDAVIT OF DEFENSE.

An affidavit of defense construed, and *held* insufficient, as admitting facts showing that the original contract between the parties was modified by a supplementary agreement set up by plaintiff, and upon the validity of which his right of recovery depended.

At Law. Rule for judgment for want of a sufficient affidavit of defense.

H. C. Thompson, Jr., for plaintiffs.

John G. Johnson, for defendant.

J. B. McPHERSON, District Judge. The controversy between these parties relates exclusively to the effect upon the original contract, which bears the date of October 17, 1901, of the supplementary paper that was executed in the following month. If the defendant is bound by the supplement, the plaintiffs' claim is established; and, that the defendant is thus bound is, I think, made clear by the following paragraph from the affidavit of defense itself.

"It is true that the syndicate agreement of 17th October, 1901, was renewed in such way as to extend the time for sale of the bonds therein referred to until the 1st day of April, 1904. This renewal was by virtue of a resolution of the board of directors of the Philadelphia Construction Company, duly passed. In said agreement of renewal thus authorized, there was a preamble reciting the fact of a modification of the agreement by the supplement, contained in the statement of claim; but the agreement authorized to be made by the resolution of the board of directors, and the agreement which was made, was one which specified for the renewal of the agreement of 17th October, 1901."

Now, while the affidavit elsewhere denies that the supplement, which was signed by the defendant's president and attested by its secretary, was "authorized by the Philadelphia Construction Company by any vote of its board of directors," and declares that it was signed by the president "without any authority conferred upon [him] by any vote of the board of directors thereof," the paragraph quoted shows plainly, as it seems to me, that the defendant, by formal resolution of its board, did recognize the fact that the supplement had modified the original contract. The averment that "the agreement authorized to be made

by the resolution of the board of directors, and the agreement which was made, was one which specified for the renewal of the agreement of 17th October, 1901," states merely the affiant's construction of the resolution and of the renewal agreement, and is not to be regarded as stating a fact. Copies of the resolution and of the renewal agreement should have been given, so that the court might be enabled to judge for itself of their legal effect. But while, for the reasons thus indicated, the affidavit is, in my opinion, insufficient as it stands, the defendant should have an opportunity to supply what may perhaps be important documents in the cause; and therefore he may set out copies of the resolution and of the renewal agreement in a supplemental affidavit, to be filed within 10 days. If no such affidavit is filed, the plaintiffs may have judgment for the amount of their claim.

SPERRY & HUTCHINSON CO. v. BRADY et al.

(Circuit Court, E. D. Pennsylvania. January 28, 1905.)

No. 44.

1. TRADING STAMPS—WRONGFUL USE—PRELIMINARY INJUNCTION.

Where allegations of a bill to enjoin defendants from using complainants' trading stamps, that defendants were engaged in using such stamps in advertising their business without complainants' permission, were not denied by any of the answers filed, complainants were entitled to a preliminary injunction.

In Equity. Granting preliminary injunction.

John Hall Jones and Martin V. Bergen, Jr., for complainants.
Elton J. Buckley and Albert H. O'Brien, for respondents.

HOLLAND, District Judge. The allegations in this bill are to the effect that the defendants are engaged in using the property of complainants, to wit, their green trading stamps, in advertising their (defendants') business, without the permission of the complainants to do so. As this allegation is not denied by any of the answers filed, we think the complainants are entitled to an injunction against defendants to restrain them from using these stamps. Some of the affidavits, however, aver they have contracts for procuring stamps from complainants. Stamps so procured would be in their possession lawfully, and of course the possessor entitled to use them for the purposes for which they were purchased. At this time the court does not pass upon any of the questions raised in this bill, except that the defendants have no right to use green trading stamps belonging to the complainants without their permission.

The motion for preliminary injunction is therefore granted, and the defendants are restrained from using green trading stamps belonging to and owned by the complainants, and not sold or issued to the respective defendants by the complainants.

GRAHAM v. OREGON R. & NAV. CO.

(District Court, S. D. New York. January 10, 1905.)

1. ADMIRALTY—AMENDMENT OF LIBEL.

Where exceptions to a libel in admiralty for want of jurisdiction are sustained, it is proper to grant leave to amend if the case is such that facts may be alleged which will bring the cause within the court's jurisdiction.

In Admiralty. On motion to set aside order.

Thomas D. Rambaut and J. Parker Kirlin, for libellant.

Maxwell Evarts and Robert D. Benedict, for respondent.

ADAMS, District Judge. This is a motion on the part of the respondent to set aside an order made herein on the 19th of December, 1904, or for a re-settlement thereof so that the order will dismiss the libel absolutely, and set aside all the proceedings had in the case by the libellant since the entry of the order.

On the exceptions to the libel, raising the question of jurisdiction, an opinion was written sustaining the exceptions but granting leave to the libellant to amend within twenty days. An order was entered in conformity with the opinion, which order is now the subject of this motion, as well as an amended complaint, which has been filed in accordance with the order.

The respondent contends that the court, having decided that the cause as alleged in the libel was not within its jurisdiction, had no power to do anything further except to dismiss the libel, without costs. Numerous authorities are cited in support of the contention, viz.: *Abbey v. The Robert L. Stevens*, 22 How. Prac. 78, Fed. Cas. No. 8; *Wenberg v. A Cargo* (D. C.) 15 Fed. 288; *Pentlarge v. Kirby* (C. C.) 20 Fed. 898; *The Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Citizens' Bank v. Cannon*, 164 U. S. 319, 324, 17 Sup. Ct. 89, 41 L. Ed. 451. These were all questions of costs and it appeared that no amendment could have been filed which would have overcome the objection to the jurisdiction. The case of *Naylor v. Hoffman*, 22 How. Prac. 510, is also cited. That was an action brought against a foreign consul, and, the court being without jurisdiction, it was held that the process of attachment issued when the action was commenced, could not be validated by a subsequent withdrawal of the exequatur of the consul. None of the cases seems to bear upon the question here, and the broad language of the courts, in some of the cases, must be regarded as simply applying to the questions under consideration. It is said that any opinion "can not be relied upon as a binding authority unless the case calls for its expression." *Bardes v. Hawarden Bank*, 178 U. S. 524, 534, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

There can be no doubt about the general power of the court to permit amendments. Those of form are a matter of course; those of substance may be made upon motion at any time before the final decree, upon such terms as may be imposed. Supreme Court Rule 24, 3 Sup. Ct. xiii.

Admiralty Rule 42 of this court provides:

"The defendant may before filing his answer except to the jurisdiction or to the sufficiency of the libel, and if the exception is sustained and the libel is not amended within such time as the court shall allow it shall be dismissed."

And in Rule 44, it is provided:

"If the exceptions are allowed on hearing, he shall amend his" (the party's) "pleadings within such time as the court shall direct."

It is said in Benedict's Admiralty (page 274):

"Sec. 483. Amendments may be allowed by the Court at any Time.—As has been before remarked, causes in admiralty must be heard and decided according to the allegations of the parties, and the proofs under them; and it has always been the practice of the American Admiralty Courts to allow every facility to the parties, to place fully before the court their whole case, and to enable the court to administer substantial justice between the parties, without circuitry of action, or turning around in court, and never to allow a party to overcome his adversary by the man-traps and spring-guns of covert chicanery, or by the surprises and technicalities of mere pleading or practice. Therefore, on proper cause shown, omissions and deficiencies in pleadings may be supplied, and errors and mistakes in practice, in matters of substance, as well as of form, may be corrected at any stage of the proceedings, for the furtherance of justice. Where merits clearly appear on the record, it is the settled practice in admiralty not to dismiss the libel, but to allow the party to assert his rights in a new allegation. The whole subject rests entirely in the discretion of the court, as well in relation to the relief to be granted, as to the terms on which it shall be granted. Amendments may be made on application to the court at any time, as well after as before decree; and at any time before the final decree new counts or articles may be added, and new and supplementary allegations may be filed."

Some of the cases in which substantial amendments have been allowed are: *The Brig Caroline*, 7 Cranch, 496, 3 L. Ed. 417; *The Schooner Anne*, 7 Cranch, 570, 3 L. Ed. 442; *The Adeline*, 9 Cranch, 244, 284, 3 L. Ed. 719; *The Edward*, 1 Wheat. 261, 4 L. Ed. 86; *The Divina Pastora*, 4 Wheat. 52, 4 L. Ed. 512; *The Edwin Post* (D. C.) 6 Fed. 206; *The Imogene M. Terry* (D. C.) 19 Fed. 463; *Card v. Hines* (D. C.) 36 Fed. 573; *Newell v. Norton*, 3 Wall. 257, 18 L. Ed. 271; *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993.

The last mentioned case was one where there could be no jurisdiction without an amendment, because one of the libellants, Cotton, as master of the *S. S. Beaconsfield*, and bailee of the cargo, did not appeal from the decree, which affected the cargo and the libel was amended after the Supreme Court had reversed the decree of the Circuit Court on the merits of the collision by substituting another party for him. The judgment based upon such amendment was sustained by the Supreme Court (see pages 309, 310, 158 U. S., pages 862, 863, 15 Sup. Ct., 39 L. Ed. 993). Other cases in which amendments have been allowed at a late stage in the proceedings to secure justice, are: *U. S. v. Boyd*, 15 Pet. 187, 10 L. Ed. 706; *House v. Mullen*, 22 Wall. 42, 22 L. Ed. 838; *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260, 272, 35 C. C. A. 282.

Several authorities present cases where amendments going to the question of jurisdiction have been allowed. The *Petition of the Long Island etc. Transp. Company* (D. C.) 5 Fed. 599, was a question of limitation of liability. Motions were made to dismiss for want of juris-

diction. Upon the hearing of the motion and exceptions, leave was granted to amend by alleging certain jurisdictional facts and the defect being so cured, the case went to a final hearing on the merits. In *The Monte A.* (D. C.) 12 Fed. 331, an action was improperly brought in rem and an amendment permitted prayer for process and judgment in personam, there being no change in the subject matter of the action. These two cases were in this court. The same kind of amendments have been allowed in other districts. In *The Manhasset* (D. C.) 18 Fed. 918, a question was presented with respect to the right to bring an action in rem to recover for death caused by negligence. It was held by Judge Hughes that the state statute, under which the action was brought, did not create a maritime tort, upon which an action against the vessel could be sustained by an administratrix, but he expressed the opinion that a right existed, enforceable by a libel in rem, in favor of the widow and the deceased's minor children, whom the administratrix represented. The formerly dismissed libel, filed by the administratrix, was amended by the substitution of the said parties and thereupon a recovery was decreed. *The Manhasset* (D. C.) 19 Fed. 430. In *The George Taulane* (D. C.) 22 Fed. 799, an amendment was allowed to show the jurisdictional fact that the vessel was in the district.

It seems that jurisdiction was obtained of the respondent here by its general appearance, and if facts exist which show that there is a maritime cause of action, the libellant should have an opportunity at the present stage of the case to aver them in an amended libel. It appears that such a libel is actually on file. It is of course subject to exceptions, which when raised will be duly considered.

Motion denied.

THE CORNELL.

(District Court, S. D. New York. January 7, 1905.)

1. COLLISION—VIOLATION OF RULES—CONDITIONS JUSTIFYING TOWS IN PASSING TO THE LEFT.

The passing of two tugs with large tows on hawsers starboard to starboard when meeting in the Hudson river below Poughkeepsie bridge, *held* not a violation of article 18, rule 1, of the statute governing river navigation (Act June 7, 1897, c. 4, 30 Stat. 100 [U. S. Comp. St. 1901, p. 2881]), it being shown that such had been the custom since the bridge was built, and was necessary to enable the up-bound tow to properly approach the bridge to pass through the center span safely.

2. SAME—TOWS—INEVITABLE ACCIDENT.

A collision between vessels forming a part of two large and long tows when passing each other in Hudson river *held* not due to a violation of the navigation rules by the tugs in passing starboard to starboard, nor to any fault of the tugs, but to inevitable accident, the tows having been driven together by a sudden and severe windstorm when they were passing at a proper and usually safe distance.

In Admiralty. Suit to recover from tug for damage to tow by collision.

Hyland & Zabriskie, Charles M. Hough, and Nelson Zabriskie, for libellant.

Amos Van Etten, for claimant.

ADAMS, District Judge. This action was brought by George W. Carman, Jr., the owner of a canal boat of the same name, to recover from the steam tug Cornell, the damages caused to the canal boat by collision on the 26th of May, 1904, with loaded boats in tow, on a hawser, of the tug George W. Washburn, a Cornell tug, bound down the river. The Carman was the outer starboard boat in the 4th tier of a flotilla of eight tiers of light boats, being towed by the Cornell, on a hawser about 600 feet long, from New York up the river to Athens. The whole tow was about 1,700 feet long. When the vicinity of the Poughkeepsie Bridge was reached, the Carman, which projected somewhat beyond the sides of the other boats, was brought sharply into contact with one of the Washburn's starboard boats and severely injured. Some other boats were broken loose from the tows by the collision.

The collision occurred a little after 3 o'clock in the afternoon. Up to about that time the weather was clear. The tide was ebb. There was a two masted schooner in the Cornell's tow, in the 2nd tier ahead of the Carman, and some ice boats.

The tug is charged with fault in passing on the starboard instead of the port side of the other tow. The defence is that the tows were passing in the customary manner at this place and that the accident was an inevitable one, because caused by a sudden and severe storm from the westward, which blew the Cornell's tow over to the eastward and in contact with the other tow. The libellant urges that there was no sudden storm, which could not have been anticipated and provided against, and that even if it should be found that there was such a storm as the claimant contends for, that the tug must still be held, because when the storm came on, the Cornell was violating her statutory duty and under such circumstances, the violation and not the storm must be regarded as the proximate cause of the collision.

The testimony, in addition to the facts stated above, shows that the Washburn's tow, also a long one, about 1,500 feet in length, was proceeding at the rate of about $3\frac{1}{2}$ to 4 miles an hour. The Cornell and tow were going at the rate of about 4 miles an hour. When below Blue Point, a projection from the western shore of the river, about two miles below the bridge which crosses the river just above Poughkeepsie, the Washburn and the tow were seen by those on the Cornell and tow a little above, or about coming down under the bridge. The Cornell manœuvred in accordance with the usual custom to get her tow straightened out to pass through the center or cantilever span of the bridge, which is the largest of the five spans which it contains. This span is 518 feet wide in the clear between the abutments, and 165 feet above the surface of the river at low tide. On each side is what is called a Truss Span, about 500 feet wide and 132 feet above the water. The other two spans are cantilever spans of about the same height as the first mentioned. Not much attention was paid in the testimony to the western span, probably because it is not regarded as available for navigation. Although there is a sufficient depth of water there, the width is much reduced by the fact that the span extends for a considerable space over land. The eastern span is also reduced in navigable water space in the same way and the navigation

of what remains is rendered more or less difficult by structures towards and on the land. With a masted vessel in tow, the center cantilever span is the one ordinarily used by towing vessels and for large tows generally.

It appears that since the bridge was built, about 18 years ago, it has been the habit of tows to pass at this point on the starboard side of each other, instead of on the port side, as the navigation laws ordinarily require. It is provided:

"Art. 18. Rule I. When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other."

* * * * *

"Art. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel."

Act June 7, 1897, c. 4, 30 Stat. 100, 101 [U. S. Comp. St. 1901, pp. 2881, 2883].

The practice of the Cornell tugs of going to the starboard side has not evidently arisen from any intention to violate the rules but because it is incidental to what is regarded as the safest and most practicable method of overcoming the difficulties of passing under the bridge with long tows. When such a tow is going up the river, in order to pass safely through the center span, it is necessary to straighten the tow out before the bridge is reached. This involves the down coming tow going to the left, as going to the right would probably, on account of the conformation of the river, involve both in unnecessary difficulties.

The tows pursued the usual course upon this occasion. When they were about half way between Blue Point and the bridge and opposite each other, a sudden storm of wind arose, with rain and hail, blowing the tail of the Cornell's tow over against that of the Washburn and doing considerable damage. The storm lasted for a few minutes only, but there can be no doubt upon the testimony as to its suddenness and severity. Of course, if the Cornell was in fault for going to the left instead of to the right of the other tow, the storm, no matter how severe and sudden it may have been, would not be available as a defence, but where she was proceeding not in violation of law but in conformity with what prudent navigation evidently dictated and had been in successful practice for many years in this particular neighborhood, it can not justly, I think, be said that the storm was not the proximate cause of the accident.

I have not overlooked the libellant's claim that the tug had no lookout, and his absence was the cause of the tug not knowing of the storm's approach. It seems that the storm was so sudden in its approach that no lookout could have seen it in time for the tug to have provided against its effect, even if that could have been anticipated. It has not been suggested, nor does it occur to me, what could have been

done under the circumstances to avert the accident. The tows were passing at a distance variously estimated from 200 to 700 feet. Assuming it was the former, which is the libellant's claim, it was quite sufficient under ordinary circumstances to constitute a prudent margin for that neighborhood.

No navigation signals were given by either tug but that is unimportant because each understood just what the other was intending to do.

Assuming that the tug was justified by the necessities of the bridge navigation in going to the left, the case seems to fall within the authorities holding that where loss is occasioned by a vis major, there can be no recovery of damages. *The Morning Light*, 2 Wall. 550, 560, 17 L. Ed. 862; *Spencer on Marine Collisions*, § 195.

Libel dismissed.

UNITED STATES v. COLE.

(District Court, M. D. Tennessee. May 26, 1904.)

No. 967.

1. INTERNAL REVENUE—DEPARTMENT RULES AND REGULATIONS—EVIDENCE.

Internal revenue rules and regulations prescribed and promulgated by the Treasury Department are only for the guidance of officers in the administration of the internal revenue laws, and have not the force of rules of evidence in an action by the United States to collect a revenue assessment.

2. SAME—SPIRITS UNACCOUNTED FOR—ASSESSMENT—PRIMA FACIE EVIDENCE.

In a suit based on an internal revenue assessment made under Rev. St. § 3309 [U. S. Comp. St. 1901, p. 2158], providing that, if the commissioner finds that a distiller has not accounted for all spirits produced by him, he shall make an assessment for the difference at the rate of 90 cents per every proof gallon, the assessment is prima facie evidence of its validity.

3. SAME—EVIDENCE.

Where, in a suit to recover an assessment on unreported spirits alleged to have been distilled from 2,774 gallons of fruit, defendant stipulated that he had received such amount of fruit, but wholly failed to account either for the destruction of the fruit or of the spirits alleged to have been distilled therefrom, a finding in favor of the government was justified.

In this case it is agreed that the records in the internal revenue office show the facts to be as follows:

(1) E. B. Cole was a distiller of spirits from fruit and during the season of 1900, from August 1st to November 15th, reported on forms 15 to have distilled 18,248 gallons of apple pomace.

(2) The internal revenue office reported on forms 192 that, in addition to said pomace so reported as distilled on forms 15, said Cole received during said period the additional amount of 2,774 gallons of apple pomace.

(3) The United States gauger's reports show that during said period Cole accounted for and tax-paid from said distillery 1,232 gallons of brandy.

(4) The surveyed capacity of Cole's still was 70.13 gallons of spirits per each 24 hours of operation.

(5) Cole operated during said period 388 hours.

A. M. Tillman, U. S. Atty.
Frank P. Bond, for defendant.

CLARK, District Judge. In dealing with a case like this it is well enough to bear in mind that revenue laws are not like penal laws, to be strictly construed, but should be construed fairly and reasonably, in such a manner as most effectually to accomplish the intention of Congress in passing these laws. *United States v. Stowell*, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555. It seems pertinent to remark, too, that this court is not now dealing with the original question of whether the assessment should have been made, but only with the question of the validity of an assessment already made by the proper officer and the proper authority. The regulations and instructions so much relied on by the defendant's able counsel in the argument at bar are intended to control the actions of officers concerned with making an original assessment against a distiller, and these regulations and instructions do not purport to furnish rules of evidence for determining the validity of an assessment when that is called in question in this court. It would be quite beyond the province of such regulations and instructions to prescribe rules of evidence for the disposition of suits in this court. Of course, such application of such rules and regulations was never contemplated by the authority promulgating them, but they were designed, as stated, to guide officers in the Treasury Department concerned with the administration of the internal revenue laws. This misapprehension as to the method in which we are dealing with this assessment and the application of these regulations and instructions apparently underlies much of the argument of the defendant's counsel. With these preliminary observations the subject of the department rules and regulations may be dismissed as without application here.

It is also well to remark that the defendant has settled and paid the taxes on so much of the spirits or brandy produced at his distillery as he properly reported according to law, and as should have been reported on the quantity of fruit or pomace reported as received and used, and that is a closed transaction; certainly in the absence of some proper pleading and proper showing on which to open the account. This suit is not based upon a deficiency assessment, nor for material used in excess of the capacity of the distillery, as estimated, according to law, under the first clause of section 3309 [U. S. Comp. St. 1901, p. 2158]. The suit is based on an assessment made under the second clause of section 3309, which provides:

"If the commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of ninety cents for every proof gallon."

The taxes were assessed on the ground that it appeared that the defendant had received and used in his distillery 2,774 gallons of pomace, and from which he should have produced and reported spirits produced at the rate of 1 gallon of spirits for every 14 gallons of pomace. The suit gives rise to the sharp, single question of the validity of this assessment, and it is clear beyond necessity for comment that

this suit does not involve the taking of a general account between the government and the defendant, but involves the single issue whether the government has made out a case which entitles it to recover. The assessment itself, it must be borne in mind, is *prima facie* evidence, and, if not impeached, is sufficient to justify a recovery, although every fact on which the defendant's liability is ascertained is open to contestation by him. *United States v. Rindskopf*, 105 U. S. 418, 26 L. Ed. 1131. This is just the situation with which we are now and here dealing. Besides this *prima facie* showing in favor of the validity of the assessment, there is a stipulation on file as a part of the proof, in which it is distinctly agreed that the defendant received the 2,774 gallons of pomace or fruit. The defendant does not now, by his pleadings or proof, offer to show the accidental destruction of this pomace received by him, the spirits produced from which have never been reported. No showing is made as to what became of this pomace thus received, if not used. There is no showing that it was not in fact used, and the stipulation strongly supports the validity of the assessment made for the spirits, what should have been reported in consequence of this otherwise unaccounted for pomace. The fact that the defendant acknowledges receipt of the pomace fully justifies the finding that he used it, in the absence of any explanation otherwise accounting for what became of the material, and the use of the pomace of course justifies the conclusion that the defendant produced spirits at the rate of 1 gallon to 14 gallons of pomace, which he has not reported or accounted for, and he is therefore justly and legally subject to assessment and to the payment of the tax prescribed by law on the number of gallons thus circumstantially shown to have been produced.

The contention of the defendant's able counsel is based largely on the view that it is necessary to sustain this assessment in a suit brought thereon in this court by testimony direct and positive of the fact that the defendant produced the spirits from the fruit or pomace which he received and used at his distillery, and that this cannot be shown circumstantially. No authority, however, is cited to support this position, except a regulation of the Treasury Department, in respect of which sufficient has been said. The issues in a suit in this court are to be determined just like any other issue in a civil case, by a fair preponderance or weight of the evidence, and any necessary fact or element may be determined by circumstantial evidence, or by direct evidence, or by both of these combined, as in other cases. A doctrine which would require direct and positive evidence to the fact that distilled spirits were produced would make it altogether certain that the government would be defeated in well-nigh every assessment and suit of this kind. When a distiller is trying in this method to defraud the government, all necessary precaution would be taken to conceal the fact of the production of the spirits from all persons who might be in a position or willing to testify directly to the fact, and it must not be forgotten that in the case of a brandy distiller the government is not represented by any officer or agent present in a position to detect and testify to a fraud of this kind. A rule requiring direct and positive testimony to the fact that the spirits were actually or certainly produced would make it certain and easy to defraud the government, and there is no question that it would

be defrauded constantly and extensively. Furthermore, I may repeat and restate that the burden is not on the government in the first instance to go behind the assessment made and certified, and to show either directly or circumstantially, the actual production of spirits, in order to uphold the assessment. As I have pointed out, the assessment is *prima facie* valid, and sufficient to support judgment for the government, unless the defendant is able to show its invalidity. The assessment is good not only on account of the presumption in its favor in the absence of evidence to overturn it by the defendant, but, as I have declared, is strongly supported by the fact, admitted in the stipulation, that the pomace was actually received, and from which fact, in my opinion, it is entirely justifiable to infer that the material was used, and the proper quantity of spirits actually produced, any contrary view not being sustained by any explanation or showing made by this defendant.

I conclude that the government has made a case for recovery, and judgment will go accordingly.

THE ROBERT BURNETT.

(District Court, S. D. New York. December 27, 1904.)

1. COLLISION—TOWS IN EAST RIVER—TUGS WITHOUT LOOKOUTS.

Two tugs with tows, neither of which had a lookout on duty nor gave any signals, both held in fault for a collision between the tows in East river.

In Admiralty. Suit for collision.

Henry W. Goodrich, for libellant.

Carpenter, Park & Symmers, for the Robert Burnett.

Henry W. Taft and William Greenough, for the railroad company.

ADAMS, District Judge. This action was brought by William Bailey, as owner of the barge Bessie S., to recover the damages suffered by him through a collision between the barge, while in tow on a hawser of about 100 feet in length, in company with two other boats, of the tug Robert Burnett, and Car Float No. 26 in tow of the New York, New Haven and Hartford Railroad Company's tug Transfer No. 5, about 3 o'clock p. m. of the 6th day of January, 1904, in the East River, about opposite pier 50. The Burnett and tow were bound from 96th Street to Port Johnson. The tow was light. The tide was ebb. The fact of there having been such a collision is disputed by the respondent.

I find that the collision happened in the vicinity alleged, towards the middle of the river, but rather on the New York side. A collision of more importance occurred about the same time between the car float and the steamship Shimosa, docking at the upper side of new pier 36 (old 47), between Jefferson and Clinton Streets. The tug had taken the float, about 225 feet long, in tow on her own starboard side at the lower side of pier 51 to be moved to the lower

side of old pier 49. They backed out and drifted down with the tide. While waiting to get in to pier 49, they were driven by the floating ice, in connection with the wind and tide, into the steamship. The collision with the Bailey occurred during the backing and drifting and was possibly not noticed by those on the No. 5 or the car float, although there is testimony to show that some men on the float observed the wound made in the Bailey and laughed at it.

There is no doubt in my mind that the collision occurred, as claimed by the libellant, by the port stern corner of the float striking the starboard side of the Bailey. No signals were given and neither the Burnett nor No. 5 had any lookout carefully attending to his duty. The collision seems to be directly attributable to such neglect and both the Burnett and the respondent must therefore be held for the damages.

Decree for the libellant against the Burnett and the Railroad Company, with an order of reference.

KRAUT v. UNITED STATES.

(Circuit Court, S. D. New York. October 27, 1904.)

No. 3,520.

1. CUSTOMS DUTIES—CLASSIFICATION—PAPER BAGS—PRINTED MATTER.

Paper bags elaborately printed with advertising matter relating to the goods intended to be packed and sold within them are not "printed matter" within the meaning of paragraph 403, Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], but are dutiable as manufactures of paper not specially provided for, under paragraph 407 of said act, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673].

On Application for Review of a Decision of the Board of General Appraisers.

See 130 Fed. 392.

This case relates to paper bags imported at the port of New York by Adolf Kraut, which were elaborately printed with advertising matter relating to the goods intended to be packed and sold in the bags. They were classified as manufactures of paper, under paragraph 407, Tariff Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], and were claimed by the importer to be dutiable as "printed matter," under paragraph 403 of said act, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]. This contention was overruled by the Board of General Appraisers. (G. A. 5,606, T. D. 25,087.) The opinion of the board reads in part as follows:

Fischer, General Appraiser. The claim that paper bags upon which there appears printed matter are dutiable as printed matter under the provisions of paragraph 403 was decided by this board adversely to the importer in an unpublished decision filed June 26, 1902, in the matter of protest 78,671—F of Adolf Kraut. The board in that case said: "The fact that the bags have printed matter thereon will not make them dutiable under paragraph 403. The articles are paper bags, and have become by a process of manufacture a distinct article for use as such, and the printing thereon is merely incidental thereto, and is not a controlling feature." It may be observed that cartons and boxes made of paper frequently have on the outside some printing to indicate the character, quantity, or quality of the merchandise packed and sold therein, yet it cannot be said that those articles

are properly dutiable as printed matter; and these bags are in this particular in precisely the same category. The board decision referred to above was affirmed, without opinion, by the Circuit Court for the Southern District of New York, December 17, 1903, in the case of *Kraut v. United States*, 130 Fed. 392.

Howard T. Walden, for Importer.

Henry A. Wise, Asst. U. S. Atty.

Before HAZEL, District Judge.

At the conclusion of the argument the court affirmed the decision of the Board of General Appraisers, without opinion.

RODGERS v. BOUKER CONTRACTING CO.

(District Court, S. D. New York. December 16, 1904.)

1. SHIPPING—LIABILITY OF SCOW FOR LOSS OF CARGO OF STONE—LYING IN EXPOSED POSITION.

The owner of a scow chartered by the day, with a man in charge, is liable to the charterer for loss of her cargo of stone by her careening while she lay in an exposed position at the end of a pier where she was left by a tug, through the neglect of her master to haul her into the slip, where she would have been protected, which he could have done without difficulty.

In Admiralty. Suit against owner of scow to recover for loss of her cargo.

Peter S. Carter, for libellant.

James J. Macklin, for respondent.

ADAMS, District Judge. This action was brought by John C. Rodgers, the charterer of scow No. 58, against the Bouker Contracting Company, the owner of said scow, to recover the damages sustained through the dumping and loss of a load of stone, at 55th Street, North River, on or about the 26th day of December, 1903.

The scow was towed to the place on Friday, the 25th of December, and left at the end of the wharf. She remained there all of the 25th, the master, instead of hauling into the slip, having endeavored to hire a tug for such purpose but could not get one at the price he was willing to pay. The weather remained comparatively calm and moderate during the day. The next day, however, wind arose in the morning from the westward and by 9 o'clock it was blowing at the rate of 36 miles. It subsequently increased and by noon it was blowing at the rate of more than 50 miles and it remained high the remainder of the day. During the storm the boat careened and the cargo was lost.

The scow was hired by the day, the hire providing, according to custom, for the use of the scow with one man in charge.

The cause of the loss was the failure of the man in charge to move the boat to a secure place during the 25th, or in the early morning of the 26th. It was expected by the tug, which towed her to 55th street, that the master of the scow would haul her into the slip. It does not appear that there would have been any difficulty about doing that and the

master was offered assistance for such purpose by the master of another boat lying in the vicinity, which he rejected. About 6 or 7 o'clock in the evening the boat swung around on one line, so that she was lying partly across the slip. There is testimony to show that at this time the master had disappeared. The boat's position at the end of the pier was one requiring constant care, and in the absence of it, she took in enough water to cause the careening, with the resulting loss. I can not sustain the respondent's contention that the high wind was the proximate cause of the accident. When that came, she should have been in a protected situation.

It seems a clear case of liability on the part of the respondent for the neglect of its agent on the boat to observe the ordinary precautions required by the circumstances.

Decree for the libellant, with an order of reference.

UEHLING v. LYON et al.

(Circuit Court, W. D. Pennsylvania. January 13, 1905.)

No. 12.

1. TRUSTS—STOCK—ISSUANCE—EQUITABLE LIENS.

Where defendant held stock in trust for M., which was subject to defendant's equitable claim for services rendered in executing the trust, and complainant's only claim to certain of such stock was through M., complainant could not maintain a bill to compel defendant to transfer the stock to him without offering to satisfy defendant's claim thereon.

In Equity.

G. K. Wright, for plaintiff.

Lyon, McKee & Mitchell, for defendants.

BUFFINGTON, District Judge. This is a bill in equity to compel Walter Lyon, one of the respondents, to transfer to Edward A. Uehling, the complainant, stock of the American Casting Machine Company of the par value of \$5,000. The stock in question came into Lyon's hands under an agreement in writing, dated March 6, 1900, signed by H. W. Hartman and J. W. Miller. Subsequently, by indorsement thereon, dated May 5, 1900, they specified the person to whom the stock should be issued. Mr. Hartman's interest in the stock and trust had been satisfied. He was called as a witness in the case, and noninterest by him in the subject-matter here in dispute is conceded. Miller is not joined as a party to this suit, nor is it shown he has any knowledge thereof. It also affirmatively appears there was a dispute between him and Uehling in reference to the transactions in which this stock issued. No question is here raised as to the nonjoinder of Miller in this bill, and, in our view of the case, we need not concern ourselves therewith; but, if our conclusion were otherwise, and we regarded the case as one otherwise warranting a decree for the complainant, we would have difficulty in making such decree, owing to Miller's nonjoinder. *Philadelphia v. River Front R. Co.*, 133 Pa. 134, 19 Atl. 356; *Gregory v. Stetson*, 133 U. S. 579, 10 Sup. Ct. 422,

33 L. Ed. 792. In our view of the case, however, this question becomes of no importance, for on other grounds this bill must be dismissed. The contention of Lyon is that, while he received the entire issue of this stock in trust, such trust was one solely to H. W. Hartman and J. W. Miller. The facts proven support this contention. There is no evidence of any trust or duty imposed upon or accepted by Lyon to Uehling, the complainant. The latter expressly stated in his testimony that he never had any dealings with Lyon, or, indeed, had any acquaintance with him. It is true that Lyon issued stock to Uehling, but such stock was part of Miller's share under the Hartman-Miller agreement; and it was issued to Uehling, not because Lyon held it in trust for him, but because he held it in trust for Miller, and he issued it to Uehling by virtue of Miller's order. The unissued stock which is still in Lyon's hands the latter claims to hold as compensation for his duties and services under the trust to Miller. He says Hartman paid him his proportion of the compensation, but that Miller never has. If this be the case—and such seems to be the proof—it is apparent that while, as between Miller and Uehling the latter may be entitled to more stock than he has received, yet, as his claim to this particular stock is through Miller, he cannot compel a transfer without first meeting the prior equitable claims of Mr. Lyon to this stock of Miller's for services rendered in executing the trust. In other words, Uehling's claim is through Miller, and he must accept Miller's stock subject to all equitable charges against it for services rendered Miller. 2 Am. & Eng. Ency. Law, 1080; Appeal of the Mifflin County National Bank, 98 Pa. 150. The latter, by assigning his stock to a third party, or directing its issue to another, cannot thereby relieve it of pre-existing equitable charges or burdens resting upon it. Applying these principles to the facts before us, it is clear that there is no trust relation existing between Uehling and Lyon; that any claim Uehling has to this stock is through Miller; that, as to the stock, it was held by Lyon for Miller, but that it was subject to an equitable claim of Lyon against Miller for services rendered. It follows, therefore, that Uehling cannot compel a transfer of the stock by Lyon without discharging the latter's equitable claim upon the stock for services. Having sought equitable relief, he must do equity. *Dwyer v. Wright*, 162 Pa. 405, 29 Atl. 754. In the absence of any offer by Uehling to satisfy what the proofs show is a just charge on Lyon's part as against Miller's stock, his bill must be dismissed.

A decree in accord with these views may be prepared.

S. P. SHOTTER CO. v. LARSEN et al.

(Circuit Court of Appeals, Fifth Circuit. January 17, 1905.)

No. 1,391.

1. APPEAL—MATTERS REVIEWABLE—CONSOLIDATION OF SUITS.

Where cross-suits between the same parties, one in the Circuit Court and one in the District Court in admiralty, were by agreement tried together on the same evidence, but separate judgments were entered in each court, a subsequent order of the trial judge finding that the causes were consolidated into the admiralty case is not sufficient to effect a nunc pro tunc consolidation, and the judgment which remained of record in the Circuit Court is not reviewable on an appeal taken in the admiralty suit.

2. SAME—WAIVER OF ERROR.

Although a decree dismissing a libel in admiralty by a charterer to recover damages for breach of charter party was erroneous, it cannot be reversed, further than to award costs to the libellant, where with his acquiescence a portion of the damages claimed by him were proved and allowed as a set-off in a cross-action brought against him by the owners in another court, and no proceedings have been prosecuted to review the judgment in such action.

Appeal from the District Court of the United States for the Southern District of Georgia.

For opinion below, see 129 Fed. 945.

On September 1, 1902, J. A. Larsen and others, owners of the Norwegian ship *Hercules*, instituted a common-law action against the S. P. Shotter Company in the city court of Savannah, Ga., to recover \$5,000 alleged damages occasioned by the refusal of the S. P. Shotter Company to load the *Hercules* at the port of Savannah between the 3d and 30th of December, 1901; the claim being that the said ship was ready for loading under charter party on said dates. On the 6th day of November, 1902, by proceedings duly had, the said action was removed into the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia. On the 20th day of November, following, the S. P. Shotter Company filed a plea and answer to the said action, and thereafter on December 5, 1902, the *Hercules* then being in the port of Savannah, the S. P. Shotter Company caused the *Hercules* to be seized under a libel in rem for a breach of said charter party in deviating from her course and unreasonably delaying her arrival at said port of Savannah, thereby necessitating the hiring of another vessel to carry the cargo designed for her and frustrating the object of her charter; the damages being named at \$1,000.00. The master of the *Hercules*, in behalf of owners, made claim for the said ship, and on December 16, 1902, the owners filed an answer to the libel. Thereafter evidence was taken, which was agreed by counsel might be used in either case—the libel suit in the District Court and the common-law suit in the Circuit Court. Following this, we find in the transcript the following entry, but without date, probably March 8, 1904:

"Testimony before the Court.

"In the District Court of the United States for the Eastern Division of the Southern District of Georgia.

"J. A. Larsen & Co., Owners of the Ship *Hercules*, v. The S. P. Shotter Company.

"U. S. Circuit Court, Removed from City Court of Savannah.

"The S. P. Shotter Company v. The Ship *Hercules*, Etc.

"U. S. District Court, In Admiralty. Libel.

"Consolidated and tried together before Judge Emory Speer, without jury, by consent of attorneys.

"Mr. Adams: The first cause was brought by Larsen & Co., owners of the *Hercules*, against the Shotter Company, in the city court. That cause was

removed to this court. Subsequently Shotter Company filed a libel in rem against the Hercules in this court. The question is, who is entitled to go forward? I suppose we do, as we brought the first case—the Larsen case.

"Mr. Owens: I do not know that that gives him the right to go forward. The Larsen case was removed from the city court. We brought the original case in this court in admiralty. I do not understand the fact that they filed suit in the state court, which was removed to this court, gives them the right to open the case.

"Judge Speer: Are the cases consolidated?

"Mr. Owens: We have agreed to try them both. By consent both cases are to be tried together, because the testimony is the same in both cases—the original case brought in this court in admiralty, and the other case is in the Circuit Court, removed from the city court of Savannah. * * *

To an opinion filed by the District Judge on March 11, 1904, we find the following preamble:

"In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

"Removed from the City Court of Savannah.

"J. A. Larsen et al., Owners of the Ship Hercules, v. The S. P. Shotter Co.

"In the United States District Court for the Eastern Division of the Southern District of Georgia.

"In Admiralty. Libel, Etc.

"The S. P. Shotter Co. v. The Ship Hercules, Etc.

"By consent both cases were consolidated and heard before Judge Speer, sitting as judge of the Circuit Court and District Judge, without a jury.

"Samuel B. Adams, attorney for plaintiff in Circuit Court, and proctor for respondent in District Court.

"George W. Owens and Walter G. Charlton, attorneys for the S. P. Shotter Company, defendant in Circuit Court, and proctors for the same company, libellant in District Court.

"Opinion. March 11, 1904."

On the 17th day of March, 1904, the transcript shows a final judgment in the Circuit Court as follows:

"Final Judgment.

"In the U. S. Circuit Court for the Southern District of Georgia, E. D.
Case Removed from the City Court of Savannah.

"J. A. Larsen et al., Owners of the Ship Hercules, v. S. P. Shotter Company.

"The above-stated cause having been heard by the court without a jury under the agreement of counsel, and it appearing that there is no dispute as to the amount of damages payable under the opinion of the court heretofore filed, and that the said damages amount to eight hundred and ninety (890) pounds sterling, it is now considered and ordered that the above-named plaintiffs, J. A. Larsen et al., do recover from the above-named defendant, the S. P. Shotter Company, the sum of four thousand and three hundred and twenty-five dollars and forty cents (\$4,325.40), less the sum of three hundred and eighty-one dollars and four cents (\$381.04), allowed to the said Shotter Company; that is to say, that the said plaintiffs do recover the sum of three thousand nine hundred and forty-four dollars and thirty-six cents (\$3,944.36), with interest from date of suit in city court of Savannah, to wit, the 1st day of September, 1902.

"It is further considered and ordered that the said plaintiffs do recover all costs of court, to be taxed by the clerk.

"In open court, this 17th day of March, 1904.

"Emory Speer, Judge."

Indorsement: "In the U. S. Circuit Court for the Southern Dist. of Georgia, E. D. J. A. Larsen et al., Owners of the Ship Hercules, v. S. P. Shotter Co. Removed from the City Court of Savannah. Final Judgment. Filed March 17, 1904. S. F. B. Gillespie, Deputy Clerk. Adams & Adams. Davis Freeman."

On the same day the transcript shows the following entry of judgment in the District Court:

"Final Decree.

"In the U. S. District Court for the Southern District of Georgia, E. D.
In Admiralty.

"S. P. Shotter Company, Libellant, v. Ship Hercules.

"In the above-stated admiralty cause, heard by consent with the common-law case between the same parties, it is considered and ordered that judgment be and the same is hereby given in favor of the above-named Hercules and its owners, and that the libellant, the above-named S. P. Shotter Company, do pay all costs of court, to be taxed by the clerk.

"In open court, this 17th day of March, 1904.

"Emory Speer, Judge."

Indorsed on back: "In the U. S. District Court for the Southern District of Georgia, Eastern Division. S. P. Shotter Company, Libellant, v. Ship Hercules, etc. In Admiralty. Final Decree. Filed March 17, 1904. S. F. B. Gillespie, Deputy Clerk. Adams & Adams. Davis Freeman. Recorded in Admiralty Record E, folio 147."

Thereafter, on May 17, 1904, the following petition was filed, to wit:

"In the District Court of United States for Southern District of Georgia,
Eastern Division. In Admiralty. Libel in Rem.

"S. P. Shotter Company v. Bark Hercules, Her Tackle, Etc.
and

"In Fifth Circuit Court of United States for Southern District of Ga.,
Eastern Division. Damages under Charter Party.

"J. A. Larsen et al. v. S. P. Shotter Company.

"To the Honorable Emory Speer, as Judge of said Courts:

"The petition of the S. P. Shotter Company, libellant and defendant, respectively, in the above-entitled causes, respectfully shows:

"(1) That heretofore, to wit, on the eighth day of March, 1904, there were sounded for trial, no jury being present, the libel of S. P. Shotter Company against the bark Hercules, her tackle, furniture, et cetera, then pending in the District Court of the United States for the Southern District of Georgia, Eastern Division, and the case of J. A. Larsen and others, owners of the said bark Hercules, then pending in the Fifth Circuit Court of the United States for the Southern District of Georgia, Eastern Division, having been removed to that court by the defendant, the said S. P. Shotter Company, from the city court of Savannah.

"(2) That in order to save delay and expense, your honor, acting upon the conviction that the said causes had been consolidated, proceeded to try the same without the intervention of a jury.

"(3) That on March 11, 1904, your honor delivered an opinion, sounding in both cases, apparently in the District Court, which said opinion or decision recited such facts as seemed to your honor pertinent to the conclusion reached by your honor, but not referring to certain undisputed facts which upon another hearing may have a bearing upon the points involved. In this decision a decree was directed to be entered in consonance with findings of your honor, the decision being in favor of the said owners of the bark Hercules and against the said S. P. Shotter Company, although the damages proved by the latter in the admiralty proceeding were allowed by the way of set-off.

"(4) That upon the minutes of both courts it appears that this decision was filed on March 11, 1904, but as a matter of fact, as is shown by the entry on the decision itself, it was not filed until the following April term, and on the 21st day of April, 1904, although judgments were entered in both of said causes on March 17, 1904, against the said S. P. Shotter Company.

"(5) That whilst said decision was read by your honor on said March 11, 1904, it was not filed on that date, nor until the 21st of April, 1904; the said decision having been retained by your honor for correction.

"(6) That whilst doubtless intended to do so, the said decision as filed does not specially find the facts and the conclusions of law, and is not in shape to

be carried to the Circuit Court of Appeals, if the case was tried in the Circuit Court, although it is in shape for appeal if the causes were tried and determined in the admiralty case in the District Court.

"Wherefore your petitioner prays that a rule nisi be issued, to be directed to J. A. Larsen, H. Larsen, O. O. Rosland, Hans Andersen, O. M. Riis, Osten Olsen, J. H. Beck, Alf Gundersen, H. A. Tobiasen, and Charles H. Russ Company, as the claimants in the one cause, the plaintiffs in the other, and to be served upon their counsel of record, calling upon them to show cause why the said decision should not be so remodeled as to specially find the facts involved and the conclusions of law reached, in order that an appropriate bill of exceptions may be presented by your petitioner, and that in the meanwhile the time be extended until the further order of the court herein for the filing of a supersedeas bond. And your petitioner will ever pray, etc.

"G. W. Owens,

"Walter G. Charlton,

"Counsel and Proctors for S. P. Shotter Co."

A rule to show cause, as prayed for in said petition, was duly issued, and the petition seems to have been disposed of by the following:

"In the District Court of the United States for the Southern District of Georgia, Eastern Division.

"In Admiralty. Consolidated Cases Tried in District Court under Name of S. P. Shotter Company v. Ship Hercules, Her Tackle, Etc.
J. A. Larsen et al., Claimants.

"S. P. Shotter Company v. The Ship Hercules, Her Tackle, Etc.
J. A. Larsen et al., Claimants.
and

"J. A. Larsen et al. v. S. P. Shotter Company.

"Upon hearing the rule heretofore issued in the above matter, it is adjudged:

"(1) That the said causes were consolidated into the admiralty case of 'S. P. Shotter Company v. Ship Hercules, Her Tackle, Etc., and J. A. Larsen et al., Claimants,' and that any appeal which may be taken proceed in said name.

"(2) That the appeal is to be taken as from March 17, 1904, but by consent the appellant is hereby allowed 20 days beyond the regular time in which to present and take any appeal from the decree of the court herein; the filing of said appeal proceedings, if necessary to carry into effect this order, to be nunc pro tunc of a date within the time for appeal.

"(3) That any supersedeas bond given shall amply protect the appellees in the amount of their recovery.
Emory Speer, Judge."

Thereafter, on May 24, 1904, the following petition for appeal was filed:

"S. P. Shotter Company, Appellant, v. Ship Hercules, Her Tackle, Etc.,
and J. A. Larsen et al., Appellees.

"To the Honorable the United States Circuit Court of Appeals for the Fifth Circuit:

"The appeal of the above-named appellant respectfully shows: That on or about December 5, 1903, the above-named appellant, S. P. Shotter Company, a corporation of the state of West Virginia, exhibited its libel in the District Court of the United States for the Southern District of Georgia, Eastern Division, against the ship Hercules, her tackle, furniture, apparel, et cetera, and against all persons intervening for their interest in said vessel, for a cause of damage, civil and maritime, praying, among other things, for the reason set forth in said libel, that the said ship Hercules, her tackle, furniture, apparel, et cetera, and all persons claiming any right, title, or interest in said ship, might be condemned to pay the demands of said appellant, the damages and costs in said libel mentioned. That process issued out of said court, having been served on the said ship Hercules, her tackle, furniture, apparel, et cetera. J. A. Larsen, H. Larsen, O. O. Rosland, Hans Andersen, O. M. Riis, Osten Olsen, J. H. Beck, Alf Gundersen, H. A. Tobiasen, and Charles H. Russ Company, claimants, did on the ——— day of December, 1903, as owners of said ship Hercules, her tackle, furniture, apparel, et cetera, file answer to

said libel in the said District Court, praying that said libel be dismissed, with their costs in that behalf, as by reference to said libel and answer will more fully appear. That the said cause came on to be heard before the Honorable Emory Speer, as judge of said District Court, on or about the 8th, 9th, and 10th days of March, 1904, and at the same time and consolidated therewith, and as a part of the same, there came on to be heard before the said judge of said District Court, a case of the said J. A. Larsen, H. Larsen, O. O. Rosland, Hans Andersen, O. M. Riis, Osten Olsen, J. H. Beck, Alf Gundersen, H. A. Tobiasen, and Charles H. Russ Company against said S. P. Shotter Company, brought by them as owners of said ship Hercules upon precisely the same issues; the said cases having been consolidated into the name of the said admiralty case and tried in the District Court before the judge thereof, in order to save expense and avoid delay. That the said consolidated cause being heard in said District Court as aforesaid, on the admiralty side thereof, the said judge, having advised thereon, delivered an opinion therein on March 11, 1904, wherein it was directed that a decree be entered in favor of the appellees and against the appellant for the sum claimed by said appellees to be due them, less the amount proved by the said appellant as damages, and that all costs be allowed against the appellant. That on March 17, 1904, the said appellees entered up a decree against the appellant, as directed in said opinion, in the principal sum of thirty-nine hundred and forty-four dollars and thirty-six cents, with interest from September 1, 1902, and a decree against said appellant for all costs. This appellant is advised and insists that the said decision and decrees are erroneous, inasmuch as this appellant was entitled to the damages and costs in said libel claimed and set forth, and that the said appellees were not entitled to the sum in said decree named, or to any other sum, from this appellant, or to any costs, and this appellant, for this and other reasons, appeals from the whole of said decision and decrees in favor of the appellees to the next United States Circuit Court of Appeals for the Fifth Circuit, at such place within its jurisdiction as it may be held; and on said appeal it intends to have said consolidated cause heard anew in the said United States Circuit Court of Appeals for the Fifth Circuit, on the pleadings and proof in the said District Court.

"And it prays that the record and proceedings may be returned to the United States Circuit Court of Appeals for the Fifth Circuit, and that said decrees may be reversed, and that such other decree may be made thereon as to the said United States Circuit Court of Appeals may seem just, and that the appellees may be condemned to pay to this appellant its damages and costs in the premises.

George W. Owens,

"Walter G. Charlton,

"Proctors for Appellant."

On this petition was indorsed as follows: "Appeal allowed in open court this May 24, 1904. Emory Speer, District Judge."

Assignments of error and bond were duly filed, and the case thus brought here for review.

In appellant's brief we find the following: "The common-law case having been removed into the Fifth Circuit Court of the Southern District of Georgia, Eastern Division, by the appellant, and the issue involved in the two causes being the same, they were consolidated into the said admiralty cause then pending in the District Court of the Southern District of Georgia, Eastern Division, and disposed of by the judge thereof, who found for the appellees, although, as we will contend, allowing the claim of the appellant—a conclusion which should have disposed of the case in our favor. As it is, the net result of the decision is a judgment against the appellant for \$3,944.36."

In appellees' brief we find: "The first case brought was by Larsen et al., as owner of the Hercules; this being the common-law action filed in the city court of Savannah on the 1st day of September, 1902. The answer of Shotter & Company to this action was filed after the removal, namely, on November 20, 1902. The libel in rem of the Shotter Company against the ship was filed in the District Court December 5, 1902. The two cases were consolidated and tried together before Judge Speer, without a jury, by consent of the attorneys."

On the hearing, on inquiry from the court, the counsel for both appellant

and appellees stated that no point was made upon the question of consolidation, and agreed that this appeal brought up all the merits.

Walter G. Charlton, for appellant.

Samuel B. Adams, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

PARDEE, Circuit Judge, after stating the facts, delivered the opinion of the court.

We are not advised of any precedent or authority warranting the consolidation of suits pending in different courts of different jurisdictions; but, assuming for this case that an effective consolidation might have been ordered by the court and agreed to by the parties, the case shows that, up to and including the entry of the final judgment in the common-law case in the Circuit Court and the entry of the final decree on the libel in the District Court, there was, by the record, no consolidation of the two cases. The statements of counsel at the commencement of the hearing before Judge Speer amount to no more than an agreement to try the cases together. It appears that the judge inquired: "Are the cases consolidated?" The answer of counsel was: "We have agreed to try them both. By consent both cases are to be tried together, because the testimony is the same in both cases." The finding of the court in the order of appeal as follows: "It is adjudged that the said causes were consolidated into the admiralty case of 'S. P. Shotter Company v. Ship Hercules, Her Tackle, Etc., and J. A. Larsen et al., Claimants,' and that any appeal which may be taken proceed in said name"—and the judicial admissions of the parties in their briefs and at the bar seem to be ineffective and insufficient to work out a *nunc pro tunc* consolidation. It is to be noticed that by none of these was the judgment of the Circuit Court rescinded or made in any way the decree of the admiralty court, so as to be reviewed therewith.

From this it appears that the only questions we have before us on this appeal are those which arise in the admiralty case. From the pleadings and evidence therein, we find that there was a deviation in the voyage outlined in the charter party for the ship Hercules, and an unreasonable delay in reporting said ship to the libelant for cargo under the charter party. The evidence further shows that even if the ship was compelled, through strikes at Hamburg, to deviate and go to Porsgrund for repairs, she was there detained longer than was necessary to make the repairs resulting from her injuries at Tybee Bar, and that the occasion was taken advantage of to re-metal, caulk, re-treenail, and otherwise improve and rehabilitate the ship to meet the demands of the Norwegian authorities and retain her A 1 classification, all of which resulted in delay, to the injury of the libelant. It follows that, when the Hercules did report, the libelant had a right to refuse to accept her, treat the contract as broken, and recover the damages suffered by the owners' breach of the charter party. As to these damages, it appears by the record that, so far as proved, they were, through the acquiescence, if not the consent, of the libelant, allowed toward compensation of the judgment for the owners' damages allowed in the case at law. It does not seem that these damages should be twice allowed, and therefore it follows that,

so far as the case before us is concerned, the libelant was not entitled to recover damages, but was entitled to his costs, and the only logical decree for this court to render is to affirm the decree appealed from and award costs in both courts to the libelant; and it is so ordered.

FAIRMONT COAL CO. V. JONES & ADAMS CO.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,107.

1. BAILMENT—DUTY AND LIABILITY OF BAILEE—CONSTRUCTION OF CONTRACT.

The common-law duty of a bailee for hire with respect to the thing bailed is to exercise a reasonable degree of care and skill for its preservation, and unless he has undertaken, by the terms of his contract, express or implied, to become an insurer, he is not liable for the destruction of the thing bailed from an unforeseen cause which he could not control; and stipulations in his contract which merely declare a liability which the law would impose upon the facts neither increase nor change his obligation.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bailment, § 46.]

2. SAME—AGREEMENT TO BE "RESPONSIBLE" FOR THING BAILED.

Plaintiff and defendant entered into a contract by which defendant, the lessee of a coal dock, was to act as bailee and agent in receiving, storing, re-shipping, and selling coal produced by plaintiff. The contract provided that plaintiff should remain the owner of the coal until it was sold, and fix the selling price, defendant to receive a commission on the sales and to guaranty the accounts; that plaintiff should insure all coal consigned, "and deliver the same safely alongside" defendant's dock, which should "thereupon be responsible to said first party for all coal after such delivery alongside its dock," and insure the same, and pay taxes thereon, and guaranty weights as per bills of lading, being compensated therefor and for dock rents by the payment by plaintiff of a stated price per ton for loading and reloading. *Held* that, in view of the other provisions of the contract, the provision that defendant should be responsible for the coal after its delivery was not intended to enlarge its common-law liability as bailee by making it an insurer against all possible contingencies, but to mark the time when such liability should commence, and that it was not liable for a loss of coal through a collapse of its dock occurring without any fault or negligence on its part.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The plaintiff in error sued in assumpsit to recover the value of certain coal consigned to the defendant, and lost while in the defendant's possession; also to recover the balance due upon open account, and for the proceeds of the sale of certain other coal consigned and not accounted for.

The plaintiff in error, a corporation of the state of West Virginia, shipped coal, upon consignment, to the defendant in error at Ashland, Wis. The latter had leased a dock extending over and into the waters of Ashland Bay, and controlled and managed it. The contract between the parties, dated April 24, 1902, recites that the plaintiff is engaged in the production of bituminous coal in the state of West Virginia, and that the defendant is engaged in the operation of coal docks at Duluth, Minn., and Ashland, Wis., and in marketing coal therefrom; that the plaintiff is desirous of reaching territory tributary to the docks of the defendant, and thereupon appoints the defendant its agent in the storing, handling, and selling of its coal in Duluth and Ashland, upon the following conditions: (1) Plaintiff

agreed to furnish, and the defendant to receive, 25,000 tons of Fairmont coal between May and September, 1902, and thereafter, during the remainder of the season of navigation, such additional quantity as may be agreed upon. (2) The coal furnished should be upon consignment, and remain the property of the plaintiff until sold and delivered to buyers, no property interest being acquired by the defendant in any of the coal so furnished; the defendant to guaranty all collections, and the selling price to be fixed by the plaintiff. (3) No other bituminous coal to be handled by the defendant, except upon written consent of the plaintiff. (4) The defendant to advance freights from Lake Erie ports to its docks, and to deduct the amount advanced upon settlements. (5) The plaintiff to insure all coal consigned "and deliver the same safely alongside" the defendant's dock, who "shall thereupon be responsible to said first party for all coal after such delivery alongside its dock," and insure the same, and pay taxes thereon, and guaranty weights as per bills of lading. (6) The defendant to enter into no contract for sale for future delivery, except as should be designated by the plaintiff. (7) The instructions of the plaintiff as to prices, terms, and conditions of sale to be absolutely carried out, so that within the common territory the selling prices fixed by the plaintiff should be, under substantially similar circumstances, uniform and without favor or discrimination. (8) The plaintiff to pay the defendant 15 cents per ton for unloading from vessels, and 17 cents per ton for reloading coal, if not screened, and 25 cents per ton for screening and reloading coal. These charges to include dock rents, taxes, insurance, and the guaranty of weights. (9) The prices stated to cover coal screened at the dock. (10) Plaintiff to pay the defendant a commission of 5 per cent. for selling screenings, and 4 per cent. for other grades; the percentage to be based on the selling price of coal at the dock, as sanctioned by the plaintiff. (11) Plaintiff not to compete with the defendant in making sales of Fairmont coal in the territory specified, with the privilege reserved to the defendant to sell cargo coal under conditions stated. (12) The commission provided to cover the total cost to the plaintiff for marketing direct to dealers or consumers; the defendant not to sacrifice any part of its commissions, or directly or indirectly to make other concessions to influence trade, or sell through others than those employed exclusively as the direct representatives of the defendant at fixed salaries. (13) Settlements to be made on the 25th of each month, covering the transactions of the preceding month. (14) The defendant to keep accurate record and books of account, and to report as the plaintiff may from time to time require, with the right reserved to plaintiff to examine and audit the books of account of the defendant. (15) At the expiration of the contract, coal consigned and remaining upon the docks of the defendant shall be purchased by the defendant at the then market value.

On September 28, 1902, part of the coal dock at Ashland leased by the defendant suddenly collapsed, and there sank with it into about 20 feet of water some 6,300 tons of coal so consigned. A considerable portion of this coal was recovered at an expense incurred by the defendant of \$2,689.78, but 1,671.35 tons were totally lost. The fact is stipulated that the collapse of the dock and the loss of the coal occurred without fault or negligence upon the part of the defendant. The court below ruled that the plaintiff should not recover the value of the coal lost, and also charged against the amount due from the defendant the expense incurred in saving the portion of the coal recovered. To review these rulings, this writ of error is sued out.

W. H. McSurely, for plaintiff in error.

F. B. Johnstone, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

The relation created by the contract in question, as between the parties thereto, was that of principal and agent, principal and factor, bailor

and bailee. The common-law duty of the bailee with respect to the thing bailed is to exercise a reasonable degree of care and skill for its preservation. He is not liable for loss or injury to the thing bailed, occurring either by vis major, or from unforeseen and unexpected causes not naturally to be expected, and which could not be guarded against by reasonable foresight. He is not an insurer. It is, of course, competent for the bailee to enlarge his common-law liability, and where he has expressly undertaken, by contract express or implied, to assume the character of insurer, he is liable for the destruction of the thing bailed, although occurring from an unforeseen cause which he could not control. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. The bailee here is therefore liable, if liable at all, because of the stipulations of the contract. In the construction of that contract it is to be remembered that, if its terms merely declare the liability which the law upon the facts would impose, the obligation of the bailee is neither increased nor changed, for, as Story observes, the general rule in the construction of special contracts of this kind is not to expound the contract unfavorably to the bailee beyond the obvious scope of its terms. Story, *Bailm.* § 35. Thus Blackstone states that a bailee "who undertakes specially to keep the goods safely and securely" obligates himself to the ordinary diligence which the common law demands (2 Bl. Comm. 452); otherwise, however, if the term of the contract is to do that absolutely which the law does not require to be done. Of this class are many of the cases cited by the plaintiff in error. *Direct Navigation Company v. Davidson* (Tex. Civ. App.) 74 S. W. 790; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Coal Company v. Richter*, 31 W. Va. 858, 8 S. E. 609; *Reinstein v. Watts*, 84 Me. 139, 24 Atl. 719; *Tindall v. McCarthy*, 44 S. C. 487, 22 S. E. 734. These cases are wanting in the element of agency, and merely emphasize the rule, so that the question resolves itself to this: Did the defendant in error by the stipulation of the contract become an insurer of this coal against all possible contingencies? In what respect, if at all, was its common-law liability enlarged? The solution of these questions rests upon the proper construction of the fifth paragraph of the contract, read in the light of the situation disclosed by the other clauses of the contract. That paragraph is as follows:

"Fifth. The first party shall insure all cargoes of coal consigned to the second party, and deliver the same safely alongside second party's docks, and said second party shall thereupon be responsible to said first party for all coal, after such delivery alongside its docks, and shall insure all such coal upon receipt of the same at its own expense, and shall also pay any taxes that may be thereafter levied upon the same; and also guarantee to the first party weights as per bills of lading, but said bills of lading shall be accompanied by manifests showing initial, number and contents of each car, evidencing the coal covered by such bills of lading. These charges shall be considered as part of the cost of storing and handling."

The agreement made the defendant in error the selling agent of the plaintiff in error at Ashland and Duluth. The coal was to remain the property of the bailor until sold and delivered by the bailee, and until the proceeds were accounted for. Then, and then

only, would the bailee have any right in the accounts arising from the sale, or any right of action against the purchaser. The bailee guarantied the collection of the accounts. The coal could only be sold at such prices as the bailor should from time to time direct. The bailee should not handle bituminous coal on its own account, or any consigned by others. It should advance the necessary freights from Lake Erie ports, deducting the amount from sales made. The bailor allowed the bailee 15 cents per net ton for loading coal from the vessel, and 17 cents per net ton for reloading unscreened, and 25 cents per net ton for screening and reloading coal. Such allowance was to be considered an equivalent for all dock rents, taxes, insurance, and guaranty of weights by the bailee. The bailee was to receive a commission of 5 per cent. for selling screenings, and 4 per cent. for other grades of coal, based upon the selling price, as authorized from time to time by the bailor; and the bailee was debarred from making any concessions of its commission, or of the storage or handling charges, to secure trade, whereby all cutting of prices was prevented. It is difficult to conceive of a contract which could be drawn more certainly to deprive the bailee of all discretion, or to continue the bailor in uncontrolled authority over the thing bailed. In the conditions established by the contract there is nothing to lead us to suppose that the bailee designed to enlarge its common-law liability, except as may be spelled out by the precise language of this fifth paragraph. By that the bailor insured the consignments of coal while in transit from its mines to the lake ports for shipment, and on the voyage through the lakes to the port of delivery, and undertook to deliver the cargoes safely alongside the dock at Duluth and the dock at Ashland; and thereupon, says the contract, the bailee shall "be responsible to said first party for all coal after such delivery alongside its docks." So that, in the last analysis, the question turns upon the proper meaning to be given to the word "responsible," as employed in the contract. Does it mean liable as insurer, or does it mean that the responsibility of the bailee shall begin when the vessel containing the coal is safely alongside the dock? We think that the latter, in view of the conditions of the contract, is the natural and correct meaning to be given to the term. The bailor was to insure its coal up to that time. After that time, in consideration of the commission allowed, the bailee was to insure. The term "responsible" is employed in connection with the subject of insurance. The time of delivery to the bailee—the time when the obligation to insure commenced—was the time of the arrival of the vessel safely alongside the dock. That marked the time when the duty of the bailor ended and the duty of the bailee began. If the bailee assumed the character of an insurer, and became absolutely responsible to the bailor for the return of the coal or its proceeds, why should the contract provide that the former should insure the coal? This clause means to us that the bailor recognized the contingencies of loss attaching to its continued ownership of the coal; that it must bear the loss occurring through fire, and sought to protect itself in that respect, but at the expense of the bailee. The same observa-

tion would apply with reference to the provision for the payment of taxes. The intent of the parties, as we read this contract, was that the liability of each is to be measured by the law of the land, except as to those matters expressly mentioned, with respect to which that liability was enlarged. This reading is strengthened by a provision of the first clause which, although connected with, and possibly limited to, the subject of the delivery and receipt of coal, may well be held to characterize the general intent as to the duty of each, in the absence, at least, of any express provision enlarging the common-law liability. That clause is as follows:

"Both parties in entering into this agreement realize the uncertainty of absolute deliveries growing out of strikes, casualties or other causes beyond the control of either party, and it is hereby mutually acknowledged that the intent of this agreement is not to bind either party as to failure to perform or modified performance by reason of matters beyond the control of the party in default, but that the coal shall be shipped and accepted by the second party as per delivery specified so far as the labor and the physical conditions at the respective plants and the ability of the carriers will permit."

The loss concededly occurred by unforeseen accident, and without default or negligence on the part of the bailee. Its liability as insurer is not established by any express term of the contract. We do not think that it can be fairly implied. Nor is there anything in the surrounding conditions which would warrant a construction to work out liability as insurer.

The judgment is affirmed.

UNITED STATES v. NORTHERN PAC. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1905.)

No. 1,961.

1. JURISDICTION OF FEDERAL COURTS—SUITS BY UNITED STATES.

Where a statute making provision for suits by the United States does not designate the tribunal in which they shall be instituted, when brought in a federal court, they fall within the general grant of jurisdiction found in Judiciary Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], and are subject to the limitations therein expressed.

2. SAME—DISTRICT OF SUIT—CORPORATIONS.

For jurisdictional purposes, under Judiciary Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], a corporation is an "inhabitant" only of the state under which it was incorporated, and is not suable elsewhere without its consent.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 814, 860.]

3. EQUITY—NECESSARY PARTIES.

To a suit by the United States in a Circuit Court in which the annulment of a contract between corporations is sought as a necessary incident to other relief prayed for, all the corporations which are parties to such contract and whose interests will be substantially affected by its cancellation are indispensable parties; and the court cannot proceed to try the case on the merits where it is without jurisdiction of one of such corporations.

Appeal from the Circuit Court of the United States for the District of Minnesota.

For opinion below, see 120 Fed. 546.

On July 21, 1890, the United States of America filed its bill of complaint in the Circuit Court of the United States for the District of Minnesota against the Northern Pacific Railroad Company, the Northwestern Telegraph Company, and the Western Union Telegraph Company, the averments of which were substantially as follows: The Northern Pacific Railroad Company was incorporated by an act of Congress approved July 2, 1864 (13 Stat. 365, c. 217), for the purpose of building and maintaining a continuous railroad and telegraph line from a point on Lake Superior in Minnesota or Wisconsin to Puget Sound and Portland in the state of Oregon. A subsidy in lands and also a right of way through the public domain were granted to it by the act as an aid to the construction of the railroad and telegraph lines. The act required, among other things, the construction of "a telegraph line of the most substantial and approved description, to be operated along the entire line." The better to accomplish the object of the act, which was declared to be the promotion of the public interest and welfare, by the construction of the railroad and telegraph line and keeping the same in working order, power was reserved by Congress to add to, alter, amend, or repeal the same at any time. Pursuant to this reservation of power Congress passed an act, which was approved August 7, 1888, 25 Stat. 382, c. 772 [U. S. Comp. St. 1901, p. 3582]. The first and fourth sections of this act are as follows:

"That all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds, or loan of credit for the construction of either railroad or telegraph lines, which, by the acts incorporating them, or by any act amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain, and operate, for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid."

"That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the Attorney General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation."

The railroad company completed its railroad in 1883. At the time the bill was filed it was engaged in operating about 2,200 miles of railroad, had received and was in the enjoyment of the lands and right of way granted to it, but had wholly ceased to maintain or operate any line of telegraph. On May 1, 1880, a contract was entered into between the Northwestern Telegraph Company and the Western Union Telegraph Company and the railroad company which recited that under a prior contract between them the telegraph companies had constructed the telegraph lines along the railroads of the railroad company and that they were jointly and equally owned by the contracting parties. The truthfulness of this recital in the contract was challenged by the government. It was claimed that on the contrary the railroad company had

built its own lines of telegraph as it was required to do by the act of its incorporation, but, if it should be discovered that such recital was true, then that the arrangement so entered into was beyond the corporate powers of the railroad company, was a gross breach of public trust, and should be relieved against in that suit. The terms of the contract of May 1, 1880, which were then being observed by the parties, effected an abandonment by the railroad company of the exercise of the telegraph franchises conferred upon it by the act of July 2, 1864. The telegraph companies claimed to be the owners of a large part of the telegraph properties and instrumentalities, and had in fact unlawfully supplanted the railroad company, with its consent, in the conduct of the public and commercial telegraph business. The railroad company, notwithstanding the requirements of the acts of Congress and its obligations to the government and to the public, persisted in protecting the telegraph companies in the possession and enjoyment of the monopoly of such business which was reserved to them by the contract. Since the passage of the act of August 7, 1888, which particularized the duties imposed upon the railroad company, it had not abrogated or annulled the unlawful contract entered into with the telegraph companies, but continued to disregard the commands of that act. The Western Union Telegraph Company was organized as a corporation under a statute of the state of New York, and it claimed to have succeeded by purchase or lease to all of the rights and franchises of its codefendant the Northwestern Telegraph Company. The legality of the incorporation of the Western Union Telegraph Company was challenged, as was also its power to acquire the rights and franchises of its said codefendant. The prayer of the bill was, in substance, that the contracts between the railroad company and the telegraph companies be set aside, annulled and canceled; that the court, by proper order and under certain penalties to be prescribed, direct the railroad company to thenceforth and through its own corporate officers and employes maintain and operate telegraph lines along its entire main line and branches for all purposes, and exercise by itself alone all the telegraph franchises conferred upon it; and that the rights of the government, the defendants, and all other persons and corporations claiming any control or interest of any kind in the telegraph lines or property on or along the railroad, or exclusive rights of way, be legally ascertained and finally adjudicated.

On July 13, 1900, the Northern Pacific Railway Company which, through foreclosure proceedings, had theretofore succeeded to the property and franchises of the railroad company, was made a party defendant. Thereafter an amended and supplemental bill was filed by the government, which, after reciting and reaverring the substance of its original pleading, set forth the following facts: In its acquisition of the property and franchises of the railroad company the duties and obligations imposed upon the latter by the various acts of Congress devolved upon the railway company, and it became chargeable with the performance thereof. Although the contract with the telegraph companies of May 1, 1880, had expired by limitation and notice, and was no longer binding as a written contract, nevertheless the railway company and the telegraph companies were still operating thereunder in all respects as had the original contracting parties. The railway company had surrendered its telegraph franchises and business to the telegraph companies and had given them the complete exercise and control thereof. The prayer for relief was similar to that of the original bill. Among other things the complainant prayed that the contracts and arrangements between the railway company and the telegraph companies for the operation of the telegraph lines along the railroad right of way be declared void, set aside, annulled, and canceled.

After the filing of the original bill the Western Union Telegraph Company tendered its plea to the jurisdiction of the court, claiming that as it was a corporation of the state of New York, and therefore an inhabitant of that state, suit could not be maintained against it in the District of Minnesota without its consent. The plea was overruled. The company, through counsel appearing for it, had previously submitted itself to the jurisdiction of the court; but it was allowed to withdraw its general appearance and the pleadings filed in its name. The reasons for this action do not appear, but the record does not show that any objection was then made thereto, nor is any made in this court. It should, therefore, be presumed that there was sufficient cause,

and that it was shown to the satisfaction of both the Circuit Court and counsel for complainant. After the overruling of the plea the issues were joined and the testimony taken. Upon final hearing the Circuit Court dismissed complainant's bill upon the merits. From the decree this appeal is prosecuted,

Charles C. Houpt, for appellant.

C. W. Bunn, for appellee railroad companies.

Rush Taggart, for appellee telegraph companies.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There is no act of Congress specially applicable to suits such as the one now under review, which designates the tribunal in which they shall be instituted. The case, therefore, falls within the general grant of jurisdiction to the Circuit Courts found in Judiciary Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], and is subject to the limitations therein expressed. It is provided in that section that:

"No civil suit shall be brought * * * against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

The exception to this provision in respect of suits between citizens of different states does not apply to suits in which the United States is plaintiff or petitioner. The contention of the Western Union, which was asserted in the Circuit Court and is still asserted here, is that, being a corporation organized under the laws of New York, it is an inhabitant of that state, and is not suable in the District of Minnesota without its consent. The fact that a corporation does business in a state other than that of its incorporation does not make it an inhabitant of that state for purposes of jurisdiction. It remains an inhabitant of the state under the laws of which it was organized. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Southern Pacific v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; *In re Keasbey & Mattison Company*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; *Rust v. Waterworks Co.*, 70 Fed. 129, 17 C. C. A. 16; *Ellsworth Trust Co. v. Parramore*, 108 Fed. 906, 48 C. C. A. 132. In *United States v. Southern Pacific et al.* (C. C.) 49 Fed. 297, which was a case very similar to the one at bar, a contrary view was announced. The pleas and motions of the Southern Pacific, a Kentucky corporation, and the Western Union, a New York corporation, were overruled; it being held that they were inhabitants of the state of California where the suit was instituted. But the doctrine which we have applied is now firmly established. It follows, therefore, that the plea of the Western Union should have been sustained, it should have been dismissed from the suit, and all proceedings thereafter should have been as though it were no longer a party defendant.

In this view of the situation, considering that the plea was sustained, as it should have been, had the Circuit Court, sitting as a court of equity,

jurisdiction to proceed further, or should the cause have been dismissed without prejudice to other proceedings? If the government had merely sought to enforce the performance of a duty imposed upon the Northern Pacific by its charter or by statute, the remedy would have been at law, by an ordinary action in mandamus, and not by a suit in equity. To such an action the Western Union would not have been a proper party, nor would it have been bound by any judgment obtained against the Northern Pacific. The jurisdiction of the Circuit Court as a court of equity arose solely from the fact that the contracts and arrangements with the Western Union and its possession and partial ownership of the telegraph lines and instrumentalities along the lines of railroad interposed an obstacle to the adequacy and efficiency of the remedy at law. The judicial ascertainment and removal of the entanglements arising from the joint ownership of the telegraph properties and the contractual relations between the defendants were peculiarly within the province of a court of equity. An action at law would have been wholly inadequate to secure the measure of relief sought by the government. But, jurisdiction in equity once secured, the court could, conformably with familiar principles, proceed to a decree that would settle all matters in dispute between the parties pertaining to the subject-matter of the litigation. *United States v. Union Pacific Railway*, 160 U. S. 1, 50, 16 Sup. Ct. 190, 40 L. Ed. 319. The averments of the original and amended bills and the prayers for relief clearly show that an important and essential purpose of the suit was the removal of the obstacles to the enforcement of the legal rights of the government; and in that particular feature of the case dwelt the elements of equitable jurisdiction. A decree was sought by the government annulling and canceling the contracts and arrangements between the Northern Pacific and the telegraph companies and the judicial ascertainment and adjudication of the rights of the government and of the defendants' claims of an exclusive right of way or of control or interest of any kind in the telegraph lines and property along the railroad. It is manifest, therefore, that the Western Union was an indispensable party to the suit and that relief so vitally affecting its interests could not be awarded in its absence. And as its codefendant, the Northwestern Telegraph Company, was merely a nominal party, the substance of its rights, if, indeed, it possessed any at all, being owned and controlled by the Western Union, it is also apparent that, with the departure of the latter from the case as a necessary consequence to the sustaining of its plea to the jurisdiction, the right to entertain the proceeding of the government as a suit in equity would thereupon cease. Upon a dismissal of the Western Union there would be present in court no defendant which asserted those impeding claims and interests the existence of which alone justified an appeal to a court of equity. The Western Union was not properly suable in the district of Minnesota without its consent. It seasonably presented its objection, and its plea should have been sustained. Its presence as a party to the suit was indispensable to the maintenance thereof in equity and to the granting of the relief asked by the government. The bill should, therefore, have been dismissed upon that ground, and not upon the merits. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Barney v. Baltimore City*, 6 Wall. 280, 284, 18 L. Ed. 825; *Bank v. Railroad*, 11 Wall.

624, 20 L. Ed. 82; *Ribon v. Railroad Companies*, 16 Wall. 446, 450, 21 L. Ed. 367; *Gregory v. Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792.

These conclusions render it unnecessary to consider whether the act of August 7, 1888, applies to the Northern Pacific, or whether that company has failed to comply with its requirements, or with the requirements of the act of July 2, 1864, by which the Northern Pacific Railroad Company was incorporated.

The decree of the Circuit Court is reversed, and the cause remanded, with directions to sustain the plea of the Western Union Telegraph Company and to dismiss the complainant's bill, without prejudice to any future proceeding.

SPARHAWK v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. January 18, 1905.)

No. 13.

1. CONTRACT FOR FURNISHING GOVERNMENT SUPPLIES—CONSTRUCTION.

A contract for the furnishing of supplies to the United States for the use of the Post Office Department during a fiscal year bound the contractor to furnish such supplies "in such quantities, and in such quantities at a time and from time to time, as may be ordered," and provided that, on the failure to furnish any such supplies within 30 days after they were ordered, the Postmaster General should have the right to purchase the same in the open market, and, if a greater price was paid, the difference between such price and the contract price should be charged to the contractor. There was a further provision authorizing the Postmaster General to annul the contract for any failure of the contractor to perform any of its covenants, and that the exercise of such authority should not affect or impair any right or claim of the United States to indebtedness or damages for the breach of any of its covenants. *Held*, that the annulment of the contract under such provision did not affect the right of the United States to thereafter purchase supplies to fill orders previously given and not filled by the contractor, and to recover from the contractor the difference between the cost and the contract price.

2. SAME—BREACH—EFFECT OF CONTRACTOR'S BANKRUPTCY.

Under a contract for furnishing supplies for the use of the Post Office Department during a fiscal year "in such quantities, and in such quantities at a time and from time to time, as may be ordered," but which did not bind the government to order any specified quantity, there can be no breach by the contractor for a failure to furnish supplies unless they were ordered, and the fact that the contractor became bankrupt during the term did not create any liability on his part for a failure to furnish supplies thereafter, where none were ordered.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Samuel Scoville, Jr., and Charles H. Edmunds, for appellant.
Jasper Yeates Brinton and J. Whitaker Thompson, for the United States.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The proof of claim of the United States was in the sum of \$7,816.95 for actual damages sustained by

reason of the failure of the bankrupt (Charles M. Stoever) to perform a written contract made July 24, 1899, between the United States, of the first part, and Charles M. Stoever, as principal, and the United States Fidelity & Guaranty Company, as surety, of the second part, whereby it was stipulated that Stoever would furnish and deliver from time to time, as the same might be ordered during the fiscal year beginning July 1, 1899, and ending June 30, 1900, certain supplies of wrapping paper for use of the Post Office Department. We quote such parts of the contract as are most material for the understanding of this controversy.

"First. The said parties of the second part hereby covenant and agree to and with the said party of the first part that the said Chas. M. Stoever shall and will furnish and deliver, at and for the prices hereinafter covenanted and agreed to be paid therefor by the party of the first part, and in such quantities, and in such quantities at a time and from time to time, as may be ordered for the use of the Post Office Department and postal service, the following mentioned articles specified in said advertisement, to wit:

* * * * *

"And it is further expressly agreed that in case of the failure of said Chas. M. Stoever, principal of the party of the second part, to furnish any of said articles within thirty days after they have been ordered, the right is reserved by the Postmaster General to purchase such articles in open market; and if a greater price than that specified in this contract be paid for such articles, the total difference between the purchase price and the contract price may be charged to the said party of the second part.

* * * * *

"The said parties of the first and second part hereby mutually stipulate and agree that this contract may be annulled by the Postmaster General for any failure, in his opinion, of the said Chas. M. Stoever to do and perform any of the covenants, agreements, or stipulations herein covenanted, agreed, and stipulated to be done or performed by the said parties of the second part, or in case of a willful attempt by him to impose upon the department articles inferior to those required by this contract; and the said parties of the second part further expressly agree that the termination of said contract as aforesaid, or anything done by the Postmaster General in pursuance of the stipulation, shall not affect or impair any right or claim of the United States to indebtedness or damages for the breach of any of the covenants of the contract by the parties of the second part."

The contract contains a provision that, in case of the failure of Stoever to perform any of his stipulations, he shall become indebted to the United States in the sum of \$10,000 as fixed and settled damages; but this provision may be disregarded, for not only does section 57, subd. "j," of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]) exclude proof by the government upon the basis of such a penalty, but in fact the United States has made its proof of claim here for actual damages only.

The appellant has abandoned as untenable his position that the claim of the United States is barred by reason of the failure to make proof thereof within a year from the adjudication herein, and accordingly has waived his first assignment of error. Hence the controversy in this case is narrowed to the question of the amount of damages allowable to the United States and provable against the bankrupt's estate.

It appears that seven orders under the contract were made on Stoever from September 20 to December 5, inclusive, 1899, aggregating 16,000 reams of paper; that Stoever failed to fill any of these

orders; and that, pursuant to the terms of the contract, purchases were made to supply these unfilled orders, the excess paid for the 16,000 reams over the contract price amounting to \$5,741.95. Five of these purchases were made between November 23, 1899, and January 9, 1900, one on January 30, and one on February 8, 1900. On January 22, 1900, the Postmaster General, by an order reciting the failures of Stoever to furnish the articles ordered, declared him to be a failing contractor. Both the referee in bankruptcy and the district judge assumed that the order of January 22, 1900, was an annulment of the contract under the above-recited provision.

On February 7, 1900, a petition by creditors of Charles M. Stoever was filed, praying that he be adjudicated an involuntary bankrupt, and on March 28, 1900, he was adjudged a bankrupt. The United States claims the excess of \$5,741.95 mentioned above, and this the referee in bankruptcy allowed. But, in addition thereto, the United States claims an excess over contract price of \$2,075 paid on 7,100 reams of paper purchased on various dates between February 8 and June 4, 1900, although it appears that no order for any part of the 7,100 reams of paper was made on Stoever. This latter claim the referee disallowed. The trustee excepted to the allowance to the United States of the sum of \$5,741.95, and the United States excepted to the disallowance of the sum of \$2,075. The court overruled the exceptions of the trustee, and sustained the exception of the United States, and decreed in favor of the government for the full amount of its claim, \$7,816.95. From this decree the trustee appealed.

The trustee insists that the excess of cost price over the contract price of the two lots of paper purchased on January 30 and February 8, 1900, amounting to \$2,090.55, should be disallowed, because the contract had been annulled by the Postmaster General on January 22, 1900, and the damages in respect to those items did not accrue and had no existence until after the annulment. The contract, however, provides—

"That the termination of said contract as aforesaid, or anything done by the Postmaster General in pursuance of the stipulation, shall not affect or impair any right or claim of the United States to indebtedness or damage for the breach of any of the covenants of the contract by the parties of the second part."

Now, the two lots of paper here particularly in question were duly ordered from Stoever on December 5, 1899, and thus Stoever became absolutely bound to furnish the paper, and the right of the United States thereto was fixed. That right was not affected or impaired by anything that afterwards took place. By the terms of the contract the right was preserved, notwithstanding an annulment of the contract by the Postmaster General; and, of course, the subsequent petition and adjudication in bankruptcy could not defeat, and did not impair, the fixed right of the United States.

In overruling the action of the referee disallowing the claim of the United States for \$2,075, the excess over the contract price paid on the last four purchases, the learned District Judge overlooked the terms of the contract. On the one hand, the United States did

not bind itself to give any orders for supplies; and, on the other hand, Stoever was not bound to furnish supplies until ordered. Until an order was given, Stoever could not know what supplies were wanted, and would not be in any default. The contract provides that Stoever will—

"Furnish and deliver, at and for the prices hereinafter covenanted and agreed to be paid therefor by the party of the first part, and in such quantities, and in such quantities at a time and from time to time, as may be ordered for the use of the Postoffice Department and postal service, the following mentioned articles."

In each instance the government was to be the first actor, giving the contractor an order for supplies. It is further stipulated that, in case of the failure of Stoever to—

"Furnish any of said articles within thirty days after they have been ordered, the right is reserved by the Postmaster General to purchase such articles in open market; and if a greater price than that specified in this contract be paid for such articles, the total difference between the purchase price and the contract price may be charged to said party of the second part."

Plainly, under these provisions, there would be no default on the part of Stoever until the articles were ordered by the government. There was no breach of the contract by Stoever during the time within which the last four purchases were made; for no order was given after December 5, 1899. We think it is not a satisfactory answer to say "that the bankruptcy had totally disabled the contractors from performing their agreement, and therefore made notice a useless formality." We do not see that the bankruptcy had made performance by the contractors impossible. Moreover, if the United States intended to hold Stoever and his surety in damages for nondeliveries in the future, orders for the goods were indispensable conditions precedent to the successful assertion of such a claim. Nor can we accept the suggestion "that, as the contract had been annulled for cause," the bankrupt was not entitled to notice. If the contract was annulled, the annulment released both parties as respects to the future.

We are not able to assent to the point made by the counsel of the appellee that this was an entire contract, in the sense that a single breach by Stoever fixed his liability for the damages in their entirety. The argument overlooks the fact that the government had not bound itself to give any orders for supplies, and that the covenant of Stoever was only to furnish supplies from time to time as orders were given. In the very nature of the case the contract was severable, as to the orders on the one side and performance and breaches on the other side.

We think that the referee was right in his conclusions, and that all the exceptions to his report should have been overruled, and his report confirmed.

The decree of the District Court is reversed, and the cause is remanded to the court for further proceedings in accordance with this opinion.

WESTERN GERMAN BANK v. NORVELL.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1905.)

No. 1,345.

1. BANKS—COLLECTION OF DRAFT WHEN INSOLVENT—RECOVERY OF PROCEEDS FROM RECEIVER.

A bank which, although known by its officers to be insolvent, received a draft for collection without disclosing its insolvency to the owner, collected the same and mingled the proceeds with its own funds, remitting to the owner its own draft, which was not received until after the bank was placed in the hands of a receiver, was guilty of fraud, and the proceeds of the draft, when collected, remained the property of the sender, and may be recovered from the receiver, where they can be traced into his hands; and such right is not affected by the fact that the sender gave directions that the remittance should be made in New York exchange, which was done; the exchange being protested and never paid.

2. SAME.

When a bank, known by its officers to be insolvent, collects money for a customer and mingles the same with its own funds, which to an amount larger than the sum so received go into the hands of its receiver, it is not essential to the right of the customer to recover from the receiver that he should be able to trace the identical money into the receiver's hands; but it is sufficient to show that the sum which went into the receiver's hands was increased by the amount so collected.

3. EQUITY PLEADING—ALLEGATION OF INSOLVENCY—SUFFICIENCY.

Allegations in a bill of the insolvency of a bank at the time it received and collected a draft *held* sufficient.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

This is a suit in equity by the Western German Bank, a corporation under the laws of the state of Ohio, against the First National Bank of Florida, a corporation under the laws of the United States, having its place of business in Jacksonville, Fla., and Joseph W. Norvell, receiver of the latter bank. The demurrer having been sustained to the original bill, the complainant amended the bill, and a demurrer was interposed to the amended bill, which the court sustained. The complainant having declined to amend further, the bill was dismissed. The complainant thereupon appealed to this court, and assigns as error the decrees of the court sustaining the demurrers and dismissing the bill.

To make plain the questions involved, it is necessary to state the material averments of the bill and the grounds of demurrer. It is alleged that the complainant, the Western German Bank, received as a deposit from a customer a draft, signed F. T. Watson, in favor of Edward Holder, for the sum of \$4,000, drawn on the Commercial Bank of Jacksonville, Fla. The complainant, on the 10th of March, 1903, forwarded the draft to the First National Bank of Florida for collection by letter, saying: "Please remit New York exchange." The First National Bank of Florida presented the draft to the Commercial Bank for payment, and the same was promptly paid. The First National Bank of Florida then sent by mail to the complainant bank its draft, dated March 13, 1903, for the sum of \$3,995, on the Chemical National Bank of New York, payable to the order of the complainant, which draft was received by the complainant bank on the 16th of March, 1903, after the failure of the First National Bank of Florida, and after the defendant Norvell had been appointed receiver of the First National Bank of Florida by the Comptroller of the Currency of the United States. The complainant presented this draft to the Chemical National Bank for payment on the 17th of March, 1903, and payment was refused, because of the failure of the First National Bank of Florida, and the draft was duly protested. The First National Bank of Florida was closed on March 14, 1903, and the receiver took possession on that

date, which was before the complainant had received the draft of the Chemical National Bank. The receiver immediately instructed the Chemical National Bank not to pay the draft and other drafts of like character, and the draft has never been paid.

The following allegation is made in reference to the insolvency of the First National Bank of Florida and the title to the money sued for: "And that on the said date above mentioned, on which your orator sent the draft for collection to the said First National Bank of Florida, and at the time that the said bank collected the same, the said bank was insolvent, and that it was well known to the said bank and to its said officers that it was insolvent, and, well knowing the said facts, the said bank and the said officers neglected to disclose the same, or to inform your orator of the same, and by continuing as a bank, with open doors and otherwise, the said bank represented to your orator and all other persons dealing with it that the said bank was solvent, and that on the faith of such representations your orator believed the said bank to be solvent, and had no knowledge or suspicion or means of knowing that it was insolvent, or in danger of becoming so, and that, acting upon said representations and relying on your orator's belief in the said solvency of the said bank as so represented, your orator so delivered the said draft to the said First National Bank of Florida, and it received the same for collection for your orator as aforesaid. And your orator further alleges that it is advised, and so charges, that by reason of the matters and premises alleged in your orator's original bill, and hereinabove alleged, the said draft, when delivered as aforesaid by the said First National Bank of Florida, did not become the property of the said bank, and that your orator did not part with the title and interest of the said draft, and that it remained the property of your orator, and that the proceeds of collection of the said draft, when so collected as aforesaid, never did become the property of the said bank, or defendant as receiver thereof, but remained always and still are the property of your orator. * * *" It is then alleged that the sum of \$3,995, collected by the defendant bank from the Commercial Bank on the draft forwarded to it by the complainant, is a trust fund, and that the same was held in trust by the defendant bank, and that the receiver now holds possession of the same as part of the assets of the First National Bank of Florida, and that the general creditors of the First National Bank of Florida have no interest in said sum, and that the same should be paid by the receiver to the complainant. The bill concludes with a prayer that the receiver may be decreed to pay the said sum, with interest, to the complainant as a trust fund, and for general relief.

A demurrer was filed by the defendant, and among the grounds of demurrer alleged are the following: "(1) That it appears by the said amended bill that the First National Bank of Florida was given specific directions regarding the collection and remittance of the proceeds of said draft, and that the said First National Bank of Florida complied fully with such instructions. (2) It appears by said bill that the proceeds of said collection were mingled with the funds of said First National Bank of Florida, and were not kept separate and distinct, and were not held in trust for the benefit of the plaintiff, and were not impressed with any trust character whatever. (3) That the amended bill shows that said First National Bank of Florida was regularly doing business when said draft was received and when the same was collected, and continued to do business thereafter, to wit, to the end of March 14, 1903, and to receive and pay out moneys in due course, and there is no allegation or showing that said bank was not in position to remit in cash or other regular way, and the presumption necessarily follows that it would have done so, rather than close its doors, but for the positive instructions of complainant as to the manner of remitting, and the facts to show fraud are not sufficiently set forth."

C. M. Cooper and J. C. Cooper, for appellant.
Duncan U. Fletcher, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. It is alleged in the bill that the defendant bank was insolvent when it received the draft for collection, and when it collected it, and when it remitted the New York exchange. The New York exchange is dated March 13, 1903, and on the next day the defendant bank and its assets were in the hands of a receiver appointed by the Comptroller. Its insolvent condition was known to the officers of the bank, and they wrongfully neglected to disclose the fact to the complainant. On the facts averred in the bill, it was a fraud on the part of the defendant bank for it to receive the draft for collection, intending to collect it and to mingle the proceeds of the collection with its general assets. The draft, therefore, and the proceeds of its collection, remained the property of the complainant bank. *Richardson v. New Orleans Deb. Red. Co.*, 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67. The fact that the complainant gave directions to the defendant to remit the proceeds of the collection in New York exchange does not alter the case. These directions were given, because the complainant bank was led to believe that the defendant bank was solvent, and was doing business honestly and in good faith. It was not supposed that the defendant bank, when its officers knew it to be insolvent, would receive drafts for collection, collect them, and mingle the proceeds with its general assets, so as to knowingly subject the owners of the drafts to loss. It appears from the bill that, with knowledge of its insolvency, it received and collected this draft, mingled the proceeds of its collection with its other funds, and followed the complainant's direction as to remitting in New York exchange; but the defendant bank was placed in the hands of a receiver before the complainant received the exchange, and the exchange was protested. As the exchange was not paid to the complainant, and did not diminish the funds in the bank, or create any liability against it affecting the general creditors, it does not have any effect upon the equitable rights of the complainant. *Richardson v. New Orleans Coffee Company*, 102 Fed. 785, 43 C. C. A. 583.

2. The fact that the proceeds of the draft, when collected, were mingled with the other funds in the bank, does not defeat the complainant's right of recovery. When a bank receives money, it being known to its officers to be insolvent, and mingles the money with its own funds, which, to an amount larger than the sum so received from its client, goes into the hands of its receiver, it is not essential to the right of its client to recover from the receiver that he should be able to trace the identical money into the receiver's hands; but it is sufficient to show that the sum which went into the receiver's hands was increased by the amount which the bank received of its client. *Richardson v. New Orleans Deb. Red. Co.*, 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67, and cases there cited.

3. In support of the third ground of demurrer, it is argued that the bill does not allege that the defendant bank was "hopelessly" insolvent. It is true that the bill does not aver in plain words the hopeless insolvency of the defendant bank. It is alleged, however, that it was insolvent, and that its insolvency was known to its officers, and that they wrongfully neglected to disclose its insolvency to the complainant, and that it received the draft for collection, collected it, and, while so insolvent, sent the New York exchange, which was dated March 13,

1903, and that on March 14, 1903, the defendant bank was placed in the hands of a receiver. These averments of the insolvency of the bank, we think, are sufficient. See *St. Louis, etc., Ry. Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683, reversing the decree of the Circuit Court, 27 Fed. 243.

The decree of the Circuit Court, dismissing the bill, is reversed, and the case remanded, with instructions to overrule the demurrer.

MERCHANTS' BANKING CO., Limited, v. CARGO OF THE AFTON
(SHEWAN, TOMES & CO., Claimants).

(Circuit Court of Appeals, Second Circuit. June 2, 1904. On Rehearing, November 23, 1904.)

No. 209.

1. SHIPPING—RIGHTS OF MORTGAGEE—FREIGHTS.

The owners and mortgagors of a ship, who are allowed to remain in possession by the mortgagee, are at liberty in the meantime to make contracts for her employment; but on taking possession the mortgagee takes the right to all the freight which is then accruing under such contracts, but not to freights which have been received by the mortgagor, although for the voyage then current.

[Ed. Note.—For cases in point, see vol. 44. Cent. Dig. Shipping, § 105.]

2. SAME—ADVANCE PAYMENTS ON FREIGHT—AUTHORITY OF MASTER.

The owners of a steamship, who had given a mortgage thereon, but who remained in possession, chartered her for a voyage; the charter party providing for advances by the charterers to the master at different ports, not exceeding a stated amount, to be deducted on final settlement of freights, and that the balance of freight money should be paid on unloading and right delivery of cargo. Such advances were made, and also additional advances, for which the master gave receipts, indorsed on the charter party, stating that the money was received as advance freight. On reaching the port of delivery, the mortgagee took possession of the vessel. *Held* that, while it was competent for the parties to the charter by agreement to enlarge the provision for advances to be applied on the freight, the master, as such, had no authority to change the provisions of the charter party, and that in the absence of proof that the additional advances were required by the necessities of the ship, or that the master's action was authorized or ratified by the owners before possession was taken by the mortgagee, the latter was entitled to recover all the freight due by the terms of the charter.

3. ADMIRALTY—REHEARING—GROUNDS.

A rehearing in admiralty cannot be granted to allow a party, after an adverse decision, to introduce further evidence, which was fully known to such party, and might have been introduced on the original hearing, but was not, because of an error of judgment on the part of counsel as to its materiality.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 125 Fed. 258.

F. M. Brown, for appellant.

Chas. C. Burlingham, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The decree appealed from dismissed the libel. The facts of the case are succinctly stated in the opinion of the court below:

"This is a libel against the cargo of the steamship Afton, and the freight moneys arising therefrom, to recover the sum of \$8,737.55. In December, 1900, the firm of McLaren & McLaren, of Glasgow, owners of the steamship Afton, executed a mortgage on the steamer to the libelant, the Merchants' Banking Company, Limited, of London, to secure a running account and advances to be made thereafter. The mortgage was duly recorded at Glasgow, but the mortgagee did not go into possession of the steamer at that time; the mortgagors continuing in possession. In July, 1902, McLaren & McLaren chartered the steamer, which was then on a voyage to Shanghai, to Shewan, Tomes & Co., the claimants in this suit, for the return voyage from China to New York. The charter party provided that the steamer should have a lien on the cargo for freight, that a lump sum freight of £7,750 was to be paid on delivery of the cargo, and that sufficient cash, not exceeding £1,500, was to be advanced to the master, if required, at the loading ports, on account of freight; the same to be deducted on final settlement of freight. During the voyage, at different ports in China, the master called for and received from Shewan, Tomes & Co. the agreed sum of £1,500, and also additional advances, amounting to £1,803 8/4, the equivalent in American currency of \$8,737.55. For these additional advances, receipts, signed by the master, were indorsed on the charter party; stating that the money was received as advance freight, or, in some of the receipts, as advance against freight, to be collected from the first payment of the charter money. When the steamer reached New York, the libelant, the Merchants' Banking Company, Limited, took formal possession of the steamer under the mortgage, on which there was then due about £110,000, and which was then in default. Subsequently the cargo was delivered, and the freights collected by Shewan, Tomes & Co. under an arrangement which preserved to the Merchants' Banking Company, Limited, its rights as mortgagee in the possession of the balance of the charter freight. On the final settlement between the Merchants' Banking Company, Limited, and Shewan, Tomes & Co., Shewan, Tomes & Co. retained for their own reimbursement said sum of \$8,737.55, which they had advanced to the master of the steamer, and paid over the balance to the bank. This action is brought to recover the amount so retained."

The case presents the questions of law whether upon these facts the mortgagee was entitled to all the freight money due from the charterers to the shipowners at the time the libelant took possession under its mortgage; and (2) whether the advances made by the charterers to the master in excess of those stipulated for in the charter are to be considered as a prepayment of freight. If the advances in question had been to the shipowners, we should entertain no doubt that the charterers would be protected, and the mortgagee would have no lien to that extent. It is undoubtedly the law that the owners and mortgagors of a ship who are allowed to remain in possession by the mortgagee are at liberty in the meantime to make contracts for her employment like the present charter; but, when the mortgagee takes possession, he takes the right to all the freight which is then accruing. "And if he finds any cargo on board in respect to which the freight has accrued, and on which the mortgagor has a lien for the freight, the mortgagee succeeds to that lien, and can enforce it in a court of law." Mellish, L. J., in *Keith v. Burrows*, 2 C. P. D. 165. Neither is there any doubt that the mortgagee does not acquire the right to freights which have become payable and have been received by the mortgagor before possession is taken, although for the voyage then current. *Willis v. Palmer*,

29 L. J. C. P. 194. The doubt arises only when an owner has received or disposed of freights for the current voyage before they were payable, as by a prepayment from the charterer, or an assignment by the owner to a third party. There is authority for the proposition that the mortgagee's right to the freight on taking possession cannot be defeated or curtailed by an assignment by the shipowner (*Brown v. Tanner*, L. R. 3 Ch. App. [1868] 597; *Tanner v. Phillips*, 10 Asp. Mar. Cas. [1872] 448), and the reason seems plain: The owner can transfer no better title than he has at the time, and, if the mortgagee takes possession before the freight is paid, the owner has no title to it, his defeasible title having been divested. *Dobbyn v. Comerford*, 10 Ir. Ch. Rep. 327. The case of a prepayment presents different considerations. Until the mortgagee has intervened, the owner can cancel an existing charter or make a new charter; and, this being so, there is no reason why a modification of an existing charter should not be within his rights. If the owner and charterer agree to modify the charter in respect to the time of paying the freight, the mortgagee has no right to complain. He has sanctioned such a transaction by permitting the mortgagor to remain in possession. So far we agree with the decision of the court below. But the dismissal of the libel proceeded upon the theory that the advances made by the charterers were in effect a prepayment of the freight to the owners. If we were able to take that view, we should have no difficulty in affirming the decision. The advances were made to the master of the ship. There is no proof that they were required by the necessities of the ship, and the charter gave the master no authority to receive them, because it provided that only £1,500 should be advanced, and the balance of the freight money should be paid on final settlement of freight, viz., "on unloading and right delivery of cargo." The burden of proving the authority of an agent to receive money lies on him who makes the payment. *Seymour v. Smith*, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683. Presumptively, the master was without authority to receive payment of freight otherwise than pursuant to the terms of the charter party. Doubtless a master has authority to collect freight at destination, that being within his customary powers, unless the owners choose to appoint a different person to do so. *Grant v. Norway*, 10 C. B. 665; *The Edmond*, Lush. 58, 29 L. J. Adm. 76. But it is not within his customary powers to collect freight payable under a charter in advance of the charter terms. In *Balcarres Brook S. S. Co. v. Grace*, 75 Fed. 1017, 22 C. C. A. 7, this court decided that the master has no authority to release a charterer from paying the hire reserved to a shipowner in a charter party, or to vary the terms of the contract made by the owner. In *Pierson v. Goshen*, 17 C. B. N. S. 352, a shipper loaded a part cargo under an arrangement with the charterer, who made default in performance, and thereafter the shipper made a charter with the master of the entire capacity of the ship at a reduced rate. The court held that the master was without authority to vary the rate of freight upon the cargo which the shipper had previously loaded. In *The Salacia*, 32 L. J. Adm., the ques-

tion was whether certain advances of the charterer to the master furnished a good defense pro tanto to an action for freight by the holder of a bottomry bond. In deciding that they were not, Dr. Lushington said, "An advance on freight can only be made in virtue of stipulations contained in the charter." In *Maud & Pollock, Merchant Shipping*, 158, it is stated, "The master has no power to vary the rate of freight at which goods are to be shipped, or to make freight payable beforehand, or to any person other than the owner." He has no authority to assign the freight. *Willis v. Palmer*, 29 L. J. C. P. 194; *Sir Henry Webb*, 13 Jur. 639.

We are constrained to hold that the charterers have not shown any defense to the claim of the mortgagee. The mortgagee was entitled to recover the whole freight payable by the terms of the charter, unless the charterers established the defense of payment to the vessel owners before the mortgagee took possession. This defense is not established by proving payment to the master, without proving that the master had authority to receive it. There is no evidence in the case from which it can be inferred that the owners ever received the advances in question, or ratified the act of the master in any way. If they received the advances, but not until the libellant had taken possession as mortgagee, any ratification by that act would be unavailing. The act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies. *Bird v. Brown*, 4 Ex. Ch. 786, 789; *Parmelee v. Simpson*, 5 Wall. 81, 18 L. Ed. 542.

The decree is reversed, with costs, and with instructions to the court below to decree for the libellant for the unpaid balance of freight, with interest.

On Application for Rehearing.

The appellees have applied for a rehearing of this cause, and for leave to take further proofs. The cause was decided against them, reversing the decree of the court below in their favor, upon the ground that, to entitle them to retain the sum of money advanced by them to the master of the *Afton*, it was incumbent upon them to show that it had been advanced to him as a prepayment of freight to the owners of the *Afton* under the existing charter of the vessel, and that there was no evidence in the record to establish that fact. The object of the present application is to enable them to introduce further proofs which will establish this controlling fact. The cause was heard in the court below and in this court upon an agreed statement of facts stipulated by the proctors for the respective parties. It now appears that there is no doubt about the particular fact, and that in settling the agreed statement of facts the proctors for the appellant repeatedly offered to have it incorporated into the agreed statement of facts, on condition that the proctors for the claimants would stipulate that the advances were not required by or applied to the uses of the steamship, but were applied to the personal needs of the owners, in no way connected with the steamer. It further appears that upon the hearing in the court below the

proctor for the appellant pointed out to the proctors for the appellees that it did not appear by the agreed statement of facts that the advance was made with the consent of the owners, or that they had ever received the benefit of it. It further appears that after the decision by that court, and after the record had been printed upon which the appeal was to be heard in this court, the proctors for the appellant again called the omission to the attention of the proctors for the appellees, and offered them to rectify it by a supplementary stipulation. The proctors for the appellees, apparently relying upon the indorsements upon the charter party, refused to amend the stipulation, and the record in the court below and in this court contains, therefore, no legal proof of the fact that the payments were made to the master with the consent of the owners. Thus they elected to rest their case on a record which was silent in respect to a fact capable of proof, and which they now seek to prove after its importance has been shown by our decision. We cannot grant the rehearing under these circumstances without ignoring a rule of procedure which rests upon the most solid foundations of propriety and expediency. In the language of Mr. Justice Story in *Baker v. Whiting*, 1 Story, 236, Fed. Cas. No. 786:

"I apprehend that no court of equity has ever felt itself at liberty to grant an application of this sort upon the suggestion of an error of judgment or a mistake of law by counsel as to the pertinency or force of evidence to be used in a cause."

The rule is inflexible that leave is never given to admit new evidence after a decree where the party might by due diligence have introduced it originally in the cause, or had full and ample means of knowledge of it within his reach. As is said in the opinion in *Norris v. Le Neve*, 3 Atk. Rep. 36, the rule is one "which cannot be broken in upon without manifest danger to the interests of all the parties in controverted suits, and it certainly will not do to lay down a new rule for this cause only."

We regret exceedingly the hardship which has been brought upon the appellees by the action of their proctors, but cannot remedy it by an abuse of judicial discretion. In denying the application, it is due to the proctors to state that in electing to stand on a record which contains no legal proof of a material fact, and declining to avail themselves of an admission which they might have secured, they are entitled to the benefit of the excuse that they acted upon the advice of their counsel in the cause—one of the leading practitioners of the admiralty bar of this circuit.

Application denied.

MAHON v. ROYAL UNION MUT. LIFE INS. CO. OF DES MOINES, IOWA.

(Circuit Court of Appeals, Third Circuit. January 23, 1905.)

No. 41.

INSURANCE—ISSUANCE OF POLICY—FRAUD.

Decedent's application for insurance in the E. Company having been declined, such company's agents applied to defendant's agent for a policy on decedent's life, and were furnished with an application, which they filled up and signed without notice to or authority from deceased, and procured the physician to copy therein the medical examination and certificate which he had previously made on the rejected application, whereupon such agents delivered the application to defendant's agent, who had no notice of the manner in which it was prepared, on which defendant issued a policy, which was delivered to deceased's wife, who paid therefor, believing it to be the policy applied for in the E. Company. *Held*, that the E. Company's agents in such transaction acted simply as brokers, and not as defendant's agents, and that defendant was therefore not liable on the policy.

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

J. W. Gillespie and Geo. B. Reimensnyder, for plaintiff in error.

W. H. M. Oram, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action by Kate L. Mahon against the Royal Union Mutual Life Insurance Company of Des Moines, Iowa, upon a policy of insurance dated December 12, 1901, on the life of Peter A. Mahon, for the sum of \$5,000, payable to the wife of the insured, Kate L. Mahon, the plaintiff. At the close of the trial, after all the evidence was in, the court below gave a positive direction to the jury to render a verdict for the defendant, which was done, and subsequently judgment was entered for the defendant on the verdict. The plaintiff excepted to the instruction of the court that the jury find for the defendant, and this instruction is the subject of an assignment of error. We will, in the first instance, consider this assignment, for, if the peremptory instruction to the jury to render a verdict in favor of defendant was right, the other assignments become immaterial and need not be considered.

The case is an extraordinary one. It appears from the evidence on the part of the plaintiff that neither her husband (Peter A. Mahon) nor the plaintiff herself intended to insure his life in the defendant company, and that neither of them at the time knew that an application to that company was made, or a policy was issued by it. The plaintiff testified that, acting on behalf of her husband, she signed an application to the Equitable Life Insurance Company of Iowa for insurance in that company for \$5,000 on his life, and that when Mr. Latham, the local agent of the last-named company, delivered to her the policy in suit, and she gave him her check for the premium, she believed it was the policy of the Equitable Life Insurance Company, and did not discover it was the policy of the

defendant company until five or six months afterwards—about the time her husband died. Other evidence on the part of the plaintiff disclosed the following facts: H. Chauncey Clark was the general agent at Philadelphia of the Equitable Life Insurance Company of Iowa, and Charles Latham was the local agent of that company at Shamokin, Pa., where the Mahons lived. Through these agents the application was made on or about December 6, 1901, to the Equitable Life Insurance Company, for \$5,000 insurance on the life of Mahon; but the application was declined by letter addressed to Clark for the assigned reason that the company was already carrying as much insurance on Mahon's life as it cared to do. Clark then asked Charles W. McCue, Jr., the general agent at Philadelphia of the Royal Union Mutual Life Insurance Company (the defendant company), whether his company would issue a policy on Mahon's life for \$5,000. McCue gave Clark a blank application of the defendant company. This blank application Clark himself filled up by copying from an application which Mahon had made about a year before to the Equitable Life Insurance Company. He then sent to Latham the application thus filled in, and which had on it what purported to be the signature of Peter A. Mahon, and also his purported signature on the attached blank medical certificate, with instruction to Latham to have Dr. Dreher fill up the medical certificate by copying therein the contents of the medical certificate, then about a year old, which was attached to the old application to the Equitable Company. This instruction was carried out by Latham, and the medical certificate was thus filled up by Dr. Dreher, and was signed by him. Dr. Dreher made no examination of Mahon. Mahon did not sign either the application to the defendant company or the attached medical certificate. Latham returned the application and medical certificate to Clark, who handed them to McCue. The defendant company accepted the application, and sent its policy in suit to McCue, who, by direction of Clark transmitted it to Latham for delivery. Latham delivered the policy to Mrs. Mahon, and sent her check for the premium to Clark, who settled with McCue for the premium due the defendant company.

Upon the evidence upon the part of the plaintiff it is plain that a valid contract of insurance upon the life of Peter A. Mahon was not entered into by the defendant company. Neither Mahon nor his wife intended to insure his life in the defendant company, and they made no application to it. The application they made was to the Equitable Life Insurance Company; and, according to the plaintiff's testimony, when the policy in suit was delivered to her, it was received as the policy of the Equitable Company. Mahon did not sign the application to the defendant company nor the attached medical certificate, and he did not authorize any one to sign his name to either of these papers. The defendant company was induced to issue its policy in suit by means of a deception practiced upon it. The application for the policy and the accompanying medical certificate were fabricated. Assuming the good faith of Mr. and Mrs. Mahon, still it must be said that those who undertook

to act for them in procuring this policy of insurance perpetrated upon the defendant company a fraud, which precludes a recovery.

It is, indeed, earnestly contended on behalf of the plaintiff in error that the defendant company is estopped from denying its liability for the reason that the fraud was perpetrated solely by its own agents, without the participation of the insured or his beneficiary. But this argument rests upon false premises. The proposition urged is without any support in the evidence. No agent of the defendant company was concerned in the fraud. The proof is that neither Clark nor Latham was agent of the defendant company. It is shown that in soliciting the insurance Clark acted as a mere broker for the person to be insured. The evidence entirely fails to show that McCue was a party to the fraud, or cognizant of it. The evidence is quite convincing that McCue was ignorant of, and had no reason to suspect, the manner in which the application and medical certificate were prepared and executed.

Under the uncontradicted evidence the court was right in giving a binding instruction in favor of the defendant, and accordingly its judgment is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. HAMPTON et al.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1905.)

No. 1,411.

ERROR—REVIEW—FINDINGS OF FACT.

Findings of fact by a consent referee are not reviewable on a writ of error further than to ascertain if they are sufficient to warrant the judgment of the court.

In Error to the Circuit Court of the United States for the Southern District of Florida.

Francis P. Fleming and Francis P. Fleming, Jr., for plaintiff in error.

Wm. Wade Hampton and Duncan Upshaw Fletcher, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The findings of fact by the consent referee are not reviewable on this writ further than to ascertain if they are sufficient to warrant the judgment. The waiver of the six months limitation in which to bring suit was sufficiently pleaded, and, we suppose, proved. We find no error in the record.

The judgment of the Circuit Court is affirmed.

BROWN v. HUNTINGTON PIANO CO.

(Circuit Court of Appeals, Second Circuit. December 6, 1904.)

1. PATENTS—INVENTION—MUSIC DESKS FOR PIANOS.

The Brown patent, No. 468,077, for improvements in music desks for pianos, consisting of mechanism by means of which the opening and closing of the fall-board automatically opens and closes the music desk, and when open locks it in position for use, was not anticipated, and, while of narrow scope, and entitled only to a construction which limits its claims to the particular mechanism described, covers a device both simple and effective, and discloses patentable invention. Claims 1 and 2 also held infringed.

2. SAME—PATENTABLE NOVELTY—SIMPLIFYING COMPLICATED MECHANISM.

Patentable novelty may be found in an improvement which simplifies a complicated train of mechanism by eliminating some of its elements, with the result that defects due to the presence of those elements are done away with.

Appeal from the Circuit Court of the United States for the District of Connecticut.

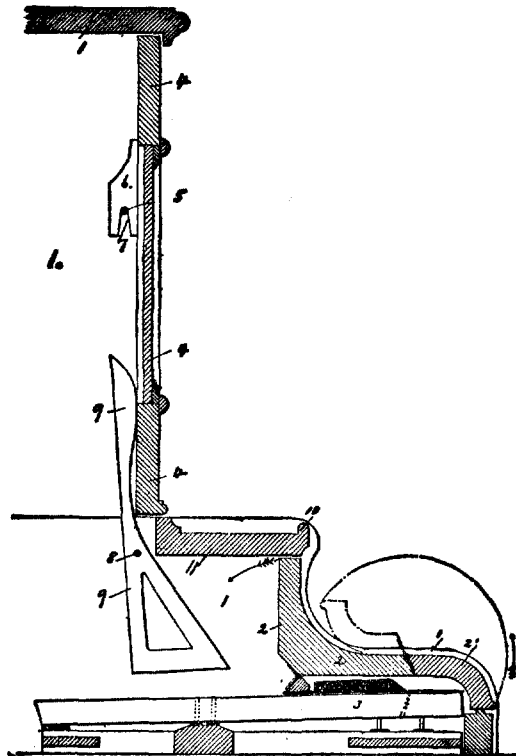
For opinion below, see 131 Fed. 273.

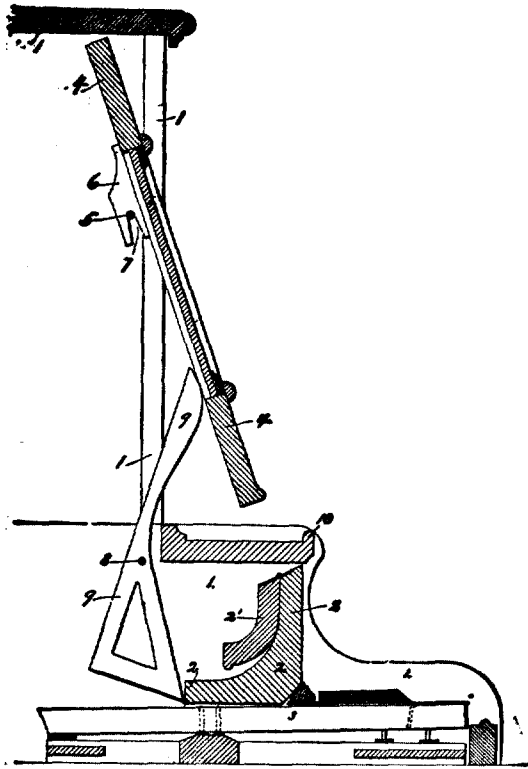
This cause comes here upon appeal from a decree of the Circuit Court, District of Connecticut, sustaining United States patent No. 468,077, February 2, 1892, and finding infringement of its first and second claims. The opinion of the Circuit Court is reported in 131 Fed. 273. To show more fully the mechanical combination of the patent, the following excerpts from the testimony of complainant's expert may be here inserted:

"The invention relates to mechanism for opening and closing the music desk of an upright piano, and more particularly in combining with a music desk and fall-board intervening mechanism, whereby the opening and closing of the fall-board will open and close the music desk. The front portion of the case of the piano above the keyboard, which normally stands in a vertical position, is hung on a horizontal axis or pivot near its upper edge, so that it can be tilted or inclined from the normal vertical position by drawing its lower edge forward, and in such inclined position it serves as the back rest for sheets of music, which are thus supported thereon in convenient position for the person playing the piano. The fall-board is the cover of the keys of the piano which project forward horizontally in front of the portion of the case referred to above, which constitutes the music desk. The fall-board is of approximately L-shape in cross-section, and is hinged to the frame at the angle of the L, and stands, when closed, with one branch extending vertically upwards from the hinge and closing the space in the case at the rear of the keys, and with the other branch extending forward over the keys. This longer branch is made in two sections, connected by a hinge, so that in opening the piano, the supplemental section is first turned upward and rearward back upon the main section, and then the two sections together are turned rearward on the hinge at the angle of the L, so that what was formerly the front horizontal branch comes to the vertical position, filling or closing the space in the case at the rear of the keys, while what was formerly the vertical branch swings backward and downward into the case. * * * There is provided an intervening connection between the fall-board and the music desk, such that when the fall-board is moved to open position the lower end of the music desk is thrown forward to bring it to the inclined position for properly supporting the music, and conversely when the fall-board is closed the music desk is permitted to return to its vertical position. * * * The intervening connection consists of a lever fulcrumed to the case at the rear of the fall-board, the fulcrum of the lever being near the middle of its length and near the level of the upper edge of the vertical portion of the fall-board. The upper end of said lever rests against the inner face of the music desk near its lower edge, so that when the upper arm of the lever is thrown for-

ward the lower edge of the music desk will be pushed forward and brought to the inclined position desired for supporting the music. The lower arm of the lever normally hangs downward below the fulcrum, extending forward therefrom in the space at the rear of the vertical member of the fall-board when closed, and in such position that when the fall-board is opened the said vertical member in turning rearward and downward to the horizontal position will engage with the lower arm of the lever, and force it rearward, and thus cause the upper end of the lever to be moved forward so as to bring the music rest to the inclined position. When the fall-board is fully opened, the rearwardly extending horizontal portion is substantially in line between the hinge of the fall-board and the point of thrust or reaction of the lever, and thus locks the lever with the music rest in inclined position. * * * When the piano is open, the pressure of the music desk on the lever holds the same pressed against the rear end of the open fall-board, and thus takes up any lost motion that there might be in the fulcrum of the lever, and prevents any looseness between the lever and the music desk and fall-board, so that there is no rattling or jar while the piano is open and in use."

The following cuts show the mechanism quite clearly:





The two claims in controversy are:

"(1) In a piano, the combination, with the case provided with a ledge, of a substantially L-shaped fall-board pivotally secured near its base within the case substantially below the front edge of the ledge, each arm or portion of the board being adapted to pass under the ledge and thereby close the space between the ledge and the keys when it is closed or open, a lever pivotally secured at the rear of the fall-board, with its lower end entirely disconnected from but in the path of and adapted to be engaged by the upper portion of the fall-board when the fall-board is opened, and a music-desk in the front of the case adapted to be operated by the lever, substantially as set forth.

"(2) In a piano, the combination, with the case, of a substantially L-shaped fall-board pivotally secured therein near its base, the front portion of the board being hinged, and adapted to be folded so as to pass under the ledge of the case and close the space between the ledge and the keys whether the fall-board be open or closed, a lever pivotally secured at the rear of the board, the lower end of which is inclined and projects toward the board and is adapted to be engaged by and forced back by the upper portion of the fall-board, said upper portion of the board being in a straight line between the end of the lever and the hinge of the board, whereby the lever is locked in its rear position, and a music-desk in the front of the case adapted to be operated by the lever, substantially as set forth."

Odin Roberts, for appellant.

Louis W. Southgate, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The field of invention is a limited one, and the patent, which is for a minor improvement in connecting mechanism to make the adjustment of the music desk automatic, must be confined closely to the precise combination shown. Nevertheless, despite the three prior patents relied on—Bourne, Felldin, and Harper & Hoover, each being for connecting mechanism effecting such adjustment—we are of the opinion that the patent is valid. The improvement is of no great importance. It was not necessary to the development of the piano as a musical instrument. It covers only a minor feature, which might, as the patentee expresses it, be “a good selling point, or, as they say in the trade, ‘talking point,’ and something that appealed to the purchaser, making the piano a better ‘seller.’” But its utility is undisputed. The facts of infringement and defense concede that much.

The reasons why conclusion is reached that the three prior patents neither anticipate nor restrict the field sufficiently to negative patentable invention are found in the history of the art as testified to by complainant’s witnesses. No one familiar with that art was called by defendant to controvert their statements. The first record of a fall-board, substantially L-shaped in cross-section, and hinged to the frame at the angle of the L (a in the cuts, supra), is found in patent to Baker (165,699), July 20, 1875. In that patent the section of fall-board which covers the keys was not in two parts hinged together, but was a single piece. The ensuing year—October 31, 1876—produced the Neill (183,773) fall-board, also known as the “Chickering fall-board,” which is substantially identical with the one shown in the patent in suit. It may be that there were other varieties of fall-board at that time, though the record does not disclose them; but the evidence conclusively shows that continuously since 1876 the substantially L-shaped, lower-pivoted folding fall-board making a quarter turn backward when opened has commended itself to the trade, and the “Boston fall-board,” as it is called (presumably after the Chickering establishment, which introduced it or made it popular), has been and now is the most universally used of all. The defendant’s expert suggested that “it was doubtless observed by the first users of pianos like that shown and described in the Neill patent that there was no object in pulling out the music desk unless the fall-board was open, and it would have been very surprising if the skilled mechanics employed in piano manufacture had not contrived simple connections by which the movement of the fall-board was accompanied automatically by the proper movement of the music desk.” Certainly it seems a reasonable assumption that workers in the art undertook to provide such connections, but it was five years before any result was achieved, and that result was embodied in the Bourne patents, September 27, 1881 (Nos. 247,473, 247,474). Bourne, however, did not effect an operative connection between the Boston fall-board and the music desk. He devised an entirely new fall-board, not L-shaped in cross-section, and not pivoted at the angle of the L. There is not a scintilla of evidence to show, as appellant seems to intimate, that fall-boards like the one shown in Bourne existed before he devised the mechanism of his patent. The complainant’s expert points out that the Bourne fall-board cannot be readily removed

from the instrument because the links, D, which form a part of the connecting mechanism of his patent, would have to be disconnected from the fall or from the frame, and are in a very inaccessible position, so that it would be a matter of considerable difficulty to disconnect them, and to insure that they were properly reappplied when the fall-board was put back. A close study of the patent shows the correctness of this statement. Now, it is desirable to have the fall-board easily removable without the aid of special skill, so as to allow of such slight repairs and adjustments as are commonly made from time to time by piano tuners. Therefore it appears that Bourne established his automatic connection only by substituting an undesirable for a desirable fall-board. And despite his improvement the trade continued to call for Boston fall-boards in preference to any other, even although such fall-boards had no operative connection with the music desk. It must be assumed that the Bourne improvement, however, did show that automatic connection was a good "talking point," and the inventive abilities of those who produced pianos with Boston fall-boards must have been stimulated to introduce a similar feature in their instrument. Three years, however, elapsed before the appearance of the next device—that of Felldin, November 11, 1884, No. 307,933. Felldin, like Bourne, devised a new form of fall-board. It was so arranged that it could be readily removed, thus obviating the defect above referred to; but it was not a Boston fall-board, and, despite its appearance, the trade continued to demand Boston fall-boards, although the instruments containing them were without the automatic connection, for the problem of establishing such connection between music desk and Boston fall-board had not yet been solved. It must be assumed that the intelligent manufacturers of pianos with Boston fall-boards appreciated the fact that automatic connection would be a "selling point" in their favor, and that they undertook to devise such connection. Nevertheless, it was not until November 1, 1887, that Harper & Hoover showed such a connection in their patent No. 372,616. It seems unnecessary to go into the details of the elaborate and complicated chain of mechanism by which this is accomplished. The criticism of complainant's expert is sound:

"Its link connection introduces features which are objectionable, and are entirely eliminated by the [Brown] construction with its disconnected lever. These objections are that the link construction involves the necessity of disconnecting the fall-board and music rack operating mechanism if the fall-board has to be taken off the piano, and the reconnection of the said parts in proper working relation when the fall-board is put back if the rack-operating mechanism is to perform its work; also that the introduction of jointed parts of this character is liable to cause rattling or jar when the piano is being played upon, and there is always liability of such joints working loose, and possibly coming wholly disconnected."

Patentable novelty may be found in an improvement which simplifies a complicated train of mechanism by eliminating some of its elements, with the result that defects due to presence of those elements are done away with. We are entirely satisfied that Brown was the first to devise a suitable connection between the Boston fall-board and the music desk, which connection does the work without introducing some objectionable element or feature which would neutralize the benefit

of having the music desk operated automatically, and find patentable invention in his simple and effective combination.

The patent was issued only after repeated rejections, after much solicitation, and several amendments both of specification and claims. It must be confined strictly to the precise language ultimately agreed upon. But upon the closest construction of claims 1 and 2 the defendant infringes, its mechanism being a Chinese copy of that shown in the patent. It is suggested that in defendant's device the lower arm of the lever when the instrument is closed is in contact with the part of the fall-board which operates it, but the language of the claims does not call for a separation in space between those parts; and when it is borne in mind that at one time the patentee proposed to amend his claims by inserting a statement that, when the fall-board is closed, the lower end of the lever is "free, and out of engagement with the fall-board," but subsequently, on rejection by the Patent Office, struck such statement out, the contention that infringement is not shown by reason of such lack of engagement is unpersuasive.

The decree is affirmed, with costs.

DOROSHOW v. OTT.

(Circuit Court of Appeals, Third Circuit. January 23, 1905.)

No. 48.

BANKRUPTCY—SUIT BY TRUSTEE—MODE OF REVIEW.

A suit in equity, commenced by a trustee in bankruptcy in a District Court against an adverse claimant of property to litigate the title thereto under authority of Bankr. Act July 1, 1898, § 67e (30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3449]), as amended by Act Feb. 5, 1903 (32 Stat. 800, c. 487 [U. S. Comp. St. Supp. 1903, p. 417]), is not a proceeding in bankruptcy, but an independent suit, and a decree or order therein is not subject to revision by the Circuit Court of Appeals under section 24b of the act (30 Stat. 553 [U. S. Comp. St. 1901, p. 3433]), although the District Court is also the court of bankruptcy administering the estate, and an injunction is also asked to restrain the defendant from prosecuting an action of replevin for the property in a state court.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Petition for Revision of Proceedings of the District Court of the United States for the District of New Jersey.

Thomas E. French, for appellant.

D. T. Stackhouse, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This case comes before us upon petition for revision in matter of law of certain proceedings had in the District Court of the United States for the District of New Jersey, in bankruptcy. The petition alleges that, on December 28, 1903, the petitioner, Doroshow, purchased of Morris Glickman certain store goods; that afterwards, in the month of January, 1904, proceedings in bankruptcy were begun against Morris Glickman in the said Dis-

trict Court, in which S. Conrad Ott was, upon petition of creditors, appointed receiver, and thereupon the said Ott took into his possession, as property of the bankrupt, the store goods so sold, as aforesaid, to the petitioner; that petitioner filed an answer to the creditors' petition, on which said receiver was appointed, and asked for the restoration of said property, and for such further relief as he was entitled to. After a hearing, the said District Court, on the 1st day of February, 1904, granted an order, permitting petitioner to bring a suit in replevin against said Ott, receiver as aforesaid, for the recovery of said personal property and merchandise; that, in accordance with this order, petitioner brought a suit in replevin against the said Ott, receiver of Glickman, bankrupt, in the New Jersey Supreme Court, for the personal property and merchandise aforesaid. (On February 15, 1904, Morris Glickman was duly adjudged a bankrupt, and on the 27th day of February, 1904, S. Conrad Ott, the receiver, was duly elected trustee in bankruptcy for the estate of the said Glickman.) Petitioner states, and it more fully appears from the record, that in July, 1904, a bill in equity was filed by the said Ott, trustee in bankruptcy, as aforesaid. The allegations of said bill, upon which the prayers for relief are founded, recite, with much detail, the circumstances attending what is called a sale by Glickman, the bankrupt, of the goods and merchandise in his store, to his brother-in-law, Doroshow, the petitioner, a few days before the proceedings in bankruptcy were commenced; also the circumstances relating to the seizure by Ott, complainant in said bill, as receiver, of the said goods and merchandise found in the store of the said bankrupt (the subject-matter of said pretended sale), these allegations all tending to show that said sale was fraudulent and invalid as against the said trustee, and that, as such trustee, he was rightfully in possession of the same. The bill then prays: (1) That the order of the District Court, entered on the 1st day of February, 1904, authorizing the said Morris Doroshow to institute a replevin suit against complainant, be vacated. (2) That said defendant, Doroshow, may be enjoined from further prosecuting the now pending suit of replevin in the New Jersey Supreme Court against complainant, "until said defendant shall have fully answered this bill of complaint and this cause shall have been fully and finally determined by this honorable court, and that thereupon the said defendant may be perpetually enjoined therefrom." (3) That complainant may be empowered and directed to sell all personal property, free and clear of any lien of the said Doroshow thereon, and that the avails thereof may be held to abide the result of this suit, or until the further order of the court. (4) That the said pretended sale or transfer from the said claimant to the said Doroshow be decreed to be fraudulent, null and void, and of no effect as against your orator and all persons claiming by, through or under him. (5) A prayer for further and other relief, etc.

Affidavits supporting its allegations were filed with the bill, and an order to show cause why an injunction should not issue, according to the prayer of the bill, and why the complainants should not be empowered and directed to sell all the personal property de-

scribed in said bill of complaint, free and clear of any lien of the said Doroshow, the avails thereof to be held by said complainant to abide the event of this suit, or until the further order of the court. Upon a hearing of the order to show cause, the court, on the 18th day of July, 1904, ordered the preliminary injunction to issue, as prayed for in the bill. The said Doroshow concludes his petition to this court, as follows:

"That the last-mentioned order was erroneous in matter of law, in that said court had no power to make it; that said court should have discharged the order to show cause; that said order should have found the court without jurisdiction. Said court should have decreed the receiver estopped by his previous hearings and conduct from asking for the relief granted.

"Wherefore, your petitioner, feeling aggrieved because of such order, asks that the same may be revised in matter of law by your honorable court, as provided in section 24b of the bankruptcy law of 1898 and the rules and practice in such case provided."

Various objections to the right and power of the court to make this order for a special injunction, are urged by the petitioner. A question, however, as to the jurisdiction of this court to revise the proceedings in the District Court, referred to in said petition, meets us at the threshold of the case. The petition is presented to this court under color of authority conferred by section 24b of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3433]). That section is as follows:

"The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Were the proceedings of the said District Court in this suit commenced by the bill in equity filed by the said trustee in bankruptcy against the said Doroshow, proceedings in bankruptcy, subject to the revision of this court, within the meaning of this section of the bankrupt law? They relate to alleged property of the said bankrupt, claimed by the said Doroshow, and ask, among other prayers for relief, for an injunction, special and permanent, restraining the said Doroshow from further prosecution of a suit of replevin in a state court, instituted against the said trustee for the said property. Summary proceedings by the bankrupt court for the determination of questions of title against adverse claimants, have not ordinarily been countenanced in bankrupt legislation, and the courts have been careful to avoid giving sanction to such proceedings in a bankrupt court, as would deprive outside parties and adverse claimants of their "day in court in the regular way,—that is, by pleadings, trial and judgment." *Collier on Bankruptcy*, 251.

In *Lathrop, Assignee, v. Drake et al.*, 91 U. S. 516, 23 L. Ed. 414, Mr. Justice Bradley, speaking for the Supreme Court, says, with reference to the jurisdiction of the District Court under the bankrupt act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517):

"Of these there are two distinct classes: First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as

an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him."

The suit in equity brought by the trustee against the petitioner in the District Court comes under the second head of jurisdiction thus described. Such a suit is authorized by section 67e of the present bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) as amended by the act of Feb. 5, 1903, c. 487, 32 Stat. 800 [U. S. Comp. St. Supp. 1903, p. 417] as follows, the italics representing the amendment made by the act last above referred to:

"And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

In the case of *In re Jacobs*, 99 Fed. 539, 39 C. C. A. 647, there was a petition of review under said subdivision "b" of section 24. The case presented by the petitioner was one where the trustee in bankruptcy had brought a suit in equity in the District Court, where the bankruptcy proceedings, in which complainant was trustee, were pending, to vacate a deed of trust, conveying property of the bankrupt to the petitioner. The petitioner insisted that the District Court had no jurisdiction of the bill, and that the suit should have been brought in the courts of the state, or in a Circuit Court of the United States if diverse citizenship permitted, under the provisions of section 23 of the bankrupt act (30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), subdivision "b" of said section expressly providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed bankrupt." (We have seen that the recent amendment to section 67e, above recited, has expressly authorized such a suit in the District Court of bankruptcy, as well as in the state court, or Circuit Court of the United States.) It was claimed that the District Court erred in entertaining the bill, and this error of law the Circuit Court of Appeals was asked to review. After an interesting discussion of decisions under the bankrupt law of 1867, the court says:

"In view of these adjudications upon the bankrupt act of 1867, we feel constrained to hold that it is only some action taken or order made in the bankruptcy proceeding itself which can be reviewed by an original petition addressed to this court, under subdivision 'b' of section 24 of the bankrupt act, and that the power thereby conferred 'to superintend and revise' the action of the District Court does not extend to suits brought in that court by the trustee in bankruptcy against third parties to collect the assets of the estate, or to suits brought by third parties against the trustee, whether such suits are rightfully or wrongfully brought in that court, as to which point we express no opinion at this time. Such suits as those last referred to, whether at law or in equity, are not proceedings in bankruptcy, or 'con-

troversies arising in bankruptcy proceedings,' within the meaning and intent of the law authorizing petitions for review, but they are suits which must be reviewed in the ordinary way, by appeal or writ of error, when they have reached a final determination in the court of first instance. We can discover nothing in the language or policy of the recent bankrupt act which would seem to require the various Circuit Courts of Appeals to review every interlocutory order made or proceeding taken, in an ordinary action at law or in equity, in a suit between a trustee in bankruptcy and a third party, which happens to be brought in the District Court, simply because the trustee's title to the property claimed, or his liability to be sued, is founded on the bankrupt act. Nor do we believe that such a construction of the act was within the contemplation of Congress."

The Circuit Court of Appeals in *Re Rusch*, 116 Fed. 270, 53 C. C. A. 631, 633, after quoting the language of Mr. Justice Bradley in *Lathrop v. Drake*, *supra*, says:

"It follows that the power to revise by original petition here the ruling of the bankruptcy court, extends only to some order made in the bankruptcy proceedings proper, and does not embrace proceedings in suits brought by the trustee in bankruptcy against third parties."

We have no difficulty in saying that the petitioner, in the case at bar, has not presented a matter reviewable in this court under section 24b of the bankrupt law. The suit brought by the trustee against the petitioner in the District Court, was specially authorized by the amendment of the bankrupt act of 1903, above referred to. It is true, the District Court was the court of bankruptcy having jurisdiction of the bankrupt's estate, which the complainant, as trustee, was administering, but the suit in equity instituted by him was none the less an independent suit, and incapable of being characterized as a proceeding in bankruptcy, within the meaning of section 24b of the bankrupt act. We cannot here and now, upon this petition, consider the specifications of error made by the petitioner to the interlocutory decree of that court. The orders and decrees of the District Court in that suit, whether interlocutory or final, can only be reviewed in this court upon appeal regularly taken.

In the case of *In re Russell*, 101 Fed. 248, 41 C. C. A. 323, referred to by the petitioner, the bankrupt court entertained an application, based upon a petition of the trustee, asking for an order enjoining the Machinists' Supply Company from prosecuting its action of replevin for certain personal property claimed by it and in the possession of the said trustee, as property of the bankrupt. A rule to show cause was issued and served upon the plaintiff in replevin. On the return day of the rule, an order was made by the court, enjoining the prosecution of the suit as preliminary to a final adjudication of the rights of the parties, referring the claim of the said Machinists' Supply Company, the plaintiff in replevin, to a referee in bankruptcy, to take proofs and report. From this order, the Machinists' Supply Company took an appeal to the Circuit Court of Appeals. That court, however, decided that the order sought to be reviewed was not a final decision, and did not fall within any of the classes mentioned in section 25 of the bankrupt act (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), and should have been presented for review, pursuant to section 24b, by a petition invoking the supervisory power of the court. The court, however, treated the appeal as though it were a petition for review, saying that they did not

intend "by doing so to make a precedent for the future." The Machinists' Supply Company insisted that the bankruptcy court was without jurisdiction to compel it to litigate its title to the property in question in the bankruptcy court, in a summary proceeding upon a petition. The court, therefore, could not decline jurisdiction under section 24b of the bankrupt act, as the order of the District Court brought up for review was clearly a proceeding in bankruptcy, and they sustained the action of the court in restraining, by this summary proceeding, the prosecution of the replevin suit, which was intended to take from the possession of the trustee in bankruptcy property held by him as belonging to the bankrupt's estate, and the court say:

"We should entertain no doubt that the Machinists' Supply Company was entitled to bring an action of trespass or trover for the recovery of the value of the property against the trustee in the state court. But the action brought, being replevin, is one for the seizure of property in the custody of the bankruptcy court, because in the custody of its officer, which, upon the principle decided in *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749, is protected from any interference by state process, or by the process of any other court not exercising supervisory jurisdiction. When property is in the actual possession of a court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control (*Rouse v. Letcher*, 156 U. S. 47, 49, 15 Sup. Ct. 266, 39 L. Ed. 341); and, as between two courts exercising concurrent jurisdiction, the court which first acquires possession will maintain its possession intact. * * * We conclude that the order under review, so far as it stayed the prosecution of the replevin action, was properly made, and that, unless leave is obtained of the court of bankruptcy, the Machinists' Supply Company must bring its action in that court. By clause 'c' of section 19 of the bankrupt act [30 Stat. 551, U. S. Comp. St. 1901, p. 3430], it is entitled to a trial by jury. In *Re Baudouine*, we pointed out that, in the absence of provisions to the contrary in the act, it is to be presumed that Congress intended the ordinary procedure of courts of law or equity, according to the nature of the controversy, should be observed. The order under review, so far as it undertook to deprive the Machinists' Supply Company of the right to be heard in a plenary suit by a reference of the controversy to a referee, was an erroneous exercise of power, and to that extent should be reversed, with costs."

In the case before us, however, the course recommended by the Circuit Court of Appeals in *In re Russell* and in *In re Baudouine*, 101 Fed. 574, 41 C. C. A. 318, has been pursued by the trustee of the bankrupt estate, and a plenary suit in equity has been brought to litigate the title to the property and enjoin the suit in replevin. We are not dealing, as in the case just cited, with a summary order by the court to show cause, but with an interlocutory decree of the District Court in a plenary suit, which the trustee has elected to bring. The action of the court below in this suit can only be here reviewed upon appeal.

The petition for review must, therefore, be dismissed.

ATLAS NAT. BANK v. ABRAM FRENCH SONS CO.

(Circuit Court, D. Massachusetts. February 2, 1905.)

No. 1,636.

1. REFERENCE—HEARING—REVIEW OF EVIDENCE.

Where, on exceptions to a master's report, the evidence, other than certain exhibits, was not before the court, the finding of fact by the master would be taken as true.

2. FRAUDULENT CONVEYANCE—EVIDENCE.

On an intervening petition by a receiver of an insolvent Massachusetts corporation against the receiver of a Maine corporation to set aside an alleged fraudulent conveyance by the Massachusetts company to the Maine company, where it appeared that the Massachusetts company conveyed to the Maine company merchandise to the amount of about \$136,000, and realized in cash from the Maine company, and in cancellation of the liabilities of the Massachusetts company, \$186,000, there was no evidence of any fraudulent intent towards creditors of the Massachusetts company, and where all the questionable acts of the person in control of the Massachusetts company, and from which a fraudulent intent could be inferred, were directed towards satisfying the claims of the Massachusetts company, to the injury sometimes of the Maine company, it was insufficient to show the intent to hinder, delay, and defraud the creditors of the Massachusetts company.

In Equity.

J. B. & H. E. Warner, for John Reed.

Gaston, Snow & Saltonstall, for B. W. Boyden.

COLT, Circuit Judge. This is an intervening petition, filed by the receiver of the Abram French Company, a Massachusetts corporation, against the receiver of the defendant, the Abram French Sons Company, a Maine corporation, to set aside an alleged fraudulent conveyance by the Massachusetts company to the Maine company. The petition and answer were referred to a master. The hearing before the master extended over a period of more than a year. A mass of evidence was introduced, mostly by the petitioner. After fully hearing the parties and examining the evidence, the master has filed an exhaustive report, in which the conclusion is reached that the transfer was not made with intent to hinder, delay, or defraud the creditors of the Massachusetts company. The present hearing was had on the petitioner's exceptions to the master's report. Since the evidence (except the exhibits) is not before the court, the findings of fact by the master must be taken as true. The only question, therefore, which is raised by the exceptions, is whether the master's conclusion upon the facts found is clearly unwarranted in law.

After reviewing the history and condition of the Massachusetts company, and all the material facts established by the evidence prior to or contemporaneous with the conveyance in question, the master concludes that they do not "warrant a finding that the transfer was fraudulent," nor do they appear to him "to establish the fact that the transfer actually accomplished by the steps thus taken was such as to be inconsistent with an honest intent." Proceeding, then, to consider the acts of the two companies after the transfer in connection with those prior

thereto, the master, upon all the evidence, including that admitted de bene, finds himself unable "to reach the conclusion that the transfer is proved to have been inconsistent with an honest intent toward the creditors of the Massachusetts company, present or future, in so far as the companies respectively are chargeable with any intent in the transaction or with any knowledge of such intent." The master finds that the following property was embraced in the bill of sale:

"The retail and hotel supply business of the seller and the good will thereof. The use of the name 'Abram French Company' to the exclusion of any further use thereof by the seller except for the purpose of liquidation. Its merchandise as shown by an inventory made by the parties as of October 1, 1901, less such thereof as has been sold for and on account of the buyer since that date. Its leases, trade-marks, and the benefit of all unfilled orders and all contracts for the produce, manufacture, sale, or transportation of merchandise, with power to enforce the same in the name of the seller or otherwise, but at the buyer's expense.' With the provision, however, that the buyer should assume 'the future burden of such contracts and hold the seller harmless from any liability hereafter arising thereunder.' But should not assume 'any liability of the seller, whether arising under said contracts or in any other manner whatever, which existed prior to October 1, 1901.'"

The only portion of the above property to which the evidence enabled the master to assign a definite value was the item of merchandise. Nothing of any value representing any of the other items came into the possession of the Maine company. As to the merchandise, the master finds that its actual value at the date of the transfer was \$136,740.04. The master finds that the consideration received by the Massachusetts company for the property sold at the date of the sale, January 23, 1902, was as follows:

"(1) \$65,000 in cash, already received by it from subscriptions on behalf of the Maine company. (2) The Maine company's rights against E. C. Huxley and E. C. Converse for \$35,000, due from them as subscribers. (3) The Maine company's rights against William A. French for \$70,000, remaining due from him as subscriber, the stock so subscribed for being delivered to him to that amount. (4) Its own notes for \$30,000 in payment of the remainder of William A. French's subscription, with the right to exchange the same for 300 shares of preferred stock delivered to him and S. Waldo French. (5) 350 shares preferred stock subscribed for, but not yet taken, by Huxley and Converse, and 3,997 shares of common stock, less what was issued to subscribers as above, 175 of which would also have to be delivered upon payment of said subscriptions."

The total actual results accruing to the Massachusetts company from what was received on January 23, 1902, for its merchandise the master finds to have been cash \$67,000, liabilities of the Massachusetts company canceled \$119,000; making a total of \$186,000. In other words, for merchandise whose actual value was \$136,740.04 the Massachusetts company realized in the manner described \$186,000. As the result of these figures, the master declares that he is "unable to find that any fraudulent intent toward creditors of the seller is to be inferred from the consideration for the sale above described, taken by itself." As bearing on the question of fraudulent intent, there is one point in the master's report which should, perhaps, be referred to. The master finds that during the first six months after the transfer in question, by the express direction of William A. French, certain letters were sent to different parts of the country requesting loans of money to

the Massachusetts company; that in some cases loans were made, and the money used by that company; and that the statements and representations respecting the Massachusetts company contained in those letters were false and fraudulent. As to these transactions the master reached the following conclusions:

"The inferences to be drawn from them relate only to the actual personal intent of French, so far as that is an element affecting the transfer at the time it was made. The utmost that can be inferred is that he then intended, if the transfer should be accomplished in the manner above described, to use it in furtherance of attempts to induce people to become creditors of the Massachusetts company by means of untrue representations as to facts resulting from it. If, as I have found, the transfer was not in violation of the rights of creditors of the Massachusetts company who were creditors at the time, neither was it in violation of the rights of any future creditors who could have been expected to become such by any reasonably possible anticipation on the part of members of either board of directors other than French. It has not seemed to me that knowledge of an undisclosed intent on his part of the character above described can be properly imputed to the Maine company in its acts resulting in the transfer, notwithstanding the extent to which those acts were controlled by French. I have therefore regarded the letters referred to as immaterial upon the questions before me."

I see no reason to doubt the soundness of these conclusions. The master finds that William A. French was the controlling mind throughout all the transactions between the two companies. Taking this fact into consideration in connection with the insolvency of the Massachusetts company, it seems to me that William A. French was especially anxious to satisfy the creditors of the Massachusetts company in order to avoid ever-impending trouble from that source. Several acts of William A. French confirmatory of this view are found in the master's report: The issuing to William A. French of 200 shares and to S. Waldo French of 100 shares of the preferred stock of the Maine company for the purpose of purchasing the notes of the Massachusetts company to the amount of \$30,000; the sums amounting to over \$30,000 wrongfully drawn from the Maine company, under the direction of William A. French, and used to pay the debts of the Massachusetts company; the settlement of claims against the Massachusetts company to the amount of \$56,800 by preferred stock of the Maine company subscribed for by William A. French, trustee; the soliciting of loans to the Massachusetts company after the transfer by letters sent under the direction of William A. French, the money so obtained being used to pay the debts of the Massachusetts company. All the questionable acts of William A. French which are found in the master's report, and from which a fraudulent intent might be inferred, seem to have been directed to satisfying the pressing claims against the Massachusetts company, to the injury, sometimes, of the Maine company. Clearly, these acts do not show any intent to hinder, delay, or defraud the creditors of the Massachusetts company.

The petitioner contends that the facts found by the master disclose an attempt to defraud the creditors of the Massachusetts company, and that relief may be granted upon any one of the following grounds: (1) That the conveyance was fraudulent; (2) that the assets of the Massachusetts company in the hands of the Maine company are charged with a trust or equitable lien in favor of the creditors of the Massa-

chusetts company; (3) that the Maine and the Massachusetts companies are in fact the same, and the debts of one are the debts of the other. These several grounds of relief all rest upon the fundamental proposition that the conveyance in question was fraudulent in fact and in law, and upon that issue the master failed to sustain the petitioner's contention.

The cases cited in the petitioner's brief are not applicable to the case at bar. Upon the facts found by the master, this is not a case in which the Maine and the Massachusetts companies are in fact the same. It is not a case in which one corporation simply transfers all its property to another corporation, and distributes the stock of the new corporation among the stockholders of the old corporation in proportion to their respective holdings. Nor is this a case, upon the facts stated by the master, in which property was conveyed for the purpose of securing it from attachment, or for the purpose of putting obstacles in the way of the enforcement by creditors of their claims; nor can it fairly be said that what was done operated to produce these results.

Upon full consideration, I find no error in the conclusions reached by the master. The exceptions are overruled, and an order may be entered confirming the report.

Exceptions overruled; master's report confirmed.

THE SAN RAFAEL.

In re NORTH PACIFIC COAST R. CO.

(District Court, N. D. California. October 28, 1904.)

No. 13,112.

1. SHIPPING—PROCEEDINGS FOR LIMITATION OF LIABILITY—RIGHT TO MAINTAIN.

The claim of a passenger on a steam ferryboat for damages growing out of a collision is one for a maritime tort within the jurisdiction of a court of admiralty, and against which the owner of the vessel is entitled to a limitation of liability, although such owner is a railroad company operating the vessel in connection with its road, and the passenger was being carried on a ticket which entitled him to both land and water carriage.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 644.

Limitation of shipowners' liability, see note to *The Longfellow*, 45 C. C. A. 387.]

2. SAME.

The right of the owner of a vessel to a limitation of liability for damages resulting from a collision on a surrender of such vessel is not affected by the fact that it was also the owner of the other vessel concerned in the collision, which is not surrendered, even though such vessel was partly in fault for the collision, where such ownership is not disclosed in the petition, since in such case the liability of the petitioner as owner of the vessel surrendered is all that is before the court for consideration or adjudication, and the right of damage claimants to proceed against the other vessel or against petitioner as its owner will not be affected by the proceeding.

In Admiralty. Proceeding for limitation of liability.

Geo. W. Towle, Jr., for North Pacific Coast R. Co.
Morehouse & Alexander, for J. S. McCue.

DE HAVEN, District Judge. The North Pacific Coast Railroad Company, a corporation, commenced this proceeding by filing its petition for a limitation of liability, alleging that it was the owner of the steamer San Rafael on the 30th day of November, 1901, when a collision occurred between that steamer and the steamer Sausalito in the Bay of San Francisco; and, further, "that said collision was an unavoidable accident, due solely and only to the density of the fog then and there prevailing in the said Bay of San Francisco, and particularly in the locality thereof through which said steamer was then and there navigating, which said fog prevented and obscured a view or vision of approaching vessels or objects, and rendered the fog signals situate on said San Rafael and on any such approaching vessels or objects and on said steamer Sausalito, with which said San Rafael collided, * * * of a more or less uncertain character and guide to go by." It is also alleged that one J. S. McCue, prior to the filing of the petition, commenced an action against the petitioner in one of the courts of the state to recover damages for alleged injuries sustained by him while a passenger on the steamer San Rafael by reason of such collision, and also for damages on account of merchandise alleged by him to have been on the San Rafael at the time, and lost as a result of said collision; that said actions were still pending. The petitioner asks for a judgment exempting it from all liability, and also prays that, in case it shall be found that the petitioner or the steamer San Rafael is liable for injuries to persons or for loss of property, caused by said collision, then such liability shall be limited to the value of the petitioner's interest in the steamer San Rafael and her freight then pending. The monition issued in this proceeding was served upon J. S. McCue, and he presented his claim, and also filed an answer to the petition. The answer alleges that the petitioner is a railroad corporation, and was at the time of the collision referred to in the petition, and for a long time prior thereto, engaged as such in the business of a common carrier of passengers for hire, between the city of San Francisco and the city of San Rafael in the county of Marin, state of California, and, as a part of its system and property, was the owner of and engaged in running the steam ferryboats San Rafael and Sausalito to and from the city of San Francisco and the city of Sausalito, the said steamers meeting and passing each other in the Bay of San Francisco in making such trips; that on the 30th day of November, 1901, he, the said McCue, was the owner, by purchase from the North Pacific Coast Railroad Company, of an individual monthly commutation ticket for the month of November, 1901, which entitled him to make one round trip daily during that entire month, between the city of San Francisco and the city of San Rafael; that such ticket was not sold or purchased as a steam ferry ticket, but as a railroad ticket, nor was it supervised "or in any manner under the control or supervision of the master or other officer of said vessels, or either of them"; that on that day he exhibited his ticket to the petitioner's agent at San Francisco, and was permitted "to enter into and upon the said steam ferryboat San Rafael, and was then and there ac-

cepted by said railroad company as a railroad passenger from its said station at San Francisco to its said destination at said San Rafael; that the said ferry trip from said San Francisco to said Sausalito was a part of the trip provided by said railroad company, and included in the said contract of transportation, but not specially or separately mentioned therein; that the said steam ferryboat San Rafael was not run or managed as a separate or independent line of business, but as a link or incident of said railroad contract and railroad business of said North Pacific Coast Railroad Company." The answer also alleges that while McCue was on board the steamer San Rafael in making the trip aforesaid he was injured in the collision of that steamer with the Sausalito. It is further alleged "that the said two steam ferryboats being at the time of said injuries the property of the said North Pacific Coast Railroad Company, and run, managed, operated, and controlled by it at the time of said collision and the said injuries, and engaged in the same service, and the fault being in the management of one and both of said vessels, and caused by the negligence of said railroad company, its agents, servants, and employes, * * * said North Pacific Coast Railroad Company has not the right and is not authorized or empowered to limit its liability to the said steam ferryboat San Rafael, or to any limitation at all," under the provisions of the Revised Statutes of the United States, for the reasons, first, "that said contract of carriage was a land contract, and not an exclusive maritime contract; * * * and, secondly, for the reason that the said contract of carriage was the direct and personal contract of the North Pacific Coast Railroad Company; * * * and for the further reason that said collision was the joint act of both of said vessels, and caused through the joint fault of both, and both vessels being the property of said railroad company, and being at said time under the control of and being run and managed by said company in the same service, * * * and the said North Pacific Coast Railroad Company, not having surrendered both of said steam ferryboats for appraisalment or into the hands of a trustee, cannot limit its liability in this proceeding"; and upon these grounds the court is asked to dismiss the petition.

1. It appears from the evidence that McCue was a passenger on the San Rafael at the time of the collision, traveling upon a commutation ticket issued by the petitioner, and good for one round trip daily between the cities of San Francisco and San Rafael. The distance between these points is 18 miles. In going from San Francisco to San Rafael over the route named in McCue's ticket, the distance traveled is 6 miles by water on the Bay of San Francisco, and thence by railroad 12 miles to the city of San Rafael; but there was no understanding or agreement between the parties that the price paid for the ticket should be apportioned between the petitioner's railroad and the steamers connecting therewith. Upon this state of facts it is very earnestly insisted by respondent, McCue, that his contract with the petitioner was an entire contract for safe transportation between San Francisco and San Rafael, and not within the jurisdiction of a court of admiralty, because it was to be partly performed on land, and that, therefore, this court had no jurisdiction to limit the petitioner's liability for a breach of such contract. The petitioner seeks in this proceeding to limit its

liability as owner of the San Rafael for damages to person and property growing out of the collision between that steamer and the Sausalito, and the petition is based upon that clause of section 4283 of the Revised Statutes [U. S. Comp. St. 1901, p. 2943], which provides that "the liability of the owner of any vessel * * * for any loss, damage, or injury by collision * * * shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight pending." The claim of McCue is for damages growing out of the collision between the petitioner's steamer, upon which he was traveling, and another, and is within the letter of the statute, and therefore one the liability for which may be limited in this proceeding. It is, of course, true that a District Court has no jurisdiction to limit liability upon any claim for damages, unless it could take original cognizance of a suit in rem or in personam to recover the loss or damage for which the claim is made. *Ex parte Phenix Insurance Company*, 118 U. S. 610-624, 7 Sup. Ct. 25, 30 L. Ed. 274. But the real nature of the claim made by the respondent, McCue, is for damages growing out of the collision between the San Rafael and Sausalito on the navigable waters of the Bay of San Francisco, which collision he alleges was caused in part by the negligence of the officers in command of the San Rafael. His claim, therefore, is for damages for an alleged marine tort. *In re Long Island Transportation Company (D. C.)* 5 Fed. 599. It cannot be successfully contended that an action, in personam, or in rem, for the recovery of damages for such a wrong, would not be cognizable in a court of admiralty. This being so, it would seem clear that under the rule declared by the Supreme Court in the case above cited this court is authorized in this proceeding to limit the petitioner's liability upon the claims filed by McCue; and the fact that he was at the time of the collision rightfully on the San Rafael as a passenger under a contract which entitled him also to transportation upon the petitioner's railroad connecting with that steamer at the city of Sausalito does not oust this court of jurisdiction. The fact that he was a passenger under such a contract would not deprive him of the right to sue in a court of admiralty for the tort of which he complains. *The Willamette Valley (D. C.)* 71 Fed. 712. "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 3 Wall. 36, 18 L. Ed. 125.

2. It is also claimed that the proceeding should be dismissed, because the steamer Sausalito owned by the petitioner, and which respondent alleges was equally in fault with the San Rafael for the collision, has not been surrendered to the court for the benefit of those claiming damages growing out of the collision. It is a sufficient answer to this to say that the petitioner does not seek to limit any liability which it may be under as owner of the steamer Sausalito; and in my opinion the right of the respondent, or any other person injured by the collision referred to, to proceed against the steamer Sausalito or the petitioner, in so far as that vessel is liable for damages growing out of such collision, is not affected by this proceeding. The petitioner does not allege that it is the owner, or has ever been the owner of the steamer Sausalito,

and the decree in this case will be restricted to an adjudication of its liability as owner of the steamer San Rafael.

3. There was no evidence given upon the trial bearing upon the allegation of the petition that the collision was the result of inevitable accident. The claim of the petitioner for exemption from all liability must therefore be denied, and a decree entered limiting its liability to the appraised value of the San Rafael and freight pending. Further hearing of the case upon the question of the amount of damages may be brought on by either party upon notice to the other.

SCHOFIELD v. PALMER et al.

(Circuit Court, W. D. Virginia. December 22, 1904.)

1. COSTS—REQUIRING SECURITY FROM NONRESIDENT—SUIT BY RECEIVER OF NATIONAL BANK.

On motion therefor, defendants, sued by a nonresident receiver of a national bank, are entitled to require plaintiff to give security for costs, where such security would be required by the laws of the state under the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), unless plaintiff by a certificate filed brings himself within the provisions of Rev. St. § 1001 [U. S. Comp. St. 1901, p. 713].

2. INTEREST—JUDGMENTS ON WRITTEN OBLIGATIONS—LEGAL RATE.

Under the law of Virginia, where an obligation bears interest at a specified rate a judgment thereon should be for the principal and interest thereon at the agreed rate until payment. Where no rate is specified, the judgment should be for interest at the legal rate in the state where the obligation is to be performed, which, in the absence of proof, will be presumed to be the same as in the state where the action is brought.

3. NOTES—PROTEST—EVIDENCE OF NOTICE TO INDORSER.

Under the law merchant it is not a part of a notary's official duty in protesting a note to give notice of dishonor to an indorser, and his certificate that he sent such notice is not even prima facie evidence of such fact in the absence of a statute making it so, or proof that the notary is not alive and capable of testifying.

4. ABATEMENT—SUIT PREMATURELY BROUGHT—NOTICE OF MOTION FOR JUDGMENT UNDER VIRGINIA STATUTE.

A notice of motion for judgment on a note under Code Va. 1887, § 3211 [Ann. Code 1904, p. 1686], which authorizes judgment on a contract for money to be obtained on motion after 15 days' notice to the defendant, if served before the liability of defendant has matured, is subject to a plea in abatement, the same as a declaration prematurely filed would be.

5. SAME—MATTER PROPERLY PRESENTED BY PLEA.

Matter in abatement dehors the record is properly presented by a plea in abatement.

6. NOTES—JOINT ACTION AGAINST MAKER AND INDORSER—DEFENSES.

Where one of two joint defendants alone pleads matter which is not merely personal to such defendant, but which goes to the right to sue, judgment cannot be rendered against the other defendant, if the plea be well taken. Code Va. 1904, § 3395, does not here apply.

7. JURISDICTION OF FEDERAL COURTS—ACTION BY RECEIVER OF NATIONAL BANK.

An action by a receiver of a national bank to collect a debt due the bank is one brought under authority of Rev. St. § 5234 [U. S. Comp. St.

1901, p. 3507], and is within the jurisdiction of a federal court, regardless of the amount in controversy.

[Ed. Note.—Actions by and against receivers and agents of national banks, see note to *McCartney v. Earle*, 53 C. C. A. 398.]

At Law.

Daniel Trigg, for plaintiff.

White & Penn, for defendants.

MCDOWELL, District Judge. These were sundry motions for judgment under section 3211, Code Va. 1887 [Ann. Code 1904, p. 1686], made by the receiver of a New York national bank. This statute, so far as now of interest, reads: "Any person entitled to recover money by action on any contract may * * * obtain judgment for such money after fifteen days' notice."

The plaintiff being a nonresident of this state, in each of the cases the defendants who appeared suggested the nonresidence of the plaintiff, and moved for security for costs. Under section 3539, Code 1887 [Ann. Code 1904, p. 1891], and section 914, Rev. St. U. S. [U. S. Comp. St. 1901, p. 684], I think these motions should be granted in those cases in which final judgment is not now to be entered. *Miller v. N. & W. (C. C.)* 47 Fed. 264. While I doubt if such certificate can be made, I shall adopt the suggestion made in *Platt v. Adriance (C. C.)* 90 Fed. 772, and allow the plaintiff, in lieu of security for costs, to file a certificate bringing the cases under the operation of section 1001, Rev. St. U. S. [U. S. Comp. St. 1901, p. 713].

In each of these cases the defendants moved to dismiss the plaintiff's motion on the ground that the notice given by the plaintiff is a "process," and that it is not under the seal of the court, etc., as required by section 911, Rev. St. U. S. [U. S. Comp. St. 1901, p. 683]. I have recently discussed this question in the opinion in *Leas and McVitty v. Merriman (C. C.)* 132 Fed. 510, and for the reasons there stated this motion of the defendants was overruled.

In each case where the note or bill sued on names the rate of interest at 5 per cent., I think the judgment should be for the principal and interest thereon at the rate agreed on until payment. 3 Minor's Insts. 386. Where no rate of interest is specified, I think judgment should be for interest at the rate of 6 per cent. per annum from maturity until payment. This is the legal rate in this state. No evidence of the legal rate in New York (the place of payment) was offered. While the rate of interest, where not specifically agreed upon, is to be determined by the law of the state of performance (3 Minor, 384), yet where there is no evidence of the rate under such law the courts here will presume that the statutory rate in New York is the same as the statutory rate in this state. 2 Phillips, Ev. note p. 49; *Cox v. Morrow*, 14 Ark. 603; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 513; *Dubois v. Mason*, 127 Mass. 37, 34 Am. Rep. 336; *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 275; *Piedmont Co. v. Ray*, 75 Va. 823; *Smith v. Smith*, 19 Grat. 548; *Wharton, Conflict of Laws*, § 779; 27 Am. & Eng. Ency. (1st Ed.) 976.

In one of these cases, an indorser of the negotiable note sued on being a defendant, the only evidence offered that notice of protest had

been sent the said indorser was the notary's certificate to such effect. Under the law merchant it is not a part of the notary's official duty to give notice of dishonor, and his certificate that he had sent notice is not even prima facie evidence of such fact. 2 Daniel, Negot. Insts. (3d Ed.) §§ 959, 960; 2 Am. & Eng. Ency. (1st Ed.) 406; 4 Am. & Eng. Ency. (2d Ed.) 389; 3 Minor's Insts. 447; Chitty, Bills, 656; Byles, Bills (3d Amer. Ed.) (224) 331; Story, Prom. Notes (3d Ed.) 366; Nicholls v. Webb, 8 Wheat. 326, 331, 5 L. Ed. 628; Dickens v. Beal, 10 Pet. 582, 9 L. Ed. 538; Walker v. Turner, 2 Grat. 536; Burke v. McKay, 2 How. 66, 11 L. Ed. 181; Harris v. Robinson, 4 How. 336, 11 L. Ed. 1000; Sims v. Hundley, 6 How. 1, 12 L. Ed. 319; Union Bank v. Gregory, 46 Barb. (N. Y.) 98; Slaughter v. Farland, 31 Grat. (Va.) 134. Consequently the statute law of this state must alone be looked to for authority (there being no evidence that the notary is not alive and capable of testifying—Nicholls v. Webb, 8 Wheat. 331, 5 L. Ed. 628) for holding the notary's certificate even prima facie evidence that notice of nonpayment of the note sued on was mailed to the indorser. The state statute making such certificate prima facie evidence of what is stated therein was, I think, repealed by the act of December 24, 1903 (Acts 1902-03-04, p. 899, c. 569). 10 Va. Law Reg. pp. 66, 89; Pollard's Va. Code, p. 1495. The plaintiff, having moved therefor in due time (section 3387, Code 1887 [Ann. Code 1904, p. 1796]), may take a voluntary nonsuit, which amounts in this state to a dismissal without prejudice.

In one of these cases (No. 566) one of the notes sued on was made January 28, 1904, and is payable in New York four months after date. The notice of motion for judgment was served on the defendant on May 28, 1904. The defendant filed a plea in abatement, setting up the fact that by reason of legal holidays under the New York statutes the note did not mature until May 31st. The plaintiff demurred to the plea. While a notice of motion for judgment is to be viewed liberally (Pollard's Code, note p. 1688; 4 Minor's Insts. [3d Ed.] pp. 633, 1318; 2 Barton's Law Pr. [2d Ed.] p. 1040), I can think of no good reason for allowing such a notice to be given in advance of liability on the part of the defendant. Every reason for sustaining a plea in abatement to a writ or declaration where a regular action at law has been prematurely instituted applies to a notice of motion prematurely served on a defendant. If a notice of motion for judgment on a note is given in advance of its maturity, mere payment of the note on maturity may not prevent a judgment against the defendant. The fact of payment may not be made known to the court on the day of trial, and the defendant, in common prudence, must come to court with his evidence of payment, in order to be sure that no judgment will be entered against him. It is true, conceding fairness to the plaintiff, that when the defendant comes to court he will not find the motion on the docket. But the defendant may have had no notice that the plaintiff has not docketed the motion, and he had a right to act on the notice that was given him that the motion would unconditionally be made for judgment. If, when the defendant arrives at court, he learns that the motion has not been docketed, he has been made illegally to suffer a loss of time and the expense of the journey. While in an independent ac-

tion for damages he might recover against the plaintiff compensation for these losses, it is not the policy of the law that a debtor who pays his debts in full on maturity should be so harassed, and required to bring an action to secure compensation. It follows that judgment should now be rendered quashing the notice of motion in so far as it relates to the note in question, and judgment rendered for the defendant against the plaintiff for the cost of filing the plea in abatement.

In another case there were two defendants, the maker and the indorser of the note sued on. The notice in this case also was served before the maturity of the note. Only the indorser appeared, and he pleaded in abatement the premature service of the notice. The plea in abatement here calls for no further discussion than is found in the opinion in case No. 566, unless it be because the plea was filed only by the indorser. I may say, in passing, that where, as here, the matter in abatement is dehors the record, a plea in abatement is the most usual method of raising the objection. 16 Ency. Pl. & Pr. 879. From 1 Barton's Law Pr. (2d Ed.) p. 295, it seems that extrinsic matter of abatement can only be presented by plea in abatement. In 1 Chitty on Pleading (16 Am. Ed.) p. 469 (584) it is said:

"Pleas in abatement to the action of the writ are that the action * * * was prematurely brought; but as these matters are ground of demurrer or nonconformity, it is now very unusual to plead them in abatement."

But this is not authority for the proposition that a plea in abatement is an improper method of raising the objection. I have found no Virginia case directly in point, and, without controlling authority for denying the right to make the objection by plea in abatement, this method seems to me preferable to any other. It saves time and expense to thus raise the objection in advance of a trial on the merits.

The fact that the maker of the note did not file a plea in abatement would not make it proper to now render judgment against that defendant. The common-law rule that prevails in this state, as in a majority of the states, is that in a joint action the judgment must be against all the defendants or against none of them. The Virginia statute (section 3395, Code 1887 [Ann. Code 1904, p. 1801]; formerly section 19, c. 177, Code 1849) allowing judgment against less than all the joint contractors does not apply where one of the defendants alone files a defense which is not personal, but which goes to the plaintiff's right of recovery against all the defendants. *Steptoe v. Read*, 19 Grat. 1-9; *Bush v. Campbell*, 26 Grat. 403. It follows that the notice of motion for judgment should be quashed as to both defendants.

In another case the amount sued for is less than \$2,000, and on this ground the notice of motion was demurred to. If the jurisdiction in this case was based on the diversity of citizenship of the parties, or on the ground that the case is one arising under the laws of the United States, the amount involved is too small. However, by Act March 3, 1815 (3 Stat. 245, c. 101; subsection 3, § 629, Rev. St.; U. S. Comp. St. 1901, p. 503), the federal Circuit Courts are given jurisdiction of all common-law suits where the United States, or any officer thereof, under the authority of any act of Congress, are plaintiffs, regardless of the amount involved. That the receiver here is suing un-

der authority of an act of Congress (section 5234, Rev. St. [U. S. Comp. St. 1901, p. 3507]) cannot be doubted. That he is an officer of the United States has been doubted (*Thompson v. Pool* [C. C.] 70 Fed. 725, 727), but the language used by the Supreme Court in *Chetwood's Case*, 165 U. S. 443, 458, 17 Sup. Ct. 385, 41 L. Ed. 782, and in *Auten v. U. S. Nat. Bank*, 174 U. S. 125, 141, 19 Sup. Ct. 628, 43 L. Ed. 920, seems sufficient to settle the doubt. In both these cases a receiver of a national bank is declared to be an officer of the United States. Many rulings of the subordinate federal courts to the same effect are cited in these opinions.

THE FLUSHING.

(District Court, E. D. New York. January 6, 1905.)

TOWAGE—LOSS OF TOW—INSUFFICIENT ANCHORAGE.

A tug, having six barges in tow to distribute at different points on Long Island Sound, left three of them at anchor, while it took others to their destination several miles distant. None of the barges carried an anchor, and two were made fast to the third, which was supplied by the tug with an anchor sufficient at the time; but a strong, though not unusual, wind arose soon after, and, the anchor dragging, two of the boats were driven on shore and wrecked. *Held*, that the tug was negligent in leaving the barges without sufficient protection against conditions which might have been anticipated; that the barge supplied with the anchor became, as to the other two, the agent of the tug, and its fault, if any, was that of the tug; that the barges were chargeable with fault which contributed to their injury in not being equipped with anchors, but that such fact did not relieve the tug from liability for half the damages, since it knew their condition, and also that many such boats were without anchors.

In Admiralty. Suits against tug for loss of tows.

Martin A. Ryan, for libelants.

James J. Macklin, for claimant.

THOMAS, District Judge. On December 9, 1902, the claimant's tug Flushing undertook to tow and distribute six boats to different points on Long Island Sound. The tow reached Field Point, off Greenwich Harbor, about 11 o'clock at night, where it remained till the morning. About 6 o'clock in the morning the tug left the tow at anchor, to deliver one of the boats at the Greenwich dock, a quarter of a mile away. Thereupon the tug returned to the tow, took off two other boats, and carried them to Portchester, which was several miles away, and delivered them at a dock which is approached by a tortuous stream. When the tug went there was little or no wind, but thereafter a southwesterly wind arose, so that the boats left at Field Point were unprotected. Under the influence of the increasing wind, the anchor dragged, and the three vessels went ashore on the beach, about a mile from the anchorage, where two of the vessels were wrecked, although the tug, returning, saved the Rogers, the third boat. Before leaving the boats, the captain of the tug learned that no one of them had an anchor, and thereupon

supplied one to the Rogers, weighing 210 pounds, as the claimant contends. Thereupon the Rogers was appointed by the tug, by the aid of this anchor, to hold the flotilla until the return of the tug. The Kilfoyle and the O'Callahan were behind the Rogers, side by side, and secured to her by a line some 10 feet long. The evidence is conflicting as to the custom of boats of the kind in question to carry anchors. It is beyond question that many of them did not carry anchors. In any case, the captain of the tug knew that these particular boats had none, and made arrangements accordingly. Whatever the weight of the anchor, it was insufficient to hold the tow against the southwest wind, which gradually became strong, but not violent.

The following conclusions are reached: (1) The tug anchored the barges at a usual place, where the bottom was favorable for holding anchors, and where there was a land protection against certain winds; but such place furnished no suitable shelter against southwesterly winds. (2) There was little or no wind when the tug started for Portchester, but the southwesterly wind that arose, although severe, was not unusual, and in the use of due care the captain of the tug should have expected and made provision therefor, and was negligent in leaving three loaded barges with an anchor of the weight that was furnished. (3) The tug used reasonable dispatch in going to and returning from Portchester. (4) The Rogers, for the purpose of operating the anchor, was the agent of the tug, and, if there was a neglect to pay out the line, it was the negligence of the tug. (5) Whether it was or was not the custom of the barges to carry anchors, they should have done so, as vessels of their size without an anchor are insufficiently equipped for navigation, and this omission contributed to the accident.

The present case presents the circumstance of the tug finding that no one of her three boats in tow had an anchor, whereupon she, according to her custom, furnished one, sufficient for immediate holding, but insufficient for weather not unusual, and likely to arise. It was quite well known to the navigators of the tug, who made a specialty of the business, that vessels like those in tow often carried no anchors. In such cases the custom of the tug was to furnish the anchor. Hence the tug was forewarned of the predicament in which she found herself and the three boats committed to her care. For such difficulty she made no provision, and left the tow without making proper provision. The detention was solely upon the business of the tug, although it was a departure that the boats in tow anticipated, and they contracted for towage with reference to such detentions for distribution of vessels along the Sound. If the boats were negligent in not having anchors, the tug was accustomed to towing such vessels, and made no prudent provision to make the tows safe.

Damages and costs will be divided.

THE WILLIE (two cases).

(District Court, S. D. New York. December 29, 1904.)

1. SHIPPING—DUMPING OF CARGO BY BARGE—UNSEAWORTHINESS.

A barge *held* liable in damages for dumping a large part of her cargo of copper ore which she was discharging from a steamship, and for injury to the ship, on the ground of unseaworthiness, due to weakness from long use in the same business, which caused her to careen after she had taken on her load, although the weather was calm and the water smooth.

2. SAME—DAMAGES ADJUDGED AGAINST BARGE—LIABILITY OF CHARTERER TO OWNER.

The owner of a barge, who chartered her to a lighterage company, has no recourse against the charterer to recover damages adjudged against her because of her unseaworthiness for the use to which she was put, where he knew of such use when the charter was made, and the charterer is not otherwise shown to have been negligent.

In Admiralty. Suits against barge for damages.

Black & Knceland, for General Chemical Co.

Butler, Notman, Joline & Mynderse and Frederick M. Brown, for the Aktieselskabet Thrift.

John F. Foley, for the Willie.

Avery F. Cushman, for General Lighterage Co.

ADAMS, District Judge. The first of the above entitled actions was brought by the General Chemical Company, the owner of some 489 tons of copper pyrites ore, to recover the damages caused by the careening of the barge Willie and a dumping of a large part of said ore on or about the 3rd day of December, 1901, at about 2 o'clock in the morning, from the deck of the barge, which was engaged in removing a part of the cargo of the steamship Thrift, while she was lying inside of the breakwater in Erie Basin.

The second action was brought by the owner of the said steamship to recover for the damages caused to her by the sudden careening of the barge, which, it is said, broke the staging on the steamship, which was being used in the discharge, and by a violent blow of the barge, consequent upon the careening, against the side of the steamship, bent in her side plating and did other injury.

It is alleged by the libellants that the damages were caused by the unseaworthy condition of the barge, through leakiness and negligence in pumping and unloading, improper trimming and distribution of the cargo, and generally owing to the negligence, carelessness and want of ordinary skill on the part of the master or other persons in charge of the barge. All of the allegations adverse to the barge were denied on her behalf.

The General Lighterage Company was brought in by the barge, under the 59th Rule, upon the allegation that the owners of the barge had chartered her to that company at the rate of \$5 per day, the barge being tight, staunch and seaworthy in all respects and properly equipped with a man on board as care taker. It was alleged that she was placed in the possession of the charterer, which was to have, under the contract, full control of her navigation and management and that at the

time of the accident, those on board, engaged in stevedoring and loading, were in the employ of and engaged in the business of the charterer.

The Lighterage Company answered the petition, denying any liability and alleging that the barge had a man on board when she was chartered; that the compensation of \$5 per day for the hire of the barge, included the services of the man, who was paid by the owner of the barge; that the man had entire control of the barge and of the loading of cargo thereon and the watching and the protecting of the cargo after it was loaded; that he was not under the orders or control of the company, except in so far as it directed the movements of the barge from place to place.

The testimony shows that the Thrift came to this port from Newfoundland on the 29th of November, 1901, with 2625 tons of the ore in question consigned to the American Metal Company, which sold the cargo to the General Chemical Company. The steamship at the time was under charter to the Cape Copper Company, Limited, for which A. H. Bull & Company were the agents and they directed the steamship to proceed to the Erie Basin where she was moved inside the basin with her starboard side next to the breakwater. The New York Stevedoring Company took charge for the charterer of the work of discharge.

The barge at the time was under charter, with other barges, to the General Lighterage Company, the terms of the contract being contained in a letter from that company to the owner of the scow, of which the following is a copy:

"February 5, 1901

Mr. W. S. Bartley,
23 South St., City.

Dear Sir:—

With reference to our conversation in regard to contract for scows for this year, beg to say that we will agree to charter from you during the current year all the barges that we may need for carrying our bulk freight at Five Dollars (\$5.00) per day per scow. It is understood that you are to furnish us boats promptly on demand, the barges are to be in first class condition, seaworthy and insurable; that you are to agree to furnish us with the largest boats possible and that the average carrying capacity of the barges over the year will not be less than Four Hundred and fifty (450) gross tons. Kindly confirm your understanding of the above in writing and we will consider contract formally closed.

Yours very truly,

Signed J. M. Goetchius, Jr.
Mgr."

It appears that a man, who is supposed to be competent, always goes with the barges, his wages being paid by the owner. This barge, in charge of such a man, was sent by the Lighterage Company to the steamship and having reached there the 2nd of December, at once commenced the discharge of cargo, the same being dumped upon her deck in the manner usually employed. A staging was erected above the deck of the steamship, projecting out beyond the side. The ore was wheeled to the end of the staging and dumped to the barge below, the master of the latter altering the position of his boat from time to time as he thought necessary. About 2 o'clock the barge had nearly 500 tons on board, her full load, when the master noticed that she was unsteady, and went off to get assistance from the master of another of

the owner's boats, engaged in the same work. Before his return, she careened and dumped a large part of her load and at the same time injured the steamship.

The night was calm and the water smooth. There is nothing to explain the accident except the unseaworthiness of the barge. Where the thing which causes an accident is shown to have been under the management of a defendant and the accident is one which in the ordinary course of things does not happen where proper care is used, it affords reasonable evidence, in the absence of explanation, of negligence, and puts upon a defendant the burden of showing that there was no negligence on his part. *The William Branfoot* (D. C.) 48 Fed. 914, 916. But this case need not rest upon such a presumption. The testimony makes it clear that barges engaged in the business of transporting copper ore upon deck are liable to have their seams opened and caulking loosened from being loaded in the usual manner, that is, dropping the ore upon the deck, often from a height of several feet. The danger is such as to require constant watchfulness on the part of those intrusted with the management of such boats. This one was built in 1900 and had been used several times in carrying these cargoes, with nothing more than an annual inspection and overhauling. She had been so used in July, August and September of 1901 and had not been regularly docked, inspected or repaired since July, 1901. No doubt she was in a fair condition for ordinary service but I find that she was not sufficiently strong for this work when she undertook it and that the disaster was the consequence of her weak condition. As she was being subjected to the strain of loading, her condition caused her to leak and take in sufficient water to render her unstable to carry a heavy deck load.

The remaining question is, whether the petition bringing in the Lighterage Company should be sustained. The claimant of the barge, upon being interrogated, was unable to point out any negligence on the part of that company, and I am satisfied that there was none, unless it can be deemed negligence to have used the barge in a dangerous business. The difficulty with such a position on the barge owner's part is, that he knew just the kind of business she was going to be engaged in when he made the chartering contract, and I think it must be taken for granted that he assumed the risk of the danger, in consideration of the hire.

The respective libellants are entitled to a decree against the barge, with an order of reference. The petitions will be dismissed.

McCARRON v. DOMINION ATLANTIC RY. CO.

(District Court, D. Massachusetts. January 31, 1905.)

No. 1,239.

1. MASTER AND SERVANT—FELLOW SERVANTS—ENGINEER AND OILER OF STEAMSHIP.

An engineer on a steamship is a fellow servant of an oiler in the engine room, and his negligence, resulting in an injury to the oiler, creates no liability on the part of the ship.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 492.]

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 236.]

2. SEAMEN—INJURY IN SERVICE—WAGES.

A seaman injured in the service of the ship is entitled to wages for the term of his shipment, where that extends beyond the termination of the voyage.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, §§ 43, 90.]

3. SAME.

The fact that a seaman at the time of his employment was an escaped convict, and subject to recapture, did not deprive him of the rights which ordinarily arise from such employment; and where he was injured in the service, and in consequence left the vessel before the expiration of his term of service, and was subsequently captured and reimprisoned before the expiration of such term, he is entitled to wages to the time of his recapture.

4. SAME—EXPENSE OF CURE.

The liability of a ship for the maintenance and cure of a seaman injured in its service does not terminate with the voyage, but continues until the cure is completed, so far as expenses necessarily incurred for the cure are concerned.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, § 43.]

In Admiralty. Suit by injured seaman for damages, wages, and expense of cure.

George R. Swasey, for libellant.

Frederic Dodge and Lincoln Bryant, for respondent.

LOWELL, District Judge. This is a libel in personam brought against the owner of the steamer Prince Edward on three causes of action: (1) For personal injuries received March 30, 1898, by the libellant, an oiler, through the gross negligence of Buckley, the third engineer; (2) for the same injuries as received in consequence of the dangerous condition of the engine room; (3) for wages and the expense of cure.

1. As Buckley was the libellant's fellow servant, there can be no recovery on this head.

2. The libellant was sent to take the hose out of a gooseneck or overflow pipe. The reversing machinery was started by Buckley without notice, so the libellant testified. In some way not made clear, the libellant was caught in or thrown down by the machinery, and received the injuries complained of. I can find no evidence that the engine room was an unsafe place, or that it differed in any essential respect from oth-

er engine rooms. The reversing machinery was not ordinarily in motion. The method and scope of its operation were well known to the libelant. There is no evidence that it could have been guarded or protected. The libelant contended that, in order to take out the hose, he must stand very close to the reversing machinery. But at the time of the accident the libelant was not reaching up to unfasten the hose above him. He was near the floor, underneath a pipe. While near the floor he could have kept away from the reversing machinery without difficulty. If the libelant's testimony be accepted, he was hurt, not by reason of defective machinery or of the unsafe condition of the engine room, but by the negligence of Buckley. There are not a few places on every steamer, which must sometimes be visited by the crew, yet which are dangerous if machinery is started without warning while one of the crew is at hand. For example, a sailor may be sent to repair or adjust the bucket of a paddle wheel. If the wheels are started before the job is done, he will be injured, not by reason of the unsafe condition of the paddle box, but by reason of the negligence of the man who starts the machinery. On this head I find for the libelee.

3. The libelant was paid wages to April 1st. The shipping articles provided, in substance, for a service of six months unless sooner discharged upon a week's notice. In *The Osceola*, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, it was said that the vessel and her owners are liable, in case a seaman is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages at least so long as the voyage is continued. If the term of employment extend beyond the voyage, I think the former must govern. The *J. F. Card* (D. C.) 43 Fed. 92, 95. Considering that the libelant was hurt in the service of the ship, and received no notice of discharge as provided in the shipping articles, he seems to me entitled to his wages for the term of his shipment, except as affected by the following state of facts: At the time he shipped he was an escaped convict. About a month after the accident, he was recaptured and taken back to the House of Correction, where he served out his sentence during the rest of his term of shipment. The libelee contends that the libelant's whole contract of service was invalid, because a convict cannot dispose of himself, and so that the libelant cannot recover except for service actually rendered. No authorities have been cited on either side, and the case seems to be one of first impression. On the whole, I am not disposed to rule that a seaman is deprived of the rights which ordinarily arise from his employment because he is subject to recapture as an escaped convict. I allow the libelant wages from April 1st to April 30th, the date of his recapture. For wages accruing after the last date it is obvious that there can be no recovery.

About a year after the accident the libelant paid \$11 as expense of cure. The libelee contends that the liability for maintenance and cure terminates with the voyage. See *The Atlantic*, Abb. Adm. 451, Fed. Cas. No. 620; *Nevitt v. Clarke*, Olc. 316, Fed. Cas. No. 10,138; *The J. F. Card*, ubi supra. On the other hand, in *Reed v. Canfield*, 1 Sumn. 195, 203, Fed. Cas. No. 11,641, Mr. Justice Story said:

"It has been asked, if, in a claim of this sort, the expenses of cure are to be paid by the ship, what are the limits of the allowance? May they be extended

over years or for life? My answer to suggestions of this sort is that the law embodies, in its very formulary, the limits of the liability. The seaman is to be cured, at the expense of the ship, of the sickness or injury sustained in the ship's service. But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing, or other assistance, they are a charge on, and to be borne by, the ship. They (the owners) are liable only for expenses necessarily incurred for the cure; and when the cure is completed—at least, so far as the ordinary medical means extend—the owners are freed from all further liability."

I cannot believe that the liability of the vessel and owners for the cure of an injured seaman is limited absolutely by the termination of the voyage; that, if the seaman is seriously hurt while anchoring the vessel in the harbor of destination, he may be abandoned by the captain without further help. After the remarks of Mr. Justice Story, I do not think that a District Court in the First Circuit should hold this to be the law. A higher court is needed to overrule *Reed v. Canfield*. Most of his cure the libellant obtained free at a hospital, and this small additional payment was not unreasonable. The payment was at the limit of the cure, "as ordinary medical means extend." With some doubt, I allow it.

Under the circumstances, the libellant can recover no costs.
Decree accordingly.

In re CONROY.

(District Court, E. D. Pennsylvania. February 4, 1905.)

No. 1,596.

1. **BANKRUPTCY—DISCHARGE—FALSE OATH IN PROCEEDINGS.**

False testimony given by a bankrupt on his examination in respect to his ownership of, or interest in, property conveyed to his wife some years before the bankruptcy proceedings, constitutes the making of a false oath in relation to a proceeding in bankruptcy, within the meaning of Bankr. Act July 1, 1898, c. 541, § 29b (2), 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], which subjects him to punishment by imprisonment if the testimony was knowingly and fraudulently false, and requires a denial of his discharge; the matter being a legitimate subject of inquiry.

2. **SAME—RIGHT TO OPPOSE DISCHARGE—PARTIES IN INTEREST.**

One who has a suit pending against a bankrupt for the recovery of a debt which is contested is a party in interest, and entitled to contest the bankrupt's right to a discharge, although his claim has not been proved in the bankruptcy proceedings.

In Bankruptcy. On application for discharge.

M. J. O'Callaghan and John W. Speckman, for bankrupt.
Joshua R. Morgan, for objecting creditor.

HOLLAND, District Judge. Joseph A. Conroy was adjudicated a bankrupt on the 17th day of March, 1903, upon a voluntary petition filed by him; and subsequently, within the time required, 12 exceptions were filed to his discharge by William P. Elder, a creditor, which were referred to a referee to take testimony and make report thereon. All the exceptions were dismissed by the referee, with the exception of the second, hereinafter set forth,

which was sustained, and he recommended that the bankrupt's discharge be denied. Exceptions were filed to the referee's findings of fact and recommendation by the bankrupt, and Elder objected also to some of his findings, all of which were overruled, and the report is now before the court for consideration.

The reason assigned by the referee for refusing a discharge for the bankrupt is set forth in the second exception, which the referee finds from the evidence should be sustained, and is as follows:

"That the said Joseph Augustine Conroy has committed an offense punishable by imprisonment, under the bankruptcy act, in knowingly and fraudulently making a false oath in his said bankruptcy proceedings, when he testified in his examination in the said proceedings that he never owned the said property No. 2419 Clifford street, or had a dollar's worth of interest in it."

An examination of the evidence shows that the findings of facts by the referee were fully justified, in sustaining the second specification of objection against discharge, and dismissing all the others filed, and his conclusions are approved. He had the witnesses before him, and is therefore better able to judge what weight should be given to their utterances than the court, who must depend upon the written statement. The evidence given by both the bankrupt and his wife, and the witnesses called to support them, as presented in cold type, shows either that they were remarkably dull and stupid individuals, or else they were endeavoring to bolster up a manufactured story which would not tally with the documentary evidence that the excepting creditor was able to produce against them. I am inclined to the opinion that the whole story of the bankrupt in regard to the property at 2419 Clifford street is a fabrication, and the referee was justified in so finding from the evidence of the bankrupt himself, together with that of his wife, the facts and circumstances surrounding it, and the documentary evidence produced in the case.

It is objected, however, before the court, that William P. Elder is not such a party in interest as entitles him to object to the discharge, and that, even if Conroy did testify falsely as to the property on Clifford street, it having been transferred to his wife on the 18th of December, 1895, and the title remaining in her since that time, he is not now the owner thereof, and any statement he made under oath in his examination, under section 7 of the bankrupt law of July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], in regard to this property, even if false, would be no ground for a successful objection to a discharge. It has been held that a transfer of property to a man's wife in fraud of creditors nine years before the bankruptcy proceedings, and a failure to schedule this property so transferred, is no ground for objections to the discharge of the bankrupt. *In re Howell* (D. C.) 105 Fed. 594. But this is a different question entirely from that of "making a false oath * * * in relation to any proceeding in bankruptcy." Under section 14, subd. 1, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], a discharge will be refused if the bankrupt "has committed an offence, punishable by imprisonment, as herein provided"; and by section 29b, subd. 2, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433],

"knowingly and fraudulently making a false oath * * * in relation to any proceeding in bankruptcy" subjects the offender to "punishment by imprisonment." Was this a false oath in connection with his "proceeding in bankruptcy"? It undoubtedly was. Whether this Clifford street property can now be administered by the bankrupt's estate is not the test as to the materiality of an inquiry into its ownership by creditors. The ownership of the property was a proper, legitimate, and material matter of inquiry in this bankrupt proceeding. If the property belonged to Conroy at this time, the creditors were entitled to that information; and the original ownership of the property, and the circumstances under which it passed out of his possession, were such that they were entitled to know the exact facts as to whether or not he was originally the owner, and when and how and under what circumstances it became the property of his wife; and, in this inquiry, if he fraudulently and knowingly made a false oath in regard to the ownership of the property at any time, he committed an offense punishable by imprisonment, under the act, and therefore sufficient to prevent a discharge. *In re Woodford Gaylord*, 7 Am. Bankr. Rep. 1, 112 Fed. 668, 50 C. C. A. 415.

It is urged that Elder is not such a creditor as would give him a standing to object to a discharge. It appears the indebtedness arose on the 8th day of November, 1895, upon which date one Doyle, Elder, and Conroy, the bankrupt, jointly executed a note for \$15,000. Subsequently Doyle and Elder paid this note, and there is a suit now pending against Conroy, the bankrupt, to recover one-third of that amount. Conroy disputes any liability on this note. It was not proven in the proceedings in bankruptcy, but, notwithstanding this fact, it is a subsisting claim against Conroy; and Elder, under the act, is a party interested to such an extent as to enable him to object to a discharge. If his claim is a just one, and he finally succeeds in obtaining a judgment, he is interested in the question of Conroy's discharge, for the reason that Conroy will not be relieved from liability on that judgment unless discharged in this proceeding, and Elder has a right to raise that question, and is interested in the result. A person has been held to have an interest sufficient to entitle him to oppose a discharge where his claim was contingent and unliquidated, so as not to be capable of being proven as a debt (*Ex parte Traphagen*, Fed. Cas. No. 14,140), or where he held an equitable claim only against the estate (*In re Tebbetts*, Fed. Cas. No. 13,817), or where his claim is being contested (*In re Belden*, Fed. Cas. No. 1,238), although his claim had not been proven (*In re Frice* [D. C.] 96 Fed. 611), or, even if it is no longer provable, he is a party in interest (*In re Bimberg* [D. C.] 121 Fed. 942; *Loveland on Bankruptcy*, § 275).

Report of the referee affirmed, and bankrupt's discharge refused.

SECURITY TRUST & SAFE DEPOSIT CO. v. ALEXANDER'S EX'RS et al.

(Circuit Court, E. D. Pennsylvania. January 26, 1905.)

No. 29.

COURTS—JURISDICTION—COMITY.

Where it was contended that a trust created by a will terminated on the death of testator's son-in-law, who was the trustee, and that the beneficiaries thereafter possessed an absolute interest in the trust estate, but after the trustee's death the Chancellor, having jurisdiction of testator's estate, appointed complainant as trustee under the will, and he sued the former trustee's executor in the federal courts for an accounting, such suit would be held open pending proceedings before such Chancellor to construe the will and determine whether plaintiff's appointment had not been inadvertently made.

Petition to Dismiss Bill for Want of Jurisdiction.

H. Gordon McCouch, for petition.

M. Hampton Todd, opposed.

J. B. McPHERSON, District Judge. The facts upon which the present motion is founded are these: George Jones, of Wilmington, Delaware, died in 1877, leaving a will, of which the second clause is as follows:

"Item Second; To my son-in-law John Alexander and his heirs and assigns I give and devise all my farm land in Kent county in this State, in trust for the equal use, benefit, and behoof of his children by my daughter Mary Jane (now deceased), with authority to retain and manage it for their respective equal benefit, or at his option at any time to convey and assign the same to them and their heirs as tenants in common free and discharged of any trust, or, with the assent to be expressed in writing, of such of the said children as may at the time of the exercise of such option, have attained twenty-one years of age, to sell and dispose of the said lands and tenements, at public or private sale for the best price to be obtained therefor, and thereupon to make a good and sufficient deed or deeds in fee simple therefor to the purchaser or purchasers thereof, free from all trust and any liability of the purchaser or purchasers to see to or account for the proper application of the purchase money by the said John Alexander or his heirs; the said purchase money thereupon to be still held in trust by him or them for my said grandchildren, or at his discretion, to be paid over to them respectively discharged of any trust, at such times and manner as he shall deem most beneficial to them respectively."

John Alexander afterwards sold the real estate referred to in the foregoing paragraph, and (so the bill avers) treated the fund derived from the sale as his own money until his death in 1895; never accounting at all for the shares belonging to two of the surviving cestuis que trustent, and only accounting in part for the share belonging to the third. In 1899 the Chancellor of the state of Delaware appointed the complainant "trustee of the estate and property which in and by the said last will and testament (of George Jones, deceased) was devised and bequeathed unto the said John Alexander, deceased, in trust for the equal use, benefit and behoof of the children of the said John Alexander by his wife Mary Jane, with authority to hold, manage, collect, receive, invest, apply, and dispose of the same, and all income therefrom to accrue, pursuant to the trusts of the said last will and

testament, and to any and all orders and decrees of the Chancellor touching the same," etc. Soon afterwards the pending bill was filed, which names as defendants the executors of John Alexander, the three surviving cestuis que trustent, the administrators of the two who are dead, and the son of John Alexander by a second marriage; all being citizens of Pennsylvania, except one, who is a citizen of New York. The bill asks for an accounting of the trust property, and a decree directing payment to the complainant of such sum as may thus appear, in order that it may be held upon the foregoing trust under the will of George Jones, or accounted for in the Delaware Court of Chancery. The case has been at issue for several years, upon the executors' denial that John Alexander had failed to account in his lifetime, but no testimony has yet been taken.

The motion to dismiss proceeds upon the theory that the trust came to an end by the death of John Alexander, that the beneficiaries are now possessed of an absolute interest therein, and that the substituted trustee has no interest whatever; the result being that the surviving beneficiaries are the proper parties complainant, but cannot maintain this suit in the Circuit Court because two of them are citizens of Pennsylvania. I do not think it necessary to decide these questions, however, because it seems to me that the correct way to test the continued existence of the trust is to apply to the Chancellor of the state of Delaware to revoke the complainant's appointment. For this court to sit in judgment on the chancellor's order, and virtually to say that he should not have made the appointment, would not be in accord with the comity that ought to prevail between the state and the federal tribunals, and for the present I am not disposed to undertake what might be thought to bear an ungracious aspect. This trust was created by a citizen of the state of Delaware, in a will that was probated there, and concerned real property there situated. The trustee was bound to account to the Delaware Court of Chancery, and was subject to its orders, and required to obey its construction of the language by which the trust was created. If the trust is still in existence—and the order appointing the complainant necessarily implies that the Chancellor so believed at that time—the substituted trustee also must account to the same court, and must obey its orders and decrees. To that court, therefore, in my opinion, should primarily be presented the application to construe the will of the testator, and to decide whether the complainant's appointment was inadvertently made.

Until this has been done, I shall hold the present motion under advisement, and the clerk is directed to make the proper entry to that effect upon the docket.

UNITED STATES MIN. CO. v. LAWSON et al.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1904.)

1. FEDERAL COURTS—EQUITY JURISDICTION—SUIT TO QUIET TITLE.

The enlarged remedy given by Rev. St. Utah 1898, §§ 2915, 3511, which authorize a suit to quiet title to be maintained without any previous adjudication of title in an action at law, and without reference to possession, may be enforced in a federal court of equity sitting in that state when the complainant is in possession and the defendant is out of possession, or when both parties are out of possession, as in either case there is no adequate and complete remedy at law.

2. SAME—MINING CLAIM—POSSESSION.

Where the owner of a mining claim is in possession of its surface, claiming title to the entire claim, his possession, in legal contemplation, extends to everything which is a part of the claim, whether vertically beneath its surface or within its extralateral rights; and a bill to quiet title which alleges such ownership and possession in complainant is not insufficient as showing an adequate remedy at law because it further alleges that defendant has, through underground workings, wrongfully entered upon and removed ore bodies beneath the surface of the claim, and threatens to extend his workings therein.

3. MINING CLAIMS—EXTRALATERAL RIGHTS—INTEGRAL CHARACTER OF VEIN.

Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downwards outside of the side lines.

4. SAME—SENIORITY IS DETERMINED BY ORDER IN WHICH THEY WERE LOCATED.

In respect of conflicting mining claims, seniority is determined by the order in which they were located, whether they have been patented or remain unpatented.

5. SAME—CONFLICT USUALLY, BUT NOT ALWAYS OR NECESSARILY, AWARDED TO SENIOR CLAIM.

While the area in conflict is usually awarded to the senior claim, it is not always or necessarily so, because acts or circumstances entirely consistent with the true order of location may have intervened, which require that this area be awarded to a junior claim.

6. SAME—ESTOPPEL—MATTERS CONCLUDED BY PATENT.

Where application for a patent is made by the owner of one of two overlapping claims, the issuance of a patent to him including the area within the overlapping boundaries is necessarily a determination that at the time of the proceedings such area is a part of that claim; but it does not necessarily determine the priority of location, and, where it does not appear that such question was put in issue and actually decided in the course of the patent proceedings, the owner of the other claim is not estopped from asserting the priority of his claim in a subsequent controversy respecting extralateral rights, which were not involved in the proceedings for a patent.

[Ed. Note.—Conclusiveness of patent to mining claims, see note to *Bunker Hill & S. M. & C. Co. v. Empire S. I. M. & D. Co.*, 48 C. C. A. 674.]

Appeal from the Circuit Court of the United States for the District of Utah.

See 115 Fed. 1005.

This is a suit to quiet the title to four mining claims in the West Mountain Mining District, Utah, and to bodies of ore beneath their surfaces. The allegations of the bill are briefly these: Complainant owns the Jordan Extension, Grizzly, Northern Light, and Fairview claims, and also the bodies of ore vertically beneath their surfaces, and is in possession of these claims and engaged in working them, with two other claims hereinafter mentioned, as one

property for mining purposes. Defendants claim to own the underlying ore bodies as parts of veins or lodes which have their apices within the surface boundaries of adjacent claims belonging to and in the possession of defendants. Under their claim of ownership, defendants, through underground workings, have wrongfully entered the underlying ore bodies in complainant's Jordan Extension, Grizzly, and Northern Light claims, have extracted therefrom large quantities of valuable ore, and are threatening to continue to extract ore therefrom and to extend their underground workings and mining operations to the remaining underlying ore bodies, including those beneath the surface of the Fairview claim. If any ore body beneath the surface of the Jordan Extension, Grizzly, Northern Light, or Fairview is part of a vein or lode dipping or extending into such claim from a claim of the defendants, it is part of a vein or lode which has its apex in the Old Jordan and Mountain Gem mining claims, which are owned by and in the possession of the complainant, and such ore body is within the extralateral rights incident to the last-named claims. Defendants' claim of ownership of such underlying ore bodies is false and unfounded in fact, and constitutes a cloud upon complainant's title. The prayer of the bill is that the title of complainant to the four claims and to the underlying ore bodies be quieted, and that defendants be perpetually enjoined from asserting any claim thereto and from extracting any ore therefrom. A demurrer to the bill on the ground that it discloses that complainant has an adequate remedy at law was overruled.

The answer of defendants specifically denies the allegations of the bill, excepting those relating to diverse citizenship, and contains affirmative allegations substantially as follows: Defendants are the owners and in the possession of the Kempton and Ashland mining claims, which are adjacent to the Jordan Extension, Grizzly, Northern Light, and Fairview claims of complainant. The only ore bodies in complainant's said claims are parts of veins or lodes which have their apices within the Ashland and Kempton claims of defendants, and which, on their dip beneath the surface, extend toward and through complainant's claims. Defendants entered these ore bodies and extracted and removed ore therefrom, as they were and are lawfully entitled to do, in pursuance of their right under the mining laws of the United States to follow extralaterally such veins or lodes on their dip.

As presented in the large volume of testimony which was taken, the controversy may be summarized in this manner: The Old Jordan, Mountain Gem, Kempton, Ashland, Jordan Extension, Northern Light, Grizzly, and Fairview are contiguous mining claims in the West Mountain Mining District, Utah, the Kempton and Ashland partially separating the surfaces of the Jordan Extension, Grizzly, Northern Light, and Fairview from the surfaces of the Old Jordan and Mountain Gem. The apex of a stratum of limestone, the strike of which is in a southwesterly and northeasterly direction, is longitudinally bisected or divided by the Old Jordan, Mountain Gem, and Kempton. The southerly side lines of the Kempton, as patented, are in part coincident with the northerly side lines of the Old Jordan and Mountain Gem, as patented, and the greater part of the width of the apex of the limestone is south of the lines so dividing the patented ground and is within the surface boundaries of the Old Jordan and Mountain Gem. The limestone is from 100 to 200 feet in width, is confined between well defined walls of quartzite, dips northwesterly at an angle of about 30 degrees, passes beyond the northerly side lines of the Old Jordan and Mountain Gem, and extends, on its dip beneath the surface, through the Kempton, Ashland, Jordan Extension, Grizzly, Northern Light, and Fairview. The ore bodies in dispute are within the stratum of limestone, and vertically beneath the surfaces of the four claims last named. The complainant owns the Old Jordan, Mountain Gem, Jordan Extension, Grizzly, Northern Light, and Fairview, and the defendants own the Kempton and Ashland. The parties are in possession of the surfaces of their respective claims, and are engaged in working them extensively for mining purposes. The evidence was chiefly directed to the question whether or not the stratum of limestone constitutes a single broad vein or lode of mineral bearing rock. Complainant insisted, and its evidence tended to show, that this stratum is such a single vein or lode, while the defendants insisted, and their evidence tended to show, that the stratum embraces several distinct and

independent veins or lodes; that one such vein or lode, called a "bedded vein," has its apex within the surface lines of the Kempton, extends on its strike in the direction of the Kempton end lines, passes on its dip beneath the surface beyond the northerly side line of that claim, and through the Jordan Extension, Ashland, Northern Light, Grizzly, and Fairview; that another distinct and independent vein or lode, called the "Ashland cross fissure," and of which the bedded vein is claimed to be a lateral continuation or appendage, has its apex in the Ashland, passes on its dip beneath the surface beyond the northwesterly side line of that claim, and through the Northern Light, Grizzly, and Fairview, and that the ore bodies in controversy are parts of the two veins or lodes, the apices of which are within the Kempton and Ashland. In the assertion of the extralateral rights intended to be set forth and sustained by their answer and evidence, the defendants have extended their underground workings and mining operations into the ore bodies in dispute and have removed some of them, but others are as yet in place and undisturbed including those underlying the surface of the Fairview.

The court dismissed the bill, but filed no findings of fact or opinion disclosing under what view of the facts or of the law the decree of dismissal was rendered.

William H. Dickson and George Sutherland (A. C. Ellis, A. C. Ellis, Jr., Waldemar Van Cott, and E. M. Allison, on the brief), for appellant.

Ogden Hiles and Charles J. Hughes, Jr. (L. R. Rogers, on the brief), for appellees.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The elements of federal jurisdiction being present, a right of action created or enlarged by the laws of a state and made enforceable in its courts of general jurisdiction is equally enforceable in the federal courts sitting in that state; but, notwithstanding the procedure prescribed by the laws of the state, the enforcement in the federal courts can be by suit in equity only where there is not a plain, adequate, and complete remedy at law, according to the distinction between actions at law and suits in equity prevailing in those courts. Rev. St. § 723 [U. S. Comp. St. 1901, p. 583]; *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167; *Prentice v. Duluth, etc., Co.*, 7 C. C. A. 293, 297, 58 Fed. 437; *Darragh v. Wetter, etc., Co.*, 23 C. C. A. 609, 78 Fed. 7; *Gillis v. Downey*, 29 C. C. A. 286, 291, 85 Fed. 438; *Sawyer v. White*, 58 C. C. A. 587, 122 Fed. 223.

The laws of Utah give a right of action in the courts of that state to quiet the title to real property without any previous adjudication of the title in an action at law, and without reference to the possession. Rev. St. 1898, §§ 2915, 3511. This enlarged right is enforceable by a suit in equity in the federal courts when the complainant is in possession and the defendant is out of possession, or when both parties are out of possession, because in either case there is no adequate and

complete remedy at law. *Holland v. Challen, and Wehrman v. Conklin, supra.*

It is objected that the present bill shows that the ore bodies in dispute are in the possession of the defendants, and not of the complainant, and therefore that the latter has an adequate and complete remedy at law. The objection is untenable. Where the true owner of a mining claim is in possession of its surface, claiming title to the entire claim, his possession in legal contemplation extends to everything which is part of the claim, whether vertically beneath its surface or within the extralateral right granted by Congress, which is not in the actual possession of another holding adversely. *Clarke v. Courtney*, 5 Pet. 319, 354, 8 L. Ed. 140; *Hunnicut v. Peyton*, 102 U. S. 333, 368, 26 L. Ed. 113; *Montana, etc., Co. v. St. Louis, etc., Co.*, 42 C. C. A. 415, 420, 102 Fed. 430; *Empire State, etc., Co. v. Bunker Hill, etc., Co.*, 58 C. C. A. 311, 315, 121 Fed. 973; *Last Chance Mining Co. v. Bunker Hill, etc. Co.* (C. C. A.) 131 Fed. 579, 583. The bill states that the complainant is the owner of the claims of which the ore bodies in dispute are part, and is in possession of these claims and engaged in working them as one property for mining purposes. This is a sufficient allegation of complainant's possession of the ore bodies as well as of the surfaces of the claims. The further statement that the defendants, through underground workings, wrongfully entered the ore bodies and extracted ore therefrom, and are threatening to extend their underground workings and to continue the extraction of ore, even if deemed an admission or allegation of an ouster or dispossession of the complainant in respect of the ore bodies actually embraced in the defendants' underground workings, leaves the allegation of the complainant's possession unimpaired in respect of the ore bodies which have not been penetrated by defendants' underground workings but remain in place and undisturbed.

The principal purpose of the present suit is to obtain a determination of the adverse claim to the remaining ore bodies, not merely to recover the possession of the underground workings and chambers from which the defendants have removed the ore, or to recover the value of the ore removed. Being itself in possession of the remaining ore bodies, and the defendants being out of possession, the complainant has no adequate and complete remedy at law. The case of *Boston, etc., Co. v. Montana, etc., Co.*, 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626, relied upon by the appellees, is distinguishable from this because in that case there was no allegation that the complainant was in possession or that both parties were out of possession, and the suit was not one to quiet title, but to recover for ores extracted and to enjoin further trespass.

A careful examination and consideration of the evidence clearly convinces us that the stratum of limestone constitutes a single broad vein or lode of mineral bearing rock extending from the quartzite on one side to the quartzite on the other. The limestone has been profoundly broken, altered, and mineralized, and has thereby obtained an individuality which, apart from other differences, clearly distinguishes it from the neighboring rock. There is a local absence of ore in places, a continuous occurrence of it in others, and a seeming local occur-

rence of it in still others, but the ore bodies are not separated, one from another, by any defined boundaries. As in *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 8 Fed. Cas. 819, 825 (No. 4,548), they are parts of one greater deposit, which permeates, in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone. As shown by extensive exploration and actual mining, the mineralization has been so general that its only defined limits are the quartzite walls which bound the limestone, and within it one may reasonably expect to encounter ore by driving or cross-cutting in any direction.

In addition to the many small fissures which exist only in the limestone and extend in every direction, other ore-bearing fissures of approximately a northerly and southerly direction are found in the quartzite, and it is the contention of the defendants that these extend through the limestone, that its mineralization is due to them and occurred at the same time and in the same manner as did the deposition of the ore in them, and that the ore bodies in the limestone are lateral continuations or appendages of these cross-fissure veins. Of this it is sufficient to say that, whatever may have been the mineralizing process, the alteration and mineralization of the limestone were so general and extensive as to convert it into a single broad vein or lode within which the cross-fissure veins are without defined boundaries, and so far lose their identity that they cannot be distinguished from the larger ore bodies therein. The ore in the quartzite is inconsiderable in amount, and is confined to these fissure veins, but it is not so in the limestone. In the evidence for the defendants it is conceded that there are no walls separating the cross-fissures from the bodies of ore in the limestone; but it is attempted to be shown that the ore in the fissures, and especially in the Ashland fissure, is distinguishable because its lamination conforms to the strike and dip of the fissure, while the lamination of the ore on either side conforms to the strike and dip of the limestone. We think the evidence for the defendants, as well as that for the complainant, shows that the difference in the lamination is not always discernible, and is an uncertain and unreliable test of the extent and boundaries of the cross-fissures. To illustrate: Mr. Wall, one of the defendants, says the plating of the ore in the limestone is similar in appearance to that of the ore in the fissure where the ore bodies are large and wide, but at a considerable distance from the fissure the structural lines become distinct and parallel to the bedding of the limestone. Mr. Legg, a witness for the defendants, says there is no sharp line of division, and the fissure structure and the influence of the fissure extend for considerable distances from the original fissure. Mr. Neill, another of the defendants' witnesses, says the fissure is entirely destroyed in places within the ore bodies in the limestone. Mr. Moorehouse, also a witness for the defendants, says the Ashland fissure has a width in the quartzite of not exceeding 3 feet, and, when measured by the difference in the lamination of the ore, has a width in the limestone of 180 feet. The defendants lay much stress upon the testimony of Mr. Holden, a witness for the complainant, who says:

"The Ashland vein can be followed for quite a distance into the Big Jordan (limestone) lode, and can be traced. It is like all of these fissures; it is somewhat difficult to follow through, but the way we do trace them we get a line from the quartzite on either side, or from one quartzite wall, and follow that line out, but we can't always find the limits of the fissure, which we take to be one of the cross-fissures."

This is far short of a statement that the boundaries of the Ashland, or of any other fissure, are well defined within the ore bodies in the limestone. Particularly is this true when the entire testimony of the witness is considered, because he also says much of the limestone has been mechanically and chemically altered until the entire original stratification or bed structure has disappeared. Our conclusion upon this controverted question of fact is that the ore bodies within the claimed spaces of intersection created by the cross-fissures, including the Ashland, are not susceptible of identification and separation from those in the stratum of limestone, and must be held to be parts of the single broad vein or lode, and not parts of distinct and independent cross-fissure veins.

Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side lines. This is so because it has been the custom among miners, since before the enactment of the mining laws, to regard and treat the vein as a unit and indivisible, in point of width, as respects the right to pursue it extralaterally beneath the surface; because usually the width of the vein is so irregular, and its strike and dip depart so far from right lines, that it is altogether impracticable, if not impossible, to continue the longitudinal bisection at the apex throughout the vein on its dip or downward course; and because it conforms to the principle pervading the mining laws, that priority of discovery and of location gives the better right, as is illustrated in the provision giving to the senior claim all ore contained in the space of intersection where two or more veins intersect or cross each other, and in the further provision giving to the senior claim the entire vein at and below the point of union, where two or more veins with distinct apices and embraced in separate claims unite in their course downward. Rev. St. § 2336 [U. S. Comp. St. 1901, p. 1436]. We recognize the force of an opinion delivered by a learned judge in this circuit, wherein it was held that the right to pursue a vein downward outside of the side lines is dependent upon the inclusion within the claim of the entire width of the apex, and that, where two collateral locations bisect the apex, neither takes any part of the vein not vertically beneath its surface. *Hall v. Equator Mining & Smelting Co.*, Transactions Am. Inst. Min. Eng., Vol. 12, p. 418. But the rule which we have stated seems to us to be sustained by the better reason as well as the weight of authority. *Argentine Mining Co. v. Terrible Mining Co.*, 122 U. S. 478, 484, 7 Sup. Ct. 1356, 30 L. Ed. 1140; *Bullion, etc., Co. v. Eureka, etc., Co.*, 5 Utah, 3, 49, 55, 11 Pac. 515; *St. Louis, etc., Co. v. Montana Mining Co.*, 44 C. C. A. 120, 123, 104 Fed. 664, 56 L. R. A. 725; *Empire State, etc., Co. v. Bunker Hill, etc., Co.*, 52 C. C. A. 222, 114 Fed. 417; *Last Chance Mining Co. v. Bunker*

Hill, etc., Co. (C. C. A.) 131 Fed. 579; Empire State, etc., Co. v. Bunker Hill, etc., Co. (C. C. A.) 131 Fed. 591.

Of the claims which include portions of the longitudinally bisected apex, those of the complainant, the Old Jordan and Mountain Gem, are in fact older in the order of location, and take the entire width of the vein on its dip or course downward, unless the superiority due to their seniority is avoided by some other and controlling fact. The defendants earnestly insist that their claim, the Kempton, is older in the order of patenting, and, as patented, includes surface areas as to which the three claims, as located, were in conflict by reason of the overlapping of their surface boundaries; that the patenting of these areas as parts of the defendants' claim was a conclusive determination that it was prior in location; and that therefore the complainant is estopped from now claiming the fact to be otherwise. The defendants have the older patent, and we will assume that originally there were surface conflicts, as is insisted, and that the areas in conflict were patented as parts of the claim of the defendants. If the present suit related to the superior right to these surface areas or to any underground or extra-lateral rights necessarily following or incident to such surface ownership, the claim of estoppel would be well taken, but as the controversy is over a different subject-matter, and it is not shown that the question of priority of location was in fact presented and determined in the course of the patent proceedings, the estoppel cannot be sustained.

Some preliminary observations respecting conflicting mining claims may not be inappropriate. Seniority is determined by the order in which they were located, whether they have been patented or remain unpatented. While the area in conflict is usually awarded to the senior claim, it is not always or necessarily so, because acts or circumstances entirely consistent with the true order of location may have intervened, which require that this area be awarded to a junior claim. An application for a patent to one of the conflicting claims presents the question, which is the superior claim within the overlapping surface boundaries? And the inclusion of the area in conflict within a patent to one of the claims is necessarily a determination that at the time of the patent proceedings such area is a part of that claim. Applying these principles to the facts of the present case, it is seen that the issuance of a patent for the defendants' claim, including therein the areas within the overlapping boundaries, operated as a declaration or determination that within these surface limits the defendants' claim was superior, but not necessarily that it was prior in location. Whether this determination proceeded from a failure of the then owners of the complainant's claims to file an adverse claim, or from an actual inquiry and decision respecting the right of possession (Rev. St. §§ 2325, 2326 [U. S. Comp. St. 1901, pp. 1429, 1430]), is not shown, so it cannot be said, and it is not insisted, that in the course of the patent proceedings there was any actual issue, trial, or decision respecting the order in which the conflicting claims were located, or that the patenting of the areas within the overlapping boundaries was actually rested upon priority of location. Treating the patent proceedings as involving, or as equivalent to, a controversy between these parties or their predecessors in interest and title, the subject-matter of that controversy was the

surface conflict between their respective claims, while the present controversy is over extralateral underground rights, not necessarily following the surface conflict, which is essentially a different subject-matter, and could not have been made the subject of an issue, trial, or decision in the course of the patent proceedings. *Montana, etc., Co. v. St. Louis, etc., Co.*, 42 C. C. A. 415, 417, 102 Fed. 430; 2 *Lindley on Mines* (2d Ed.) § 730. The case is thus clearly within the rule in respect of estoppel by judgment—that, where the subsequent action involves a different subject-matter, the judgment in the prior action is not conclusive as to every matter which could have been offered and received to sustain or defeat the claim made therein, but only as to matters actually litigated and determined. The subject was exhaustively considered in *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195, which was an action upon county bonds and interest coupons attached thereto. In a prior action upon other coupons attached to the same bonds it had been determined that the bonds were void in the hands of parties who did not acquire them before maturity for value, and, inasmuch as the plaintiff had not been shown to have so acquired the bonds, judgment was rendered against him. In the second action it was held that the prior judgment did not estop the plaintiff from proving that in fact he acquired the bonds before maturity for value. In the course of the opinion it was said by Mr. Justice Field:

"In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Other decisions to the same effect are *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 618, 12 Sup. Ct. 746, 36 L. Ed. 562; *Roberts v. Northern Pacific R. R.*, 158 U. S. 1, 27, 15 Sup. Ct. 756, 39 L. Ed. 873; *Southern Pacific R. Co. v. United States*, 183 U. S. 519, 533, 22 Sup. Ct. 154, 46 L. Ed. 307; *Board of Comm'rs v. Platt*, 25 C. C. A. 87, 91, 79 Fed. 567; *Board of Comm'rs v. Sutliff*, 38 C. C. A. 167, 170, 97 Fed. 270; *Linton v. Nat'l Life Ins. Co.*, 44 C. C. A. 54, 57, 104 Fed. 584; *Ætna Life Ins. Co. v. Board of Comm'rs*, 54 C. A. 468, 474, 117 Fed. 82; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 687, 15 Sup. Ct. 733, 39 L. Ed. 859. In the last case there was a controversy over extralateral underground rights between two mining claims which were in conflict as

located. Priority of location became the pivotal question, and it was insisted that a determination in the course of prior patent proceedings, that one of the claims was superior within the area in conflict, estopped the owner of the other claim from asserting that it was prior in location. Mr. Justice Brewer, in speaking for the court, said:

"The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided."

The estoppel was sustained, but it was because the superiority of right asserted and upheld in the course of the patent proceedings had been expressly rested upon the single fact of priority of location. The facts were these: The owner of one claim applied for a patent, and the owner of the other filed an adverse claim and commenced an action to determine the right of possession to the area in conflict. Rev. St. §§ 2325, 2326 [U. S. Comp. St. 1901, pp. 1429, 1430]. The judgment in that action was for the plaintiff, and the reason why it was held to operate as an estoppel in the subsequent action involving a different subject-matter is shown in the following extract from the opinion, which has reference to the former action:

"The single ground stated in the complaint upon which superiority of right is claimed is priority of location. A judgment for the plaintiff upon such a complaint is necessarily an adjudication in favor of that priority of location. There is no other fact upon which it can rest. It is doubtless true, as suggested, that other questions may be litigated in an adverse suit, but they can be litigated only when they are presented to the attention of the court by some appropriate pleading. The only pleading upon which the case passed to trial and judgment was the complaint, and in that, as we have seen, plaintiff's right to recover is rested upon the single fact of priority of location."

We think it is manifest from the extracts quoted, and from the opinion as an entirety, that the court recognized that superiority of right is not always or necessarily controlled by priority of location; otherwise, the court would not have inquired and determined with such care whether the question of priority of location had been in fact presented and decided in the former action, and would not have conceded that "other questions may be litigated in an adverse suit." As before indicated, it is not shown in the present case whether there was an adverse suit, nor, if so, what questions were in fact presented and determined therein, nor upon what ground the superior right to the area in conflict was asserted and sustained in the patent proceedings. The claim of estoppel was interposed by the defendants, and the burden was upon them to show the existence of every fact essential to sustain it. This they did not do.

The decree is reversed, with a direction to enter a decree for the complainant in conformity to the prayer of the bill.

In re FRIEND et al. TALLCOTT v. FRIEND et al. PONTOOSUC WOOLEN MFG. CO. v. SAME.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

Nos. 1,087, 1,088.

1. BANKRUPTCY—JUDGMENT CONFIRMING COMPOSITION—MODE OF REVIEW.

By virtue of Bankr. Act July 1, 1898, § 14c (30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3428]), which provides that "the confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition, and those not affected by a discharge," a judgment confirming a composition is a judgment granting a discharge, reviewable by appeal under section 25a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]).

2. SAME—MODE OF REVIEW.

Bankr. Act July 1, 1898, §§ 23, 24, 25 (30 Stat. 552, 553, c. 541 [U. S. Comp. St. 1901, pp. 3431, 3432]), establish a clear distinction between proceedings in bankruptcy and controversies at law and in equity arising in the course of bankruptcy proceedings, and also, in connection with Act March 3, 1891, creating the Circuit Courts of Appeals (26 Stat. 826, c. 517 [U. S. Comp. St. 1901, p. 547]), prescribe the manner in which judgments or orders in each class of cases are reviewable, and such particular mode is exclusive. A judgment or decree in a controversy at law or in equity arising in bankruptcy proceedings is reviewable by the Circuit Court of Appeals under its organic act, and section 24a, by appeal or on writ of error, as may be appropriate, while a judgment or order in a proceeding in bankruptcy, if one of those specifically enumerated in section 25a, is reviewable only by appeal, and, if not within such excepted cases, unless rendered on a jury trial, can only be reviewed on original petition as provided in section 24b.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Petitions to Review and Revise an Order of the District Court of the United States for the Northern District of Illinois, in Bankruptcy.

On motion to dismiss.

The petitioners seek to have this court review and revise in matter of law certain rulings which culminated on May 7, 1904, in the confirmation of a composition offered by the bankrupts. The petitioners prayed and were allowed an appeal, but failed to perfect it. On May 17, 1904, they filed these petitions. The bankrupts interpose a motion to dismiss for want of jurisdiction.

The following sections of the bankruptcy act are referred to in the opinion:

"Sec. 14c. The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

"Sec. 23a. The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

"Sec. 23b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision 'b,' and section sixty-seven, subdivision 'e.'"

"Sec. 24a. The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the Supreme Court of the District of Columbia."

"Sec. 24b. The several Circuit Courts of Appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

"Sec. 25a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Courts of Appeals of the United States, and to the Supreme Courts of the territories, in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

Bankr. Act July 1, 1898, c. 541, 30 Stat. 550, 552, 553 [U. S. Comp. St. 1901, pp. 3428, 3431, 3432].

Horace Kent Tenney and David Campbell, for petitioners.
S. O. Levinson, for respondents.

Before GROSSCUP and BAKER, Circuit Judges, and BUNN, District Judge.

BAKER, Circuit Judge (after stating the facts). By virtue of section 14c, Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], a judgment confirming a composition is a judgment granting a discharge. *United States ex rel. Adler v. Hammond*, 104 Fed. 862, 44 C. C. A. 229; *Ross v. Saunders*, 105 Fed. 915, 45 C. C. A. 123; *Marshall Field & Co. v. Wolf Dry Goods Co.*, 120 Fed. 815, 57 C. C. A. 326; *Wilmot v. Mudge*, 103 U. S. 217, 26 L. Ed. 536.

So the question becomes this: Has a party who feels himself aggrieved by a judgment rendered by the court without the intervention of a jury, granting the bankrupt a discharge, his choice between presenting the matter for review by original petition and by appeal?

The Supreme Court, so far as we are advised by counsel and our own researches, has not furnished an explicit answer.

Looking to the bankruptcy act, in connection with the Evarts act of March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], creating the Circuit Courts of Appeals, we have reached the following conclusions, which, as premises, in turn, require the result that these petitions be dismissed, namely:

That section 23 (30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]) establishes a clear distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings"; the former, broadly speaking, covering

questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances, and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate; and the latter, broadly speaking, involving questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, concerning property in the possession of the trustee or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly the administrative orders and judgments, but only the question of the extent of the estate.

That the same distinction is maintained in section 24a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]), on the one hand, and sections 24b and 25a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), on the other.

That section 24a gives, if the grant be necessary in view of section 6 of the act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549], this court appellate jurisdiction of controversies at law and in equity between trustees and adverse claimants, to be invoked by writ of error or by appeal, as may be appropriate.

That section 24b confers upon this court "jurisdiction in equity" to revise in matter of law "proceedings in bankruptcy," to be invoked by original petition.

That section 25a confers upon this court jurisdiction in equity to review in matter of law and fact three specific "proceedings in bankruptcy," to be invoked by appeal within ten days.

That if, in any "proceeding in bankruptcy," a trial by jury be had under section 19, a review in this court cannot be entertained under section 24b or section 25a, because those sections confer only jurisdiction in equity, and not jurisdiction at law; that a review cannot be held under section 24a, because that section relates exclusively to "controversies," as distinguished from "proceedings"; and that, if a review lies, it must come by writ of error under the act of March 3, 1891.

That, in "controversies" involving the rights of those not directly concerned in the settlement of the estate, the right of review should be extended to six months, under or in analogy to the act of March 3, 1891.

That "proceedings in bankruptcy," involving directly the settlement of the estate, should be disposed of promptly, even if not always summarily, and the right of review should be limited to 10 days, under or in analogy to section 25a.

In this way all "controversies" and all "proceedings" are reviewable under one or another provision that is specifically applicable. But the very fact that specific methods are provided for specific situations is conclusively indicative to our minds that Congress did not intend that an aggrieved party should be at liberty to disregard the course definitely opened for him, and to choose some other that might better suit his inclination or convenience. There is no evi-

dence of an intent, for example, to jumble up writs of error with appeals. Why should an inference be entertained that original petitions to review and appeals were intended to be interchangeable at the election of the suitor? The matters now sought to be presented for review are "proceedings in bankruptcy" on the equity side of the bankruptcy court. Section 24b, on its face, applies, and, if it were not for section 25a, would in fact undoubtedly apply, to all "proceedings in bankruptcy" on the equity side. The intention is expressed that the review of these summary orders and judgments shall not extend to an examination of the correctness of the facts, but only to the law applied to the facts on which the court admittedly acted. Then section 25a excepts three specific "proceedings in bankruptcy" from the general rule, one of them being the proceedings set forth in these petitions. These three matters were deemed of such importance in the settlement of the estate that a special review was provided for by appeal, in which law and fact—either or both—could be determined. The petitioners admit that, if their desire had been to have a review of the facts, they would have been compelled to perfect their appeal under section 25a. But an appeal, the facts on which the court acted being unchallenged, presents only matter of law. That these petitioners felt themselves aggrieved only in matters of law is therefore not influential in determining whether they should proceed under 24b or 25a. What is determinative, in our judgment, is that their grievance arose from a matter that was excepted from the operation of section 24b by reason of being selected from the general class of "proceedings in bankruptcy" for special treatment in section 25a.

The result is re-enforced, we think, by the consideration that, if a discharge through a composition is sought to be set aside on review, the trial court should in advance be apprised of the aggrieved party's intention (as is the case by prayer for appeal, as is not by original petition filed here), to the end that the composition money, the creditors and the bankrupt may be kept in court, and the aggrieved party required to file there a bond to pay all damages occasioned by his appeal. These petitioners prayed an appeal, which was granted on condition that they file a bond. This they failed to do. For aught we know, the court, on seeing that the appeal was abandoned, and while the aggrieved parties were prosecuting their original petitions for review without bond and without the knowledge of the trial court, may have let the creditors carry off the composition money to all parts of the world. The petitions show that there are 196 assenting creditors, scattered from New York to Oregon. These creditors have not come nor have they been brought here, the petitioners merely asking us to frame and cause to be served such a notice "as this court may direct." The motion to dismiss is presented by the bankrupts.

That the method of review provided for in section 25a must be pursued in the cases therein named is explicitly decided in *In re Good*, 99 Fed. 389, 39 C. C. A. 581, and in *In re Kuffler*, 127 Fed. 125, 61 C. C. A. 259. See, also, *Loveland on Bankruptcy* (2d Ed.) pp. 809, 816.

This court, in *In re Rouse, Hazard & Co.*, 91 Fed. 96, 33 C. C. A. 356, reviewed on original petition an order regarding the priorities of certain claims, but the question of the rightfulness of the judgments of allowance was not involved. It was said:

"If the controversy coming before us was with respect to the merits of the several claims of these labor claimants, we should be wholly without jurisdiction, for there is neither an appeal, nor does the amount allowed to any one claimant exceed the sum of \$500."

It may, perhaps, be fairly said that the implication is this: "A judgment allowing or rejecting a debt or claim of \$500 or over" is reviewable, in equity, only under section 25a; but an order establishing the priorities of allowed claims, irrespective of the amounts of the several claims, or a judgment allowing or rejecting a debt or claim of less than \$500, is a "proceeding in bankruptcy," reviewable in equity in matter of law, under section 24b, because not excluded therefrom by section 25a.

The petitioners contend, however, that we are precluded from standing in line with the above-cited decisions in the Second and Eighth Circuits, by reason of certain Supreme Court decisions. And they cite *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, and *Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 24 Sup. Ct. 725, 48 L. Ed. 992. We have examined these and other Supreme Court decisions—many more than we deem necessary to cite—and find nothing that prevents, but, on the contrary, much that supports, the construction we have given to the sections concerning appellate jurisdiction in the bankruptcy act of 1898 and the Courts of Appeals act of 1891. In *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, the distinction between "controversies at law and in equity between trustees and adverse claimants" and "proceedings in bankruptcy" is dwelt upon; and in *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116, it is said that this distinction "is recognized in sections 23, 24, and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction." In *Bardes v. Hawarden Bank*, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 262, and in *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, the necessity of construing the appellate sections of the bankruptcy act in connection with the fifth and sixth sections of the judiciary act of March 3, 1891, is pointed out. In *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, a summary order on the bankrupt's agent to turn over to the trustee certain of the bankrupt's moneys which were in the agent's possession was held to be a "proceeding in bankruptcy" reviewable under section 24b by the method therein prescribed. In *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, Cominger, assignee by appointment of a state court, had received moneys from the insolvent's estate which he claimed were his as commissions earned prior to the filing of the creditors' petition in bankruptcy. Thus Cominger was a stranger to the "proceedings in bankruptcy," and an adverse claimant. The subject-matter constituted a "controversy between the trustee and an adverse claim-

ant," reviewable under section 24a, as declaratory (see *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666) of a probably existing right, under section 6 of the act of March 3, 1891, c. 517, 26 Stat. 828 [U. S. Comp. St. 1901, p. 549]. Nevertheless Comingor was summarily brought in and ordered to turn over to the trustee the amounts to which he asserted an adverse right. To get rid of the erroneous holding that he was subject to summary proceedings, he was compelled to resort to the summary review provided for in section 24b. Though entitled to plenary proceedings, reviewable by a plenary appeal, he could not get a decision to that effect by taking a plenary appeal under section 24a from a summary "proceeding in bankruptcy." In *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, the alleged bankrupt demanded a jury under section 19. The jury returned a verdict of not guilty, whereon the court entered a "judgment refusing to adjudge the defendant a bankrupt." The petitioning creditors appealed under section 25a to the Circuit Court of Appeals for the Sixth Circuit. That court asked the Supreme Court whether the appeal could be entertained. The Supreme Court answered no. Now, the judgment in question, as a mere judgment, is expressly named in section 25a. But the judgment was rendered on the law side of the trial court, and appeals, which alone are provided for in section 25a, cannot be used to review judgments at law. While the decision is merely the negative answer to the specific question, the implication seems to be that such a case may possibly be reviewed on writ of error by a Circuit Court of Appeals under the organic act. In *Plymouth Cordage Co. v. Smith*, 194 U. S. 311, 24 Sup. Ct. 725, 48 L. Ed. 992, it appears that the District Court of Kingfisher county, Okl., took certain "proceedings in bankruptcy" on the equity side, which the aggrieved parties sought to have reviewed by the Circuit Court of Appeals for the Eighth Circuit on original petition under section 24b. In view of the jurisdiction conferred upon the Supreme Court of the territory in sections 24a and 25a, the Circuit Court of Appeals inquired of the Supreme Court whether it had jurisdiction to review on original petition under section 24b "proceedings in bankruptcy" in equity which were not included in section 25a. The Supreme Court answered yes, saying:

"Congress may well have believed it wisest that the Circuit Courts of Appeals should deal in this summary way with questions of law arising in the progress of bankruptcy proceedings in the territorial courts, although jurisdiction by appeal or writ of error (under the territorial organic acts), and by appeal as provided (in sections 24a and 25a), was vested in the Supreme Courts of the territories." (The words in the parentheses are ours.)

If an inferior territorial court enters one of the judgments in bankruptcy proceedings on the equity side which are specifically named in section 25a, is it conceivable that Congress designed that the aggrieved party should have his choice, not merely between methods of review, but also between forums?

The petitions are dismissed.

JENKINS, Circuit Judge, did not sit at the hearing, but, at our request, considered the subject with us in consultation, and we are authorized by him to say that he fully concurs in the foregoing opinion.

THE BEN R.

(Circuit Court of Appeals, Sixth Circuit, December 15, 1904.)

No. 1,314.

1. ADMIRALTY—SUIT TO ENFORCE STATUTORY PENALTY—APPEAL.

A proceeding in rem by the United States against a vessel, under Rev. St. § 4499 [U. S. Comp. St. 1901, p. 3060], for the enforcement of a penalty for violation of a statutory provision, is one in admiralty, and not a criminal proceeding, and a decree dismissing the libel is appealable.

2. STATUTES—CONSTRUCTION—PENAL ACTS.

To extend a penal statute to a case not specifically described, the intention of the Legislature must be ascertained from the words of the act, and not made out by conjecture as to the purpose of the lawmaker or based upon probabilities.

3. SHIPPING—PENALTY FOR VIOLATION OF NAVIGATION STATUTE—GASOLINE VESSELS.

Act Jan. 18, 1897, c. 61, 29 Stat. 489 [U. S. Comp. St. 1901, p. 3029], which makes all vessels of above 15 tons burden carrying freight or passengers for hire, propelled by gas, fluid, naphtha, or electric motors, subject to the provisions of certain enumerated sections of the Revised Statutes relating to river navigation, and to inspection and employment of engineers and pilots by steam vessels, the latter provisions being found in title 52 [U. S. Comp. St. 1901, p. 3014], does not have the effect of extending to such vessels the provisions of section 4499 [U. S. Comp. St. 1901, p. 3060], imposing penalties upon "any vessel propelled in whole or in part by steam" which shall be navigated without complying with the terms of such title, and such a vessel is not subject to seizure and forfeiture thereunder.

Appeal from the District Court of the United States for the Western District of Kentucky.

This is an appeal in admiralty from a decree of the district court dismissing a libel sued out by the United States against the Gasoline Boat Ben R., its tackle, furniture, etc.

The proceeding was brought for the purpose of enforcing against the boat two penalties, of \$500 each, alleged to have been incurred for navigating without inspection and without a licensed engineer.

The appellee, Frank T. Rounds, as claimant obtained the release of the boat upon entering into bond in double the amount claimed. The penalties are claimed under the act of January 18, 1897, c. 61, 29 Stat. 489 [U. S. Comp. St. 1901, p. 3029], which reads as follows: "That all vessels of above fifteen tons burden, carrying freight or passengers for hire, propelled by gas, fluid, naphtha, or electric motors, shall be, and are hereby, made subject to all the provisions of section forty-four hundred and twenty-six of the Revised Statutes of the United States, relating to the inspection of hulls and boilers and requiring engineers and pilots; and all vessels so propelled, without regard to tonnage or use, shall be subject to the provisions of section forty-four hundred and twelve of the Revised Statutes of the United States, relating to the regulation of steam vessels in passing each other; and to so much of sections forty-two hundred and thirty-three and forty-two hundred and thirty-four of the Revised Statutes, relating to lights, fog signals, steering, and sailing rules, as the board of supervising inspectors shall, by their regulations, deem applicable and practicable for their safe navigation."

The provisions of section 4426 are as follows: "The hull and boilers of every ferry-boat, canal-boat, yacht or other small craft of like character, propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life, as may be applicable to such vessels, shall by the regulations of the board of supervising inspectors, also be required to be complied with, before a certificate of inspection shall

be granted; and no such vessel shall be navigated without a licensed engineer and a licensed pilot. Provided, however, that in open steam-launches of ten tons burden and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer."

Sections 4412, 4233, and 4244 [U. S. Comp. St. 1901, pp. 3020, 2893, 2906] relate solely to the duties of vessels passing each other, and to the subject of lights, fog whistles, and sailing rules, and have no direct bearing upon the question as to penalties imposed for noninspection or navigation without licensed engineer.

R. D. Hill, U. S. Atty., and M. H. Thatcher, Asst. U. S. Atty.
W. T. Ellis, R. W. Slack, and L. P. Little, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after making the foregoing statement). The motion to dismiss the appeal must be denied. It is based upon the notion that a libel to enforce a penalty is a criminal proceeding, and that, therefore, no appeal in behalf of the United States will lie from a decree dismissing the libel.

But this is not a criminal case, but a proceeding in rem against the gasoline steamer Ben R. It is prosecuted under section 4499 [U. S. Comp. St. 1901, p. 3060], which provides that "the vessel" navigated contrary to its provisions "shall be liable" for the penalties named, "and may be seized and proceeded against by way of libel," etc.

An appeal lies from any final decree in admiralty, whether the proceeding is one to enforce a forfeiture or a penalty by the United States or by an informer in his own name. Some examples are: *The Palmyra*, 12 Wheat. 1, 14, 6 L. Ed. 531; *The Haytian Republic*, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. Ed. 930; *The Three Friends*, 166 U. S. 1, 50, 51, 17 Sup. Ct. 495, 41 L. Ed. 897.

While the effect of the act of January 18, 1897, c. 61, 29 Stat. 489 [U. S. Comp. St. 1901, p. 3029], is to subject vessels of above 15 tons burden, propelled by "gas, naphtha or electric motors," to the provisions of section 4426, in respect of inspection and navigation by licensed engineers and pilots, the act provides no penalty for noncompliance, and none is provided by that section or either of the other sections of the Revised Statutes, which are specifically referred to in the act itself.

The insistence of the counsel for the United States is that section 4499 has application, and this proceeding is based alone upon that provision of the Revised Statutes. That section is in these words:

"If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of five hundred dollars for each offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

But it will be observed that that section refers alone to "steam" vessels, and it must be conceded that unless it has been amended so as to include vessels propelled by gasoline it does not apply to the Ben R, which is not propelled by steam, but by gasoline alone.

That the act of January 18, 1897, does not, in terms, refer to section 4499 by providing that vessels propelled by naphtha, etc., shall be subject to its provisions, and that it does specifically provide that such vessels shall be subject to certain other sections specifically enumerated, is the most pregnant fact involved in the matter of the applicability of that section to the class of boats regulated by the act. Notwithstanding the failure of Congress to mention the particular section as one to which such vessels should be amenable, is it otherwise so evident that it intended to subject them to the penalties of that provision of the old law as to authorize us to say that that section extends to and includes vessels not propelled by steam?

But upon what authority shall we do thus? It is most apparent that the section is omitted from those specifically mentioned as extended to such vessels. The natural presumption would be that the omission under such circumstances was not through oversight or inadvertence, but because it was not the purpose of the Legislature to subject such small vessels as were likely to be propelled by gasoline or naphtha or an electric motor to the severe penalties denounced against the great vessels using steam. Neither are we pointed to any word or phrase in the act of 1897 which is so ambiguous as to enable us to say that such ambiguous phrase, properly read, extends section 4499 to such vessels.

But it is said that if the penalties of that section do not apply there are no penalties for the enforcement of the provisions of law made applicable by the act of 1897 to such small craft. But this is a penal statute, and such statutes are not to be extended beyond their plain meaning by either implication or construction. If a case is not within the letter of such a statute, it cannot be brought within it because supposed to be within the reason or policy of the law. It may be quite improbable that the Legislature purposely omitted all penalties for the enforcement of the provisions for the first time made applicable to such craft, and it may be also probable that Congress intended that the penalties applicable to steam craft should be likewise made applicable to gasoline craft. But it was long ago observed by Chief Justice Marshall, when asked to extend a criminal statute to places not enumerated in the act because it was improbable that Congress intended to make the differences with respect to place which the words of the law imported, that "probability is not a guide which a court, in construing a penal statute, can safely take." Such an argument, when based not upon an ambiguity of language, but upon the mere fact that the cases enumerated in the statute are kindred to a case not so enumerated but within the mischief intended to be remedied, is an appeal to legislative rather than judicial power. To extend a penal statute to a case not specifically described, the intention of the Legislature must be ascertained from the words of the act, and not made out by conjecture as to the purpose of the lawmaker or based upon probabilities.

The rule of construction for such statutes as that before us is well defined by the Supreme Court in *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37, where it was said by Marshall, C. J.:

"The intention of the Legislature is to be collected from the words they employ. When there is no ambiguity in the words there is no reason for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that that which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of kindred character with those which are enumerated."

This language has been approved and applied in many cases. Among them are *Sarlls v. United States*, 152 U. S. 570, 575, 14 Sup. Ct. 720, 38 L. Ed. 556; *U. S. v. Harris*, 177 U. S. 305, 510, 20 Sup. Ct. 609, 44 L. Ed. 780; *United States v. Stocking* (D. C.) 87 Fed. 857. It has also the support of the text-books. Endlich, *Interpretation of Statutes*, § 329; *Sutherland State Construction*, § 350.

If we treat section 4426 as amended so as to include both steam and gasoline vessels within its terms, what is the penalty for its nonobservance? Section 4499 answers this, if the vessel be one propelled by steam. But if it be propelled by some other power, what then? Section 4499 is included within title 52. That title embraces 101 sections. Quite a number of penalties are prescribed by various sections which apply to certain specific requirements. Some of these penalties are enforceable against the vessel as liens, and others are penalties enforceable against the owners only, or against officers of the law, or agents of the owners by proceedings in personam. The last two sections cover cases where no specific penalty has been elsewhere prescribed. The first of these sections is 4499, and covers the case of vessels propelled by steam "navigated without complying with the terms of this title."

The next section, No. 4500 [*U. S. Comp. St.* 1901, p. 3060], reads as follows:

"The penalty for the violation of any provision of this title, not otherwise especially provided for, shall be a fine of five hundred dollars, recoverable one-half for the use of the informer."

Now, if one or the other of these two sections is to be held applicable because the probabilities are that Congress so intended, the balance of probabilities would seem to favor 4499 as the applicable section. But there is no word in the act of January 18, 1897, which will authorize us to say that that word or that phrase, properly interpreted, operates to amend section 4499 so as to include gasoline vessels. It may be that the intention of Congress was to subject vessels so propelled to the penal effect of section 4500. If so, this libel would not lie, for the penalty then denounced is enforceable only as a fine.

But we conceive that the rule in respect of the construction of penal statutes does not justify the extension of such a statute to a subject not embraced by words simply upon the doctrine that the case omitted is within the spirit or policy of the law. If it is not within its letter, it is not applicable.

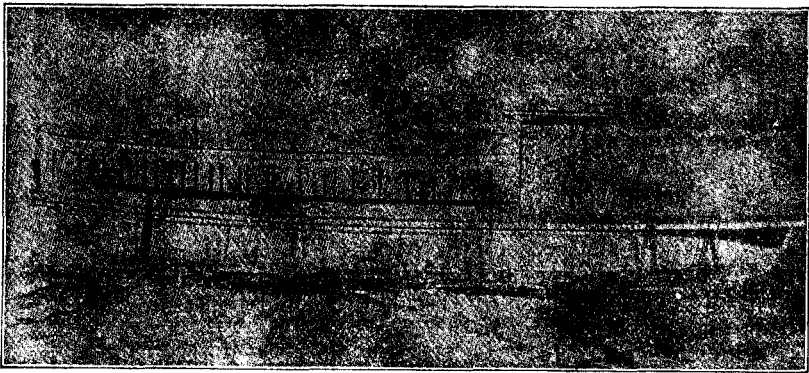
This view of the case makes it unnecessary and improper for us to express any opinion with respect to the other questions which

have been argued, and which could only become relevant in the event of the applicability of section 4499 to the case made by the libel.

For the reasons herein stated, the decree dismissing the libel is affirmed.

NOTE.—The following is the opinion of the District Court by EVANS, District Judge:

"The libel in this case seeks to condemn the gasoline boat Ben R upon the ground that it is a vessel of more than 15 tons burden, and that it was navigated on the Ohio river and engaged in carrying passengers and freight for hire without having thereon in charge of its engines and machinery a duly licensed engineer. The court has not only heard the testimony, but (what is not very material) has gone, in company with the district attorney, upon the boat itself, to see if that would aid in a better understanding of the testimony. It may also aid in better understanding what is about to be said to insert the following accurate picture of the boat:



"After a very careful consideration of the case as developed at the trial the court has reached the following conclusions upon the facts, namely:

"1. That the structure called an inclosed space, which appears upon the top of the boat, and extends above the surface of the upper deck, is rather a cover for an opening in that deck than anything else, and is something which in no way adds to the carrying capacity or tons burden of the vessel. It is a mere canopy or extension upward of the top of the boat above the level of the upper deck, and its sides consist mainly of glass or open space. It is a covering for the opening in the deck, and is useful for light and air; but is obviously unavailable for anything else, as much so as if it were a mere awning. If anything, this structure rather diminishes the boat's carrying capacity for such passengers or freight as might otherwise go upon the upper deck, and, as intimated, adds nothing to the real capacity of what might be called the cabin or hold of the boat. In short, the so-called closed-in space on the upper deck is not such a permanently closed-in space as is available for cargo, stores, passengers, or crew, any more than would be the more elevated part of the top of an ordinary street-car, which it somewhat resembles. If not so available, it should not be included in the estimate of tonnage.

"2. That by no proper test can the boat be found to have a greater burden than 15 tons. Any proper admeasurement would, in my judgment, exclude therefrom the so-called inclosed space above described for the reason indicated, viz., that it is not available for putting into it either cargo, stores, passengers, or crew.

"Unless the boat is of more than 15 tons burden there is no statutory requirement that a licensed engineer shall be put in charge of its engine.

Whether the law is wise in placing the limit at 15 tons burden is a question for Congress and not for the court.

"Though I shall not go into the authorities nor the learning in the case, nor attempt to state in detail any rules which ought to control in the determination of the questions involved or those which should control in the admeasurement of the boat, it may not be amiss to refer to the article on 'Tonnage' in the Encyclopedia Britannica and the rules laid down by Moorsom.

"Having reached the conclusions of fact which have been stated, it results that the libel must be dismissed, and a judgment accordingly may be prepared and submitted."

ROESSLER & HASSLACHER CHEMICAL CO. v. PETERSON.

(Circuit Court of Appeals, Third Circuit. February 6, 1905.)

No. 50.

MASTER AND SERVANT—INJURY OF SERVANT—ASSUMED RISK.

While plaintiff, who had been employed for eight years as a general laborer in and around defendant's manufacturing plant, was slacking lime to make whitewash with which to spray the inside walls of a new building—using for the purpose an old sheet-iron drum, 18 inches deep and 12¾ inches in diameter—he poured too little water at a time upon the lime, causing it to suddenly vaporize, by which it was thrown out of the vessel into his face, and he was injured. He was 40 years old, of ordinary intelligence, and had worked at various employments; and he and his co-employé had been engaged in the whitewashing, off and on, for a month or more. Whether they selected the drum themselves, or were directed to use it by their foreman, was in dispute. *Held*, that the work was within the general scope of plaintiff's employment, the risks of which he assumed; that the danger of such an accident in slacking lime was one of which defendant had no greater means of knowledge than plaintiff, it not being shown that it had occurred before; and that defendant could not be charged with liability for the injury, either on the ground that it failed in its duty to instruct plaintiff, or because it furnished him the drum for use, it not appearing that the explosion would not have occurred from the same cause, had any other vessel been used.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 297-300, 305-309.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the District of New Jersey.

Charles C. Hommann, for plaintiff in error.

George S. Silzer, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This case comes up upon writ of error to the Circuit Court for the district of New Jersey, to review a judgment entered therein against plaintiff in error, upon a verdict of a jury for \$8,000 damages, besides costs. We will speak hereafter of the plaintiff in error as the defendant, and the defendant in error as the plaintiff.

The suit in the court below was an action in tort, founded upon the alleged negligence of defendant company, which resulted in injury to the plaintiff. The facts, as disclosed by the record, are that the plaintiff, at the time of the accident, in February, 1903, had been employed

by the defendant company for more than eight years, to do and perform such work and services at the chemical works of said defendant company, "as should be directed and required of him as a laborer." His wages were \$9 a week. He says in his testimony, that he first worked for about six months inside the factory, as a fireman at a gas generator, afterwards outside in the yard, under the foreman of the yard gang. "My duties in the yard were unloading cars and loading, and sweeping, and all things that I was ordered to do to keep things in condition outside of the factory." He afterwards says, in explanation of the character of his work as a laborer, that he was in the chloride of lime gang, where they manufactured chloroform. "Q. What did you there? A. Worked in that lime and run the chloroform out of the kettles." Plaintiff testifies that before he came to the works of the defendant company, he worked in a clay bank; that he afterwards worked six years in the Perth Amboy Terra Cotta Company; that he also worked at an emery mill. "Q. What work did you do in the clayworks? A. Worked in the brickyards, setting kilns and spraying. Q. How did you spray there? A. With the regular clay mixed up with water." That he worked for a mason for a couple of days, and helped slack lime for mortar. About a month before the accident, by the direction of the yard foreman, the plaintiff and another laborer undertook to slack lime and make whitewash, which they used in spraying the inside of the walls of a new brick building. The lime was slacked and the whitewash made just outside the building, in a sheet iron vessel or drum, about 18 inches high and 12¾ inches in diameter. These drums had been used for chloride of lime in the manufacture of chloroform, and plaintiff testified that he was familiar with them, and had handled them when so used; that when they were discarded as old and unfit for that use, they were around the yard, and were used sometimes as receptacles for ashes and other waste material. He also says that it was at the suggestion of the foreman, that one of these discarded drums was used to slack the lime in and prepare the whitewash for spraying. The foreman denies this, and says in his testimony:—"They slacked the lime by my order in a half barrel,—an old kerosene barrel, that was standing in the yard a long while full of water. I gave the order to Teiss (a fellow workman) to cut that barrel in half, to slack lime in, which the men did; I seen it myself as they slacked the lime in that barrel," and that they changed to the drum without his orders. The two men were engaged at this work, off and on, for about a month before the accident, the one slacking the lime and making the whitewash, and the other doing the spraying of the walls inside the building, and alternating in this. Plaintiff says he had made whitewash once before in a trough, and that he had made it seven or eight times during that month in this metal drum. The foreman testifies, in answer to the question as to what he said to plaintiff when he set him to work, that he asked him whether he knew how to slack lime and whitewash, and he said yes, he had done it many times. After they had been so engaged, off and on, during five or six weeks, plaintiff, in order to slack some lime, put a couple of shovels full into the drum. He then poured about half a pail full of water upon it, just enough to cover the lumps of lime. When it started slacking,

he took a stick and stirred it around, and then when the water dried from it, he poured about half of what was left of the pail full of water and then stirred it again. He then poured the rest of the water upon it, when an explosion occurred, throwing the lime into his face and eyes, as he stood over it. It was for the alleged negligence of the defendant company, in directing the plaintiff to slack the lime in the receptacle described, without warning him of the special danger incurred thereby of an explosion, such as actually happened, that damages were claimed by the plaintiff.

There was no proof or testimony of any kind, tending to show that the defendant company had knowledge of, or was informed that, such special danger attended the process of slacking lime in the receptacle described, or in any other. Nobody connected with the works, including the plaintiff, testified that he knew of any such special danger, or that such an explosion in slacking lime had ever occurred before, in receptacles of that kind, or any other. Two of the witnesses employed in the works testified to slacking the lime in just such vessels. Three or four witnesses were produced in behalf of the plaintiff, who testified as experts, that the drum in question was not a safe vessel in which to slack lime, and two or more experts were produced on behalf of the defendant, who testified that they considered the drum in question a safe and fit receptacle for the slacking of lime. The court, refusing the peremptory instructions, asked for by defendant's counsel, charged the jury generally, and submitted to them the case. Defendant excepted to the refusal to instruct peremptorily in its favor, and to certain portions of the charge to the jury, and the verdict and judgment having been rendered in favor of the plaintiff, we have here to consider the assignments of error founded upon these exceptions.

The view we take of the assignment of error, directed to the refusal of the court to give peremptory instructions to the jury to find a verdict for the defendant, makes it unnecessary that we should consider the other assignments, founded upon exceptions to the admission of testimony and to certain portions of the charge delivered by the trial judge to the jury.

The Supreme Court has repeatedly approved the proposition, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not literally, whether there is any evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, and upon whom the onus of proof is imposed. *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780; *Marion County v. Clark*, 94 U. S. 278, 24 L. Ed. 59.

A careful reading of the evidence sent up to us by the bill of exceptions, and consideration of the facts established thereby, and undisputed, convince us that this case should not have been submitted to the jury without peremptory instructions to find for the defendant. It is not denied that the plaintiff in this case, a man of mature years, was of fair intelligence, and had undertaken, in the usual and customary way, the duties of a common laborer and man of all work, in and around the premises of defendant, to do and perform such work and services as, in the language of the plaintiff, "should be directed and required of him as a laborer." His wages were \$9 a week, and up to the average paid

to laborers of his class. He was 40 years of age, and was undoubtedly a man of varied experience, as attested by the work in which he had been employed, both previous to his engagement by the defendant and during his 8 years of service with it.

We cannot, in the light of the evidence, regard whitewashing, and the slacking of lime as incident thereto, as outside the scope of the general employment of such a laborer as the plaintiff is proved to have been. He must, therefore, be considered to have assumed the risk incident to his employment. Whitewashing, and the slacking of lime for that purpose, is one of the commonest of domestic services. No special skill or training, and the slightest experience only, are required to perform it. That heat and steam are evolved in the slacking of lime, is almost as much a matter of common knowledge as that boiling water will produce steam, and it cannot be seriously contended that any special duty of protection is owing by the employer to a laborer of mature years and intelligence, who assumes, upon request, the work of slacking lime for the purpose of whitewashing. The employer, in this case, is not to be complained against for assuming that such a man understands, as well as the employer, all that is necessary to be understood about the work he undertakes. This, we think, is in accord with the well-settled doctrine of the numerous cases dealing with the law of master and servant, and the assumption of risk of employment by the servant. But it is urged on behalf of the plaintiff, that the vessel or receptacle in which the lime was slacked was selected by the defendant's foreman, and that a special danger attached to the slacking of lime therein, of which the plaintiff was ignorant, and as to which he was not informed by the defendant. This receptacle, as appears by the evidence, was a metallic cylinder or drum, 18 inches high and $12\frac{3}{4}$ inches in diameter. These drums had been used for holding chloride of lime in the manufacture of chloroform. When discarded for that use, they lay around the yard, and were, as we have seen, sometimes used for ashes and waste material. That such a receptacle should have suggested itself either to the plaintiff or to the defendant's foreman, was most likely, answering better than what has been described as the usual receptacles for such purpose, barrels and buckets.

It is not denied that the so-called "explosion" was occasioned by the pouring of too little water on the lime at first, and afterwards, when it had become heated and the water absorbed, adding a small quantity of water to the heated material. The gas or steam instantaneously produced by this operation was the cause of the injury, by blowing up the lime into the face of the plaintiff, who was leaning over the drum. The same causes would have produced the same results, if the lime had been slacked in a barrel or a pail. There is nothing in the evidence to show the contrary. The danger of its happening was incident to the employment of slacking the lime in any ordinary receptacle. As such, its risk was assumed by the plaintiff in undertaking the work. There is no evidence to show that such a thing had happened before at these works, though these drums had been used, or that the defendant had any information in regard thereto, not possessed by the plaintiff, nor is there any more reason for saying that defendant ought to have known of the likelihood or danger of such a happening, than that the plaintiff

should know of it. No duty is imposed upon the master, to caution his servant against dangers incident to his work, as to which the master has no better information than his servant, or as to which there is any reason why the master should be better informed than the servant. Indeed, in the case of slacking lime and making whitewash, it is more reasonable to suppose that any man of mature years and fair intelligence, who had been variously employed as a laborer, and who had ever made whitewash, would be better informed as to whatever of danger attended the operation, than his casual employer, whether he be an ordinary housekeeper, farmer or manufacturer.

The expert testimony, describing the chemical action of water upon lime, in scientific terms, and what the precise effect of using too little water at first and adding small quantities afterwards to the superheated lime in such a vessel as a barrel, bucket, or drum, and the danger incident thereto, does not at all affect or qualify our judgment in this respect. Scientific knowledge is not in this respect better than common knowledge, to assist the ordinary man in performing this work, or in avoiding the dangers incident thereto. Nor does it help us in determining in this case, whether ordinary care was exercised by defendant, in permitting the use of the drum for making the whitewash in. To hold the contrary of this, would impose upon the thrifty housewife, who employed a chance laborer to whitewash her garden fence, the duty of giving instructions to one she had every reason to believe was as well or better informed on the subject than herself, and would expose her to a possible liability that would indeed be startling.

We have examined the numerous and familiar cases cited by the defendant in error, dealing with the duty of the master to use ordinary care in providing a safe place in which, and safe appliances with which, a servant is to work, and also his duty to inform his servant of the dangers incident to the special work in which he was employed, and of which the master is informed, or ought to be informed, and of which the servant is ignorant. None of them are applicable to the case at bar. In our opinion, there is no proof of a want of ordinary care on the part of the defendant, in furnishing to the plaintiff a safe place in which to work, or, assuming that the drum was furnished by defendant, for the purpose of making whitewash, safe appliances with which to work. The explosion caused by putting a small quantity of water on the superheated lime, was a danger, whether due to plaintiff's own negligence, or not, incident to his employment, and as to which the defendant had no greater knowledge, or means of knowledge, than had the plaintiff.

The judgment below is therefore reversed.

INSURANCE CO. OF NORTH AMERICA v. WISCONSIN CENT. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,079.

1. INSURANCE—CANCELLATION OF POLICY—AGENCY.

A representative of plaintiff railroad company, having authority to attend to its insurance business and to do everything in respect thereto that could be done by its officers or directors, gave an order to a broker to place insurance to a stated amount on property of the company at a certain place. The broker applied to an agent at such place having power to issue policies for certain companies, including defendant, and he issued policies in different companies to the required amount, which he forwarded to the broker, who delivered them to plaintiff's representative, by whom they were accepted. Certain of the companies desiring to cancel their policies, the agent wrote others to take their place, and forwarded them to the broker, who presented them to plaintiff's representative, and he accepted the same and surrendered the old ones. Defendant notified its agent to cancel its policies, and he proceeded in the same manner. He noted their cancellation on his books, as also did the broker; but before he had taken the substitute policies to plaintiff's representative the property was destroyed by fire. The policies contained a provision that they might be canceled by defendant on five days' notice to the insured, but no such notice had been given. *Held*, that in the transaction the broker was defendant's subagent, and not an agent of plaintiff; that there was nothing in the course of dealing which gave him implied authority to cancel policies which had been delivered to plaintiff, and substitute others, or to waive notice for plaintiff, but, on the contrary, the course of dealing showed that such power was retained by plaintiff's representative, and that, he having neither consented to the cancellation nor waived notice, defendant's policies remained in force.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 99-103, 126-129.]

2. ERROR—REVIEW—DIRECTED VERDICT.

Where, at the conclusion of the trial, both parties move for a directed verdict, the court is thereby authorized to find the ultimate facts, and the only inquiries on review are whether there was any proper evidence to sustain its findings, and whether the law was correctly applied thereto.

3. SAME—WAIVER OF RIGHT TO JURY TRIAL—MOTION FOR DIRECTED VERDICT.

After both parties have moved for a directed verdict, and the court has announced its decision, a party cannot demand the submission of the case to the jury, and assign error upon the court's refusal.

4. PRINCIPAL AND AGENT—DELEGATION OF AUTHORITY BY AGENT.

A person authorized by a corporation to act in its behalf as to all matters pertaining to the insurance of its property, including the fixing of rates and the acceptance and cancellation of policies, cannot delegate his power to another, without the corporation's consent, express or implied.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 87-89.]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

George H. Noyes, for plaintiff in error.

M. C. Phillips, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

BAKER, Circuit Judge. The railroad company brought its action on two policies issued by the insurance company on January

31, 1903, covering property at Menasha, Wis., which was damaged by fire on February 19, 1903.

The parties stipulated the amount the verdict should be, if there was any liability. The defense was that the policies had been canceled by mutual consent of the parties before the fire occurred. At the conclusion of the evidence, which was confined, of course, to the truth of the defense, each party moved the court to direct a verdict in its favor. After the court, in the presence of counsel, had announced the ultimate facts which he found established by the uncontradicted evidence and his conclusion of law thereon that the policies were in force, counsel for the insurance company asked the court to submit to the jury two alleged questions of fact. This the court declined to do, entered the directed verdict, and thereon the judgment now under review.

1. We have read every word of the evidence, and have found no contradictions. The salient and controlling items are these: The home office of the railroad company was at Milwaukee; of the insurance company, at Philadelphia. Gill, at Milwaukee, had full charge of the railroad company's insurance, with authority to agree on rates and forms, to accept and reject policies, to cancel policies after acceptance, and generally to do everything respecting insurance that the company could do through its directors and managing officers. Fieweger, at Menasha, was agent for the insurance company, with authority to write and issue its policies. Leedom, at Milwaukee, was agent of various insurance companies, but not of this one; and he was also an insurance broker—that is, he procured for his customers insurance from other agents, for which business he received from such agents one-half of their commissions. Leedom solicited business from Gill, and had been given some prior to the transaction in question; but the course of dealings between them in other instances was not different from in this. On January 31, 1903, Leedom obtained from Gill an order to place \$64,000 insurance on the property at Menasha. Leedom at once transmitted the order to Fieweger, who accepted it. Fieweger wrote up the amount in various companies; canceled some policies and substituted others, entered the transactions in his books, and finally, on February 6, 1903, sent to Leedom 22 policies, aggregating \$64,000. Thereupon Leedom entered the policies in his office books, and took them to Gill, who accepted them. Between the 6th and 12th of February Fieweger received instructions from several companies to cancel their policies, whereupon he wrote policies in other companies, entered them in his books, noted in his books that the old ones were canceled, and sent the new to Leedom, with the request that he should take up and return the old. Leedom took the new policies to Gill, who accepted them, and delivered up those for which these were substituted. On February 18th Leedom received a letter from Fieweger, stating that the insurance company had ordered the policies in suit to be canceled, inclosing new policies to be substituted therefor, and requesting the return of the former. Leedom entered the new policies, and noted the cancellation of the old in his office books. On the 19th he tele-

phoned to find whether Gill was in town, and learned that he was absent, but would return on the 20th. Later, on the 19th, the fire at Menasha occurred. On the 20th Leedom tendered the new policies to Gill, who declined to accept them, and refused to surrender the old. Other evidence, and the want of evidence, will be taken up in connection with the contentions of counsel.

Each policy contained this provision: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation." The five-days time is for the protection of the insured, and therefore can be waived only by the insured or his authorized agent. The insurance company did not give the railroad company notice of cancellation. It merely directed its own agent, Fieweger, who had written the policies, to cancel them. Fieweger did not serve notice upon the insured or upon Gill. If he had, the railroad company or Gill could have waived the five-days provision, and agreed to immediate cancellation. All that Fieweger did was to notify Leedom of the insurance company's instruction to cancel the policies, and to send him others to take their place. So the defense was bottomed on the proposition that Leedom was authorized on behalf of the railroad company to waive notice, to agree to cancellation, and to accept substitute policies.

(a) There was no express authority. Gill's order to Leedom to place insurance, without naming the companies or the rate, meant that Gill was retaining the right to reject any and all policies if the companies or the rates were not satisfactory to him. Leedom testified, without objection, that he never had received any instructions regarding the cancellation or substitution of policies for the railroad company, and that he had never exchanged policies without the express direction of Gill. We are excluding Gill's testimony, which was objected to on the ground that it was merely the expression of an opinion, that he had never given Leedom any authority to cancel or substitute policies.

(b) The "course of dealings" between Gill and Leedom did not clothe the latter with implied authority to cancel or substitute. Leedom testified that he frequently solicited Gill for business, sometimes successfully, other times not; that Gill was a customer, like others; and that his dealings with Gill in prior instances did not differ from those in this case. When Leedom received the 22 policies on February 6th, he took them to Gill for his acceptance. Gill accepted them; but, if there had been wildcat companies in the lot, he would have had the right to reject them. When, between the 6th and 12th of February, Fieweger notified Leedom that certain companies had ordered the cancellation of their policies, and inclosed new ones to be substituted, Leedom did not write back to Fieweger that he, on behalf of the railroad company, waived the five-days provision, and agreed to the cancellation and substitution. On the contrary, he went with the new policies to Gill, and told him of the companies' intention to avail themselves of their right of cancellation under the policies, and showed him the new policies which he had ready for his acceptance in case he consented

to waive notice; and thereupon Gill, having satisfied himself respecting the new policies, waived notice, agreed to the cancellation of the old policies, surrendered them, and accepted the new. This course of dealing up to February 18th, so far from establishing an implied authority in Leedom to cancel the policies in suit and substitute others, shows a prohibition of his doing anything of the kind.

(c) A witness from Fieweger's office testified: "It is customary in our office, and customary generally, upon receipt of notice that a company declined a risk, to at once write insurance as a substitute for that which is canceled." Declines the risk? That is, if an agent writes a policy and his company declines the risk before the policy is delivered, the agent writes a policy in some other company and takes it around to his customer for acceptance. If the policy has been accepted by the insured, the company cannot decline the risk, but must cancel.

Leedom testified: "We [speaking for his firm] were to place \$64,000 of insurance. It is customary, when we are given an order for insurance for a definite amount, to keep that covered in such companies until we have orders to the contrary." Evidently he was speaking of the usual or customary mode of doing business in his own office. But if he meant a general custom he did not define one that purported to empower brokers "to keep the amount covered" otherwise than in accordance with his course of dealings with Gill.

Leedom further testified: "It is customary, in placing a line with an agent, to ask him to place a certain amount, and if he got cancellations to write them in other companies, and send me new policies, with the request that I get the old ones back. I delivered the new policies to the Wisconsin Central, and received back the old policies for which the new ones were substituted." The comment on his other testimony applies to this as well.

And this was all the evidence touching customs. In our judgment, it did not tend to prove a custom that empowers insurance agents to step into the shoes of the insured, and to cancel and substitute policies, and otherwise to exercise the insured's judgment and discretion, without his knowledge and consent. So it is needless to express any view respecting the legal effect of evidence that would sustain such a customary authority in a case where the other evidence established that the insured, by his orders to and dealings with the broker, had notified the broker that he intended to reserve to himself all questions of waivers, cancellations, and substitutions.

(d) The claim that the railroad company, through Gill, held out Leedom as its agent in such a manner as to justify the insurance company, through Fieweger, in relying on Leedom's having authority to cancel, is wholly without merit. The railroad company was an occasional customer of Leedom's. But even this was not known to Fieweger. The correspondence between Fieweger and Leedom and their entries in their books were unknown to the railroad company and Gill. In this transaction Leedom was subagent

to Fieweger for the insurance company. He might also have been clothed by the railroad company with its discretion in regard to waiver, cancellation, and substitution; but he was not; and neither the railroad company nor Gill did anything to indicate that he was. If Fieweger supposed that Leedom was more than his own sub-agent, the result came from his failure to inquire.

The foregoing review of the evidence and of the inferences to be drawn therefrom so clearly points to the correctness of the judgment that it would be supererogatory to distinguish from this the cases relied on by counsel.

2. Even if it were conceded that the jury, if the uncontradicted evidence had been submitted to them, might properly have drawn inferences of ultimate fact different from those hereinabove stated, nevertheless the judgment must be affirmed. Both parties moved for a directed verdict. The insurance company thereby joined its adversary in asserting that only one set of inferences of ultimate fact could properly be drawn from the evidence. The parties thus united in a request that the court should make a finding of the ultimate facts, and state thereon his conclusion of law. On review the only inquiries are whether there was any proper evidence to sustain the court's finding, and whether the law was correctly applied to the facts as found. *Beutell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; *Merwin v. Magone*, 70 Fed. 776, 17 C. C. A. 361. The record shows that the court reviewed the evidence, and stated the ultimate facts substantially as we have done, and thereon announced the legal conclusion that the policies were in force. After the court had thus virtually ended the case, the insurance company could not revive its right to demand a jury trial and to predicate error on the court's refusal to submit the cause to the jury.

3. The insurance company's whole defense proceeded on the theory that it would be enough to prove that Gill had expressly or impliedly authorized Leedom to exercise the insured's discretion as to waiver, cancellation, and substitution. But Gill was not the insured. He was the agent to whom the insured had committed the exercise of judgment and discretion on its behalf. The holder of such a commission cannot pass it on without the consent of the principal. Unless Gill had authority from the directors and managing officers (and the evidence fails to show that he had), he could no more redelegate his trust than the president of the road could step aside and put an office boy in his place.

The judgment is affirmed.

GIBSON v. STANDARD AUTOMATIC GAS ENGINE CO. et al.

(Circuit Court of Appeals, Third Circuit. January 18, 1905.)

No. 35.

RECEIVERS—APPOINTMENT ON CONDITIONAL WAIVER OF CLAIMS BY CREDITORS
—ENFORCEMENT OF STIPULATION.

A receiver was appointed for the property of a corporation on a bill filed by a stockholder and creditor, and an impending sale by a sheriff of certain of its property enjoined, expressly in consideration of a stipulation made by complainant and certain other creditors that if the total amount realized by such receivership on the assets of the company, and applicable to the payment of its debts, should not exceed a sum which had been offered for the property by an execution creditor, the stipulators would waive any claims they held against the company, either as creditors or stockholders. The order directed the receiver to advertise and sell the property, and it was sold for less than the sum named in the stipulation, and the sale confirmed, all without objection by the stipulators. *Held*, that the court was justified, on distribution of the proceeds, in holding the stipulators bound by their stipulation and in excluding their claims.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 68, 69; vol. 44, Cent. Dig. Stipulations, §§ 41, 52, 53.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

A. O. Fording and E. C. Breene, for appellant.

P. M. Speer, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This suit was begun by bill of complaint filed by the appellant February 25, 1904, against the persons and corporations who are appellees here. On March 3, 1904, a substituted or amended bill was filed. It is not necessary to recite the contents of either of these bills. The latter prayed the court, among other things:

"(4) To appoint a receiver or receivers to take suitable charge of all the property, assets, and business of the said company [the Standard Automatic Gas Engine Company], and to hold the same under the orders and directions of your honorable court; to continue the said business pending the determination of the issues which may be made in the present suit, and to collect, according to law, for the benefit of the said corporation, creditors, and stockholders, all accounts and moneys justly due the said company by the said John B. Smithman and other debtors thereof.

"(5) To enjoin the defendants and each of them, except the Standard Automatic Gas Engine Company, from causing any of the property of the defendant company to be sold under the writs of *ieri facias* now in the hands of the sheriff of Venango county, or to proceed further under said writs, but, until such injunction may properly be made under the practice of your honorable court, to grant a restraining order with the same effect for the time being."

Immediately upon the exhibition of the first bill, and upon the ex parte application of the complainant, a restraining order was granted and issued, of which the following is a copy:

"To John B. Smithman, J. W. Raymond, Leander Milton, William E. Blaney, J. P. Strayer, George G. Snowden, John Walker, administrator of the estate of John T. Sharp, deceased, A. F. Smithman, the Oil City National

Bank, a corporation, and Frederick T. McCollum, sheriff of Venango county, greeting: You and each of you will take notice that on the 25th day of February, 1902, on motion of Robert D. Gibson's solicitor in his suit against the Standard Automatic Gas Engine Company and yourselves, and on presentation of his bill of complaint to the Circuit Court of the United States for the Western District of Pennsylvania, at the city of Pittsburg, the said court has set the hearing of his motion for the allowance of an injunction as prayed for in his bill, and of his application for the appointment of a receiver as prayed for in his said bill, for Thursday, the 27th day of February, 1902, at 2 o'clock p. m., and that it was at the same time ordered by the said court that, pending such hearing, you and each of you be restrained from causing any property of the Standard Automatic Gas Engine Company to be sold under certain writs of fieri facias issued from the court of common pleas of Venango county to the sheriff of the said county on the 13th day of February, 1902, and from proceedings further under said writs or any of them."

On February 27, 1902, on motion of the complainant, the hearing of his application for the appointment of a receiver was postponed until March 6, 1903; and the restraining order was continued in force until such hearing should be had, notwithstanding an offer then made by the defendant John B. Smithman, whom, among others, that order had restrained "from causing any property of the Standard Automatic Gas Engine Company to be sold under certain writs of fieri facias issued from the court of common pleas of Venango county," which offer was as follows:

"Pittsburg, Pa., Feb. 27, 1902.

"I hereby offer as of this date and agree to pay for the property, franchises, drawings, patents, materials of every kind, and all assets of the Standard Automatic Gas Engine Company, including realty, the sum of fifty-seven thousand dollars, being approximately the amount of the just debts of the company. This offer not to be held binding if the sale now fixed" [under the writs of fieri facias] "for Saturday, the first day of March next, should be postponed by reason of any order of this court.

Jno. B. Smithman.

"Or I will hereby offer of this date and date of adjournment of said sale, to wit, March first next, the sum of forty-eight thousand dollars for the property levied upon.

Jno. B. Smithman."

On the day to which the application for the appointment of a receiver had been postponed the following stipulation was filed:

"Now, March 6th, 1902, comes the plaintiff, Robert D. Gibson, who is applying to the said court in the above action for the appointment of a receiver of the property and assets of the defendant company; and also comes defendant J. W. Raymond, who is joining in the said application; and also comes George G. Snowden, one of the said defendants; and said Gibson, Raymond, and Snowden do hereby stipulate and agree that if a receiver be appointed as prayed for, and if the total amount of money realized by such receivership on the assets of the said company, and applicable to the payment of debts of the company now existing, shall not exceed fifty-seven thousand (\$7,000) dollars, then said Gibson, Raymond, and Snowden will waive, and in that event do hereby waive, any and all claims of R. D. Gibson, R. D. Gibson, trustee, J. W. Raymond, and George G. Snowden against the assets of the said company, whether as creditors or as stockholders.

"J. W. Raymond.

"Geo. G. Snowden.

"R. D. Gibson."

"On the strength" of this stipulation, and though "the court was of the opinion that no case for a receiver was made out, but at the earnest request of" the stipulators, "and upon their representation that a sale by a receiver would prevent a sacrifice of the property, and that it would likely sell for a sum much in excess of \$57,000" (which Mr. Smithman,

as has been seen, had offered to pay for it), "the court finally appointed a receiver to give them that opportunity, but as a condition of such appointment required them to file the stipulation referred to." The language just quoted is taken from the opinion which was delivered by the learned judge below in support of the orders appealed from, and the antecedent decree to which it refers was in these terms:

"And now, to wit, March 8, 1902, this matter came on to be heard upon the motion for the appointment of a receiver, and thereupon, after hearing the bill, answer, affidavits, and arguments of counsel, the motion for the appointment of a receiver is hereby granted, as follows:

"First. John F. Mattox is hereby appointed receiver of all the property of every kind and description of the said the Standard Automatic Gas Engine Co., wherever the same may be, with all the powers, rights, and duties of receivers in like cases, and particularly with rights, powers, and duties herein especially set forth.

"Second. The officers and agents of said defendant company, and all other persons having possession of any property of said company, shall forthwith assign, transfer, and deliver to the said receiver all the property, accounts, bills, and accounts receivable, assets, books, vouchers, letters patent, and other papers and property belonging to the said defendant company, including applications for pending patents. The said receiver shall forthwith enter into possession of said property and keep and hold the same subject to the further order of this court, with power to take such steps as shall be necessary for the preservation of the property. He shall forthwith cause an inventory or list of all the property and effects of said company, including patents and property situate at the works and elsewhere, to be made; and H. D. Brown and J. W. Raymond are hereby appointed to make such inventory, it being agreed by Mr. Raymond's counsel that his services shall be gratuitous. All the creditors of the said company, their agents, attorneys, and all other persons whomsoever, claiming to be creditors of the said company, are hereby enjoined and restrained from interfering with the property or affairs of said company by suit, attachment, execution, or other process, in law or equity, without the order or direction of this court. The receiver is directed to give bond in the sum of \$2,000.00, with surety to be approved by the court. It is ordered that all liens and rights of judgment and execution creditors, if any such exist, of, in, and to any property delivered to the receiver, be, and the same are hereby, preserved, subject to the determination of this court hereafter.

"It is further ordered that all the property and effects of said corporation of every kind and nature whatsoever, including franchises, real estate, machinery, fixtures, patents, applications for patents, tools, patterns, stock on hand, bills receivable, accounts receivable, and generally all and every kind and nature of property belonging to said corporation, whether real, personal, or mixed, and whether in possession or action, and wherever situate, and including the right of the company to any, all, and all outstanding contracts, be sold by said receiver upon Thursday, the 10th day of April, 1902, on the premises, in the borough of West End, Venango county, Pennsylvania; that the said receiver shall, in brief form, advertise the said property for sale once a week for four weeks preceding said sale, in some paper published in Oil City, and may make such other advertisement of the same in trade or other journals, if it seems proper to him to do so. The said property shall be sold upon the following terms: One-fourth of the purchase money to be paid to the receiver on the property being knocked down, the balance to be paid in cash at the time the sale is confirmed. Possession of the works to be given when sale is confirmed.

"The receiver shall have power to adjourn the sale for not more than two days from said date of sale without further order of the court. He shall make return of said sale to the court on Tuesday, the 15th day of April, 1902, at 2 o'clock p. m., at which time the court may, if it see fit, approve said sale absolutely and without further notice, and order a deed and proper conveyances to be forthwith made.

"And it is further ordered that purchasers at said sale shall have the right, within thirty days after the confirmation and delivery of the deed herein provided for, to determine what, if any, of the outstanding contracts and agreements of said company so sold the purchaser will assume or adopt. It is further ordered that the real estate so sold be sold and conveyed free and divested of all liens."

In pursuance of authority given by this decree, the receiver, on April 10, 1902, sold the property to which it related at public sale "to John B. Smithman, for the sum of \$45,000, that being the highest and best price bidden for the same." A return of this sale was made, and thereupon, "and no objection being made to the confirmation of such sale," it was on April 15, 1902, duly confirmed. On the following day, viz., April 16, 1902, the court, by "order made by consent of all parties," appointed a master "to distribute the fund raised by such receiver's sale, * * * subject to the ultimate judgment of the court upon exceptions, if any, as to law or fact, to said master's report." In the course of the proceedings in the master's office claims of considerable amount were presented by the three persons, including this appellant, who had executed the stipulation of March 6, 1902, and with relation thereto they exhibited a petition to the master, which, at their request, he certified to the court, and the learned judge thereupon entered an order as follows:

"And now, April 22, 1903, the petition of R. D. Gibson, J. W. Raymond, and George G. Snowden, and the objections thereto, came on to be heard upon the certificate of C. W. Hays, the master appointed by this court to distribute the funds in the hands of the receiver; and upon hearing and consideration of said petition, and arguments of counsel thereon, it is ordered, adjudged, and decreed that the stipulation of said R. D. Gibson, J. W. Raymond, and George G. Snowden, filed in this court on the 6th day of March, 1902, was and is a valid stipulation, binding upon the parties thereto, and the objection on behalf of the defendant company, and on behalf of execution creditors to the proof of claims upon the fund for distribution by said parties to said stipulation, is sustained, and the master is directed to proceed accordingly."

The matter adjudicated by this order again came before the court upon exceptions of R. D. Gibson et al. to the master's report. Upon October 6, 1903, these exceptions were dismissed, and the report confirmed, in an opinion to which reference has been already made; and the only question raised by the assignment of errors is, whether the court below erred in its ruling that the stipulation of March 6, 1902, was binding upon the parties thereto, and precluded them from asserting any claim upon the proceeds of the receiver's sale.

When the receiver was appointed Smithman's offer to purchase the property of the Standard Company for \$57,000, or such portion of it as had been levied upon for \$48,000, had been rejected; and the then existent situation, whether rightly created or not, had been produced at the instance of the plaintiff himself, and he it was who urged the court to constitute the receivership. Neither did he object to the sale that was made, nor to the reference to a master which ensued. Consequently he is not in a position to complain, and in fact does not complain, of anything that was done, except the disallowance of his claim to participate in the distribution of the fund which, by his procurement, the court had brought into

existence, and which, therefore, it was incumbent upon it to see should be equitably appropriated. In discharging this duty the learned judge was confronted by the stipulation in question. He, of course, knew the effect which the court had given to it, and his opinion informs us that by it alone he was prevailed upon to comply with the earnest request of the appellant that a receiver should be appointed. Why, then, should he not be bound by it? He was not entitled to demand, as matter of right, the order for which he asked, and the court in yielding, as matter of grace, to his importunity, certainly was warranted in assuming that the agreement which induced it to do so could not, after its object had been attained, be repudiated. The stipulation was "a condition of such appointment," and the provision of the decree by which it was made, that all the property of the corporation should be sold, must have been known to the appellant. Therefore we cannot sustain his contention that his agreement was to be operative only in case a receiver to continue the business of the corporation, and not to sell its assets, should be appointed. The learned judge of the court below, to whom the circumstances under which that agreement was tendered and accepted were fully known, did not so understand the matter, and we see no reason to suppose that he was mistaken about it. The stipulation was filed, and thereupon the decree was made; and if the stipulators really believed that its direction to the receiver to sell absolved them from their undertaking, they should then have said so. But, instead of doing this, they allowed the decree to be entered, and the stipulation to remain on file, without ever suggesting that it was not obligatory until the time arrived for enforcing it. Its language was their language. It was chosen by them, and if ambiguous should not be construed most favorably to them. But, when fairly read in the light of the surrounding circumstances, the meaning of the paper seems to us to be plain. It referred, it is true, to a receiver to be appointed "as prayed for"; but we cannot agree that because the appointment which was actually made was coupled with an order to sell, instead of to operate, as had been proposed by the prayer of the bill, that therefore the appointment itself, which, as made, was acquiesced in by the appellant, was not the appointment prayed for. As we have said, it seems never to have occurred to any one that it was not until this controversy arose; and that a sale by the receiver was contemplated by the parties to the stipulation is indicated by its waiver of their claims, "if the total amount of money realized by such receivership on the assets of the said company, and applicable to payment of debts of the company now existing, shall not exceed \$57,000"; for it could not have been supposed that, during any admissible period of receivership, a sum exceeding that amount could be realized from its assets otherwise than by selling them. The fact is, we are convinced, that when the stipulation was filed and the decree entered, the only question in the mind of the court, or of any of the parties, was not as to whether a sale should be made, but whether a sale, which was inevitable, should be made by the sheriff, or by a receiver; and the learned judge himself has said that he was persuaded to interdict

the impending sheriff's sale solely by the representation of the appellant and his associates that "a sale by a receiver would prevent a sacrifice of the property."

Upon the grounds we have stated, we concur in the opinion of the court below that good faith requires that the appellant should be held to his stipulation, and therefore the orders of that court, which the appellant has averred to be erroneous, are affirmed.

DUNN et al. v. MAYO MILLS.

(Circuit Court of Appeals, Third Circuit. February 1, 1905.)

No. 24.

1. AMENDMENT OF PLEADINGS—DISCRETION OF COURT.

The allowance of amendments to pleadings is a matter purely discretionary with the trial court, and its action is not reviewable unless there has been a gross abuse of discretion. The allowance of amendments to a declaration which do not change the cause of action, or which affect only the mode of proving damages, is clearly within the court's discretion.

2. EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL—APPLICATION OF RULE.

In an action against a partnership on a writing evidencing a sale of goods by plaintiff, and containing all the essentials of a contract, by specifying the kind and quantity of goods bought and the price to be paid, the fact that it was signed only with the surname of a person as buyer, and that parol evidence was necessary and was given by plaintiff to identify such person as a partner in defendant firm, and to show that he contracted for and on its behalf, does not change its character as a written contract, or render admissible parol evidence on the part of defendant to vary or contradict its terms by adding a condition not therein expressed.

3. SALE—CONSTRUCTION OF CONTRACT.

A provision in a written contract for the sale and purchase of a stated quantity of goods, "deliveries to be made as wanted until further agreement," does not give the purchaser the right to decline to take the goods bought, no matter when tendered, but he is bound to accept them within a reasonable time; and, in an action for breach of the contract by his refusal to take the goods, what constituted a reasonable time is a question for the jury.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 356, 447.]
ACHESON, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

S. B. Price, for plaintiffs in error.

Dwight M. Lowrey, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. In this opinion the parties will be designated in accordance with their respective positions in the court below; that is to say, the defendant in error will be referred to as plaintiff, and the plaintiffs in error as defendants. The action was brought to recover \$2,234.21, the balance claimed to be due from the defendants to the plaintiff upon an alleged contract in writing, which in the plaintiff's statement of claim was set forth as follows:

"The Mayo Mills, H. M. Daniel, Manager.
 "517-519 Philadelphia Bourse.

"No. 1063.

Nov. 5, 1900.

"Sold to Hazle Knitting Mills, Hazleton, Pa.

"60,000 lbs. 8's cones Mayo Carded Peeler.

"Delivery, 4000 weekly.

"Price, 18¾.

"Terms, 2 per cent. 10th month.

"Accepted by Mr. Kemp."

It appeared upon the trial that a mistake had been made in copying into the statement of claim an unsigned paper as above, and thereupon the plaintiff proposed to amend by substituting therefor a copy of the writing which had been signed "Kemp," by William H. Kemp, who was a partner in the defendant firm, as follows:

"Bot. of the Mayo Mills 60,000 lbs. 8's Mayo carded peeler on cones 4,000 weekly at 18¾ 2% 10th month less 2% for cones. Deliveries to be as wanted until further agreement.

"Nov. 5, 1900.

[Signed] Kemp."

The statement further alleged that, upon the refusal of the defendants to receive and pay for any more yarn, "the plaintiff, after due notice, sold for account of the defendants, 4,703 pounds of 8's cotton yarn, the balance undelivered under the said contract, at 14 cents per pound, which was the then current market price and reasonable value of the said yarn," and this clause the plaintiff likewise asked to amend by inserting in lieu thereof the following:

"The balance of yarn undelivered at the date last aforesaid was 4,703 pounds, and the current reasonable market price of No. 8's cotton yarn at the date last aforesaid was 14 cents per pound."

The court permitted both of these amendments to be made, and the allowance of each of them, respectively, has been assigned for error.

"It is well settled that * * * questions respecting amendments to the pleadings are purely discretionary matters for the consideration of the trial court, and, unless there has been gross abuse of that discretion, they are not reviewable in this court on writ of error" (*Mexican Central Railway v. Pinney*, 149 U. S. 201, 13 Sup. Ct. 859, 37 L. Ed. 699), and we have not been convinced that any abuse of discretion was committed in this instance. By the first of those amendments, nothing was effected but the addition to the copy exhibited in the original statement of the words "deliveries to be made when wanted, until further agreement," and the signature "Kemp." This did not change the cause of action. It but remedied a defective statement of it by correcting an inadvertence of the pleader; and, as the Supreme Court has said, "the trial court may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, in its discretion or by its rules, prescribe." *Bamberger v. Terry*, 103 U. S. 43, 26 L. Ed. 317. This amendment "deprived the defendants of no rights" (*The Tremolo Patent*, 90 U. S. 527, 23 L. Ed. 97), and it could not have surprised them, for an exact copy of the paper which it inserted in the declaration had been set out in the affidavit of defense, in which it was averred that it and it alone, was "the true and correct contract." The second amendment was even more clearly admissible.

It did not relate to the cause of action at all, but solely to the measure of damages. The statement alleged that after breach the plaintiff had sold the quantity of yarn undelivered upon the contract "at 14 cents per pound, which was the then current market price and reasonable value of the said yarn"; but no such specific sale had in fact been made, and therefore the allegation that there had been was properly stricken out, so as to leave the amount of the recoverable damages for determination from evidence of market price simply. That the trial court had authority to permit this to be done appears from the cases already cited, and we think that in doing so it properly exercised its discretion. "Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually, to permit or refuse rests in the discretion of the court, and the result in either case is not assignable for error. This subject was fully examined in *Tiernan's Executors v. Woodruff*, 5 McLean, 135, Fed. Cas. No. 14,027. It is there shown that both in the English and American courts amendments have been allowed, in well-considered cases, for the purpose of introducing into the suit a new and independent cause of action." *Tilton v. Cofield et al.*, 93 U. S. 163, 23 L. Ed. 858. This was going further than the learned judge went in the present case; and we think that, in going as far as he did, he was clearly right.

The remaining specifications, as summarized in the brief submitted in their support, present but two questions, and these will be separately considered:

1. By the plaintiff's amended statement a written contract of purchase and sale was sufficiently alleged, and this allegation was sustained by proof. The instrument declared upon and produced appears on its face to be a contract. It is not silent upon any matter essential to its completeness. It lacks no element of agreement which oral evidence was needed to supply. It is perfect in itself. *Mfg. Co. v. Goddard*, 55 U. S. 446, 14 L. Ed. 493. It specifies the kind and quantity of the commodity bought, and the price to be paid. It fully discloses a sale—"a transmutation of property from one man to another in consideration of some price." 2 Bl. Com. 446. Inspection of it reveals nothing to induce belief that it was not intended to be a complete and final statement of the whole of the transaction, and the only object for which the defendants offered the oral evidence in question was to add to its contents, "contrary to the settled and salutary rule upon that subject." *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 517, 12 Sup. Ct. 46, 35 L. Ed. 837. The fact that the writing stood in need of construction did not exclude it from the operation of this rule. Whether it was correctly construed is a distinct question, which will be considered further on. All that it is necessary to say at this point is that no case has been cited, and none, we think, could be found, to support the contention that, because a document presents a patent ambiguity, extrinsic evidence may be given to add to or vary its terms. Where, for the ascertainment of the meaning of any part of its language or its relation to facts, a resort to oral evidence is requisite, such evidence, subject to certain conditions and limitations, is undoubtedly relevant. But to interpret the words contained in a writing is one thing, and to add to them is another. For the one purpose oral testimony has often

been received, but for the other it is wholly inadmissible, because "the instrument itself must be considered as containing the true agreement between the parties." Ph. & Am. Ev. 753. "The writing is the contractual act, of which that which is extrinsic * * * forms no part." *Pitcairn v. Philip Hiss Co.*, 125 Fed. 113, 61 C. C. A. 657. The offer and admission of plaintiff's proof that the signature "Kemp" was made by William H. Kemp, and that he contracted for and on behalf of the defendant firm, of which he was a member, did not render the oral evidence rule inapplicable. That rule relates to the terms of the contract, and not to proof of the fact of its execution, or of the parties on whose behalf it was executed. Where a contract has been made partly by letters and partly by verbal communications, the evidence both of the letters and of the conversations should be submitted to the jury, whose province it then becomes to pass upon its effect as a whole. *Elizabeth City Cotton Mills v. Loeb*, 119 Fed. 154, 56 C. C. A. 42; *Hood, Irvine & Co. v. Keen*, 11 Serg. & R. 280. But here the entire and final agreement between the parties was embodied in the writing, and the plaintiff proposed no departure from it. The oral evidence he adduced went only to show that the defendants, as copartners, were bound by it; and to the contention that by the production of evidence for that purpose he opened the door for the reception of testimony to add to its contents, we cannot yield our assent. "There is no doubt that, where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract, on the one hand, to, and charge with liability on the other, the unnamed principals—'unnamed' meaning unnamed in the writing—and this whether the agreement be or be not required to be in writing by the statute of frauds, and this evidence in no way contradicts the written agreement." *Calder v. Debell*, L. R. 6 C. P. 486, 40 L. J. C. P. 89, 224, Eng. Ruling Cases (Am. Ed. 1902) vol. 2, p. 456. "A principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument and was not disclosed, and the party dealing with the agent supposed that he was acting for himself; and this doctrine obtains as well in respect to contracts which are required to be in writing, as those where a writing is not essential to their validity." *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547; *Lerned v. Johns*, 9 Allen, 420.

2. The contract being wholly in writing, its construction was for the court, and the legal effect of its only ambiguous part was rightly stated in the charge. The phrase, "deliveries to be made as wanted, until further agreement," could not have been intended to mean that the defendants were to be at liberty to refuse deliveries at any time, except, as by further agreement, they might consent to accept them. To have so interpreted this language would have been to hold that no binding contract had been actually made, although, from the instrument as a whole, it plainly appears that the parties supposed that they had made one. The deliveries were to be made, not if wanted, but "as wanted"; and we think that the understanding of the learned judge that this did not give the defendants the right to decline to take the

goods they had bought, no matter when tendered, was unquestionably correct. They were bound to accept in a reasonable time, and whether the time which had elapsed when they refused to do so was or was not a reasonable time was properly submitted to the jury for decision. *Stevenson v. Kleppinger*, 5 Watts (Pa.) 420; *Muskegon Co. v. Keystone Co.*, 135 Pa. 132, 19 Atl. 1008; *City of Elizabeth v. Fitzgerald*, 114 Fed. 547, 52 C. C. A. 321.

Our conclusion is that none of the specifications of error can be sustained, and therefore the judgment of the Circuit Court is affirmed.

ACHESON, Circuit Judge (dissenting). Upon one point I dissent from the opinion of the majority of the court, and hence I cannot concur in the judgment of affirmance. This was a suit by the Mayo Mills against A. L. Dunn, William H. Kemp, and Henry W. Jacobs, copartners trading as Hazel Knitting Mills, to recover damages for the breach of an alleged contract of sale of yarns by the plaintiff to the defendants. The only written contract the plaintiff produced was the following paper:

"Bot. of the Mayo Mills 60,000 lbs. 8's Mayo carded peeler on cones 4,000 weekly at 18 $\frac{3}{4}$ 2% 10th month less 2% for cones. Deliveries to be made as wanted until further agreement.

"Nov. 5, 1900.

[Signed] Kemp."

This paper did not show a contract between the parties to this suit. By its terms the buyer of the yarn was Kemp, and he only was liable to the plaintiff. In order to reach the defendant firm, it was necessary for the plaintiff to resort to parol evidence, and this the plaintiff did; calling and examining as a witness its manager, Henry M. Daniel, who negotiated with Kemp the contract in question, with a view to charge the defendant firm with liability. He testified as to what occurred and was said between himself and Kemp. The plaintiff thus made out its case by the introduction of parol evidence tending to show that the parties to the alleged contract were the Mayo Mills, on the one side, and the Hazel Knitting Mills, on the other side. This showing was essential to a recovery by the plaintiff against the defendants. As part of his testimony in chief, Daniel related a conversation between himself and Kemp, immediately before Kemp signed the paper, in respect to the terms of the proposed contract. Now, the defendants, on their side of the case, made several offers of evidence, which, in substance, were to prove the whole conversation between Daniel and Kemp at the time the order was given and the paper was signed by Kemp, and to show that it was then expressly agreed between Daniel and Kemp, as a condition of the purchase, that the yarn was to be taken if the defendant firm could use it satisfactorily in their business, but, if not, the yarn was not to be taken. The defendants' offers were rejected upon the rule that excludes parol evidence to contradict or vary a written contract complete in its terms. But this rule, it seems to me, was inapplicable here. The paper of November 7, 1900, was incomplete as against the defendants. Therefore the plaintiff resorted to parol evidence, and was obliged to do so. Without parol evidence the paper was inadmissible in this case. And here let it be observed that it was not enough for the plaintiff to prove that the signature "Kemp" stood

for William H. Kemp, and that he was a partner in the Hazel Knitting Mills firm. The plaintiff had to go further, and show by parol evidence that the contract was between it and the defendant firm. 1 Lindley on Par. *178. This text-writer states the law thus:

"If, therefore, one partner only enters into a written contract, the question whether the contract is confined to him, or whether it extends to him and his copartners, cannot be determined simply by the terms of the contract."

And because "the terms of the contract" signed "Kemp" did not import any liability on the part of the defendant firm, the plaintiff had recourse to parol evidence.

The contract which the plaintiff proved rested partly on a writing and partly in parol. This, it seems to me, is clear, for there can be no contract without parties. The element of parties is an essential element of any contract. Here this element, as against the defendants, had to be, and was, established by parol evidence. Hence I say this contract rested partly on a writing and partly in parol. But it is a familiar principle that, where a contract is thus made out partly by a written document and partly by parol evidence, it is to be treated as a parol contract. Leake on Contracts, 143; Moore v. Garwood, 4 Exch. 618; Harper v. Kean, 11 Serg. & R. 280. The contract sued on in this case, under the plaintiff's proofs, was not a written contract at all, but was a parol contract; and hence the rule excluding parol evidence to contradict or vary a written contract did not and could not apply to the defendant's offers.

The precise question now before us was not involved in any of the cases relied on to sustain the rulings of the court below. The authorities cited in the opinion of the majority of this court were concerned simply with the question of the admissibility of parol evidence to show that the person who signed a written contract was acting as agent for an unnamed principal, and they do not touch the further question as to the effect of the admission of such parol evidence in opening the door to the other side to introduce parol evidence. I do not doubt that it was competent for the plaintiff here to introduce parol evidence to show that Kemp was contracting for the defendant firm, but what I insist on is that, having gone into parol evidence to hold the defendants, the plaintiff was in no position to invoke against them the rule of exclusion. This view finds support in *Bogk v. Gassert*, 149 U. S. 17, 25, 13 Sup. Ct. 738, 37 L. Ed. 631, where it was held that, when one party has testified to his understanding of the written contracts which are the subject of the suit, he has no right to object to the other party giving his understanding of the contracts. In *Waymart Water Company v. Borough of Waymart*, 4 Pa. Super. Ct. 211, 219, it was held that where, in order to prove the assent of the borough council to the written contract sued on, the plaintiff can show no resolution or ordinance authorizing the contract, but must depend upon parol evidence of what was said and done at the council meeting at which the contract was signed, the plaintiff had no reason to complain of the admission of parol evidence to show that the assent was given conditionally, and that the writing does not embody the whole action of council in the matter.

In the present case, as we have seen, parol evidence on the part of the plaintiff was indispensable to show the defendants' alleged con-

tractual liability. For that purpose the paper signed "Kemp" was altogether insufficient. It was lacking in the essential particular of parties. The plaintiff then having put into the case the parol evidence mentioned, it seems to me necessarily to follow that the defendants were entitled to introduce the parol evidence offered by them.

Because of the misapplication (as I think) to the defendants' case of the rule excluding parol evidence, I would reverse this judgment and award a new trial.

SOUTHERN TRUST & DEPOSIT CO. v. YEATMAN.

(Circuit Court of Appeals, Third Circuit. February 1, 1905.)

No. 22.

1. CORPORATIONS—STOCK SUBSCRIPTION PAYABLE IN PROPERTY—RATIFICATION OF INFORMAL ACCEPTANCE.

Code Md. 1888, art. 23, §§ 69, 70, amendatory of the general incorporation act of 1868, authorize a corporation organized thereunder to accept in payment for its stock such property "as it is proper that the said corporation shall own for the advancement of the purposes for which it was incorporated," but only where the same shall have been "previously authorized by the stockholders assembled in general meeting, pursuant to a call to consider the propriety of receiving the said subscription." *Held*, conceding such provisions to be applicable to a corporation thereafter created by special act, that where such act expressly authorized the corporation to purchase and hold stocks of other corporations, and the subscribers to its stock, at the meeting at which it was formally organized, accepted a subscription which by its terms was in part payable in the stock of another corporation, and the corporation caused such stock to be transferred to its own name, and held and received dividends thereon for two years, such action was a ratification of the subscription contract which bound the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 338-345.]

2. SAME—ACTION TO RECOVER UNPAID SUBSCRIPTION.

A written subscription to the stock of a corporation, which shows on its face that it is payable partly in cash and partly in the stock of another corporation, must be accepted, if at all, in conformity to its terms; and the corporation cannot retain the cash payment, issue the stock, and thereafter maintain an action against the subscriber to recover the difference as an unpaid subscription.

Gray, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 130 Fed. 798.

John G. Johnson, for plaintiff in error.

George W. Pepper, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The material facts of this case, as disclosed by the evidence, all of which was received without objection, are as follows:

On April 19, 1901, John Sherman, who was soliciting subscriptions to the stock of the Southern Trust & Deposit Company, the

plaintiff below and in error, before the organization of the company, visited John C. Yeatman, the defendant, at Kennett Square, Pa., where he resided, and requested him to subscribe to the stock; and it was then and there agreed between the two that Yeatman would take 200 shares of the stock, of the par value of \$50 each, at \$60 per share, and that the company would take in payment \$2,600 in cash, and the residue in stock of the Monumental Savings Association of Baltimore, Md., of the par value of \$100 per share, at \$120 a share. Sherman told Yeatman that it was necessary, as a matter of form, for him to sign a subscription paper to be filed. Thereupon Yeatman signed the subscription paper, a copy of which appears below, and gave to Sherman his check for \$2,600, and a certificate for 104 shares of the stock of the Monumental Savings Association; and Sherman signed and gave to Yeatman the receipt, a copy of which appears below. All these things occurred at the same time, and constituted one transaction.

"No. _____.

Shares 200.

"I, John C. Yeatman, of Kennett Sqr., State of Penna., do hereby subscribe for 200 shares of stock of the Southern Trust & Deposit Company of Baltimore, Maryland, duly incorporated by Legislature of the State of Maryland, at the par value of fifty (\$50) dollars per share, for which I agree to pay sixty dollars (\$60) per share—thirty dollars (\$30) per share to be paid when called for, or at the regular organization meeting; and I agree to pay for said stock in three (3) installments as follows: Fifty per cent. (50%) in cash, twenty-five per cent. (25%) in six months, and the remaining twenty-five per cent. (25%) in twelve months after date hereof, ten dollars (\$10.00) per share of purchase price to be placed in the surplus account of said company.

"Dated at Kennett Sqr. this 19th day of April, 1901.

"Paid \$12,000.

John C. Yeatman.

[Seal.]"

"Kennett Sq. Penna., April 19th, 1901.

"Received of John C. Yeatman, of Kennett Sq., Pa., certificate of stock in the Monumental Savings Association of Baltimore Md., No. of shares (104) and check for twenty-six hundred dollars in full payment of (200) shares of stock of the Southern Trust and Deposit Company of Baltimore, Md., and I agree to return certificate of stock to the said John C. Yeatman for \$3,000.00 three thousand dollars of the said Monumental Savings Association of Baltimore, Md., the trust company stock to be issued after the organization meeting. [Signed]

John Sherman. [Seal.]"

A meeting of the subscribers to stock for the purpose of organizing the plaintiff company was held on June 14, 1901. Most of the subscribers were present, and 652 shares (including Yeatman's), which was more than a majority of the subscribed stock, were represented. By a provision of its charter, the company could do no business until \$25,000 of its capital stock were subscribed and paid in. The stock subscriptions did not amount to the required sum unless Yeatman's subscription was counted. There was positive testimony that, after the subscribers had assembled to organize, they were informed as to the terms of Yeatman's subscription, and told that, if there was no objection to accepting the Monumental Savings Association stock as a cash payment by Yeatman on his subscription, a sufficient amount was subscribed to legally organize the company, but if there was any objection they could not organize. No objection was made, and the meeting was called to order and proceeded to organize the company. Immediately thereafter Yeatman's check for \$2,600 was

passed to the credit of the company, and the certificate for 104 shares of the Monumental Savings Association stock was delivered to the company. On or before July 13, 1901, the company, acting pursuant to the terms of Sherman's receipt of April 19th, had the 104 shares of the Monumental Savings Association stock divided between the plaintiff company and Yeatman according to their interests; 79 shares being issued to the company, and 25 shares to Yeatman. The memorandum, "Paid \$12,000," at the foot of Yeatman's subscription, was written by Sherman, who, upon the organization of the company, became its vice president. The 79 shares of the Monumental Savings Association stock were entered and carried on the books of the plaintiff company as part of its assets; the stock was pledged by the company as collateral for loans; and dividends on the stock were received by the company up to January, 1903. There is a conflict of testimony as to the time when objection on behalf of the company to the transaction in question was first made. The defendant's witnesses say that it was not until the spring of 1903, after the stock had ceased to pay dividends. Mr. Wilcox, who became secretary and treasurer of the company in April, 1902, states that verbal complaint was made to the defendant in June, 1902. The first written demand upon the defendant was contained in a letter dated September 17, 1903, signed by Wilcox, as treasurer of the company. The action in this case to recover so much of the defendant's subscription as was not paid in cash (\$9,400) was brought on October 16, 1903.

The plaintiff's alleged right of action rests upon the proposition that by the law of Maryland a subscription payable otherwise than in cash was not allowable, excepting under a vote of the stockholders at a meeting especially called, with notice of a purpose to pass upon the acceptance of such subscription.

The plaintiff relies upon sections 69 and 70 of article 23 of the Maryland Code of 1888, which are substitutes for sections 56 and 57 of the general corporation act passed in 1868 (chapter 471), in these words:

"Sec. 69. Subscriptions to the capital stock of such of said corporations as have capital stock may be made in land or other property at a valuation agreed upon between the corporation and the subscriber, where the said property so subscribed shall be such as it is proper that the said corporation shall own for the advancement of the purposes for which it was incorporated, but such subscription shall not be otherwise received, nor shall they be so received unless the same shall have been previously authorized by the stockholders assembled in general meeting, pursuant to a call to consider the propriety of receiving the said subscription and of fixing the terms upon which it shall be received.

"Sec. 70. Where property of any kind is received by the authority of the stockholders in general meeting as aforesaid, in payment for stock, the books of the company shall be so kept as to show at all times fully what property was received for the said stock, at what value and the number of shares of the capital stock issued for the same; in all other cases money only shall be considered as payment of a subscription to any part of the capital stock."

The defendant in error, however, contends that these sections are not applicable here, for the reasons following. The plaintiff was created a corporation by a special act of the Legislature of Maryland passed on April 5, 1900, entitled "An act to incorporate the Southern

Trust & Deposit Company of Baltimore, Md." Laws Md. 1900, p. 444, c. 299. This act contains eleven sections, defining with much detail the powers of the company, its rights, privileges, and liabilities, and the manner of conducting its business. The third section grants to the corporation authority to purchase and hold stocks, in the words following:

"Sec. 3. That the said body corporate shall have the right to purchase and hold * * * stocks * * * upon such terms as may be established or approved by said company."

Section 11 provides that the corporation shall be subject to certain specified general acts of 1892, but there is no clause of the special act subjecting the corporation to the provisions of the corporation act of 1868, or to the provisions of sections 69 and 70 of the Code of 1888. The act of 1868 contains the provision:

"All corporations heretofore formed under the general laws of this state, relating to corporations, or under any special law, are hereby declared to be entitled to the benefit of and to be subject to all the regulations in this act contained. * * *

The act of 1868 contains reference to corporations formed thereunder, but there is no express provision therein extending the act to corporations thereafter created by special act of the Legislature. It is urged, therefore, in the brief of the defendant in error, that the above sections 69 and 70 do not apply to this case. The argument in support of this position is impressive, but the point, if made at the trial below, seems not to have been considered by the court. We think, therefore, that we ought not to pass upon the question, and, in the view we take of the case, it is not necessary.

The court below submitted to the jury the question whether there had been a ratification on the part of the plaintiff of the defendant's payment in stock, and the jury found in favor of the defendant. The plaintiff in error insists that there could be no ratification, except by the stockholders assembled in general meeting, pursuant to a call, to consider whether the stock of the Monumental Savings Association should be received in part payment of the defendant's subscription; and, as there was no such ratification, it was error to submit to the jury the question of ratification. In determining this point, great weight, we think, should be given to the third section, heretofore referred to, of the special act of April 5, 1900, creating the corporation plaintiff, which authorizes the corporation to purchase and hold stocks. That section recognizes stocks as property, "such as it is proper that the said corporation shall own for the advancement of the purposes for which it was incorporated," and empowers the corporation to fix the terms of purchase. Therefore the acquisition of Yeatman's stock by the corporation was not ultra vires in the sense that the company had no authority to acquire and hold stocks. Did, then, the failure of the company to comply with the formalities prescribed by section 69 of the Maryland Code before the corporation took Yeatman's stock preclude corporate ratification, except by the stockholders assembled in general meeting pursuant to a special call? We think not. Let us look at the facts of the case. The evidence justifies these findings, namely: That at the

meeting to organize the company a majority in number of the subscribers to stock were present, and a majority of the stock subscribed was represented; that it was then and there stated in open meeting that, unless Yeatman's stock in the Monumental Savings Association was accepted as a cash payment on his subscription, the company could not legally be organized; and that, without objection by any one, the subscribers, with full knowledge of the terms of Yeatman's subscription, proceeded to organize the company. Upon the evidence it may be affirmed that the stockholders convened at this meeting, without dissent, accepted Yeatman's stock as a cash payment. The state of Maryland might have objected to this, but has not done so. The rights of creditors were not involved, and none of them has complained. The only complaint comes from the corporation, which owes its organized existence to the action of the stockholders in treating Yeatman's stock as a cash payment. Moreover, the contract which the plaintiff seeks to have declared illegal is an executed contract. In this regard the case differs widely from *Baile v. The Calvert College, etc.*, 47 Md. 117. Still further, the contract here in question was fully performed on both sides more than two years before this suit was brought. As long as it appeared to the plaintiff to be a profitable bargain, the plaintiff held onto the contract, enjoying its fruits. It was not until conditions had changed, and after it had become impossible to restore the status quo, that the plaintiff undertook to avoid the contract. If the plaintiff ever had that right, it was lost by reason of its conduct. We need not again recount the acts of ownership exercised by the plaintiff over this Monumental Savings Association stock. The plaintiff's positive acts and its long-continued acquiescence preclude it from questioning at this late date the validity of the contract. The plaintiff in error has no reason to complain that the court submitted to the jury the question of ratification. There was ample evidence to sustain the finding of the jury. *Stokes & Haines v. Detrick & Bradley*, 75 Md. 256, 263, 23 Atl. 846; *Edelhoff et al. v. The Horner-Miller Mfg. Co.*, 86 Md. 595, 610, 39 Atl. 314.

But the case has another aspect: It clearly appears that the defendant never entered into an agreement to pay exclusively in money. In the transaction between him and Sherman, the latter was acting on behalf of a contemplated company. Upon its corporate organization the company could adopt the agreement which Sherman had made, but only upon its agreed terms. Now, the facts are undisputed. As we have already noted, all the evidence in respect to the transaction between Sherman and Yeatman came into the case without objection. We do not see how the evidence could have been excluded. The defendant's subscription had on its face the acknowledgment, "Paid \$12,000." This called for explanation on part of the plaintiff. Moreover, the two papers of April 19, 1900, connect themselves together. They constitute the actual agreement. Sherman communicated to the body of subscribers and stockholders assembled for organization the fact that Yeatman was to pay partly in stock, before his subscription was accepted. It follows, then, that, if the stipulation to pay partly in Monumental Savings Association

stock is void, there was no ground for recovery in this action, under the proofs. The corporation is the plaintiff. Now, certainly as between the corporation itself and the defendant, the subscription agreement, if binding at all, was binding in its entirety. Treating it as an unexecuted contract, the corporation cannot demand its enforcement, save upon the agreed terms.

The judgment of the Circuit Court is affirmed.

GRAY, Circuit Judge, dissents.

FURNESS, WITHY & CO., Limited, v. LEYLAND SHIPPING CO., Limited,
et al. SAME v. BOSTON ELEVATED RY. CO. THE PLANET
NEPTUNE. THE MERIDIAN.

(Circuit Court of Appeals, First Circuit. February 1, 1905.)

Nos. 540, 541.

SHIPPING—DEMURRAGE—LIABILITY OF PURCHASER OF CARGO.

A written contract for the sale of cargoes of coal to be delivered from the ships, which contained no provision with respect to the rate of discharge, bound the purchaser only to receive the coal at a rate which was customary and reasonable under the circumstances; and, where it did so, it cannot be held liable for demurrage which the seller was obliged to pay under the charter parties, requiring a more rapid discharge.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 571, 576.

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 70.]

Appeal from the District Court of the United States for the District of Massachusetts.

These were two suits in admiralty, involving liability for demurrage in the case of two steamships—the Planet Neptune and the Meridian—each laden with coal.

The opinion of the District Court in the case of *The Planet Neptune*, written by Lowell, District Judge, is as follows:

This is a libel for demurrage. The charter party guarantied discharge at the rate of 1,000 tons a day if the vessel could deliver at that rate. The steamer reported at anchor in President Roads at noon on November 26th, not being allowed by the harbor master to proceed to the upper harbor without a berth. The rest of this day should be allowed for berthing, entering at the customhouse, removing the hatches, etc.; and, as November 27th was a holiday, the lay days began on the morning of November 28th. *New Rupperra Steamship Co. v. 2,000 Tons of Coal* (D. C.) 124 Fed. 937. There were 5,100 tons of coal on board, and so the discharge should have been complete at some time on December 4th. As the discharge under a competent stevedore never reached 250 tons in any one day from any one of the four hatches, it is probable that the guarantied rate was somewhat beyond the vessel's reasonable capacity. I allow six full days for discharge, which is at the rate of only \$50 tons a day. The discharge should have been completed at the end of December 4th.

The Boston Elevated Railway Company, the claimant, to whom the coal was sold, has summoned in its vendor, the consignee, and contends that the consignee is liable to it for the demurrage. The written contract of sale contained in the letters which passed between the parties provided that the

coal should be delivered alongside the vendee's pier, or overside in the harbor into lighters. The vendor was thus bound to discharge the coal, and the vendee to furnish wharf or lighters to receive the discharge. The contract did not mention the rate of discharge. If the contract made between a vendor who is to discharge, and a vendee who is to receive discharge, mentions no rate of discharge, both parties are bound only to proceed at a rate reasonable under all the circumstances. The written contract cannot be varied by parol, but, even if parol evidence were here admissible, it would establish only a statement by the claimant that it could discharge at the rate of 1,000 tons a day at its new dock, and that it hoped and expected that the dock would be ready for discharge upon the steamer's arrival. On that consideration, and on that only, according to the testimony of Stewart, the vendor's agent, did Mahler, the vendee's agent, promise to receive 1,000 tons a day. But there was inserted in the contract an alternative method of discharge into lighters, and as to the rate of that discharge Mahler made no suggestion. The alternative was for the benefit of the vendor as well as of the vendee, inasmuch as it permitted the former to employ a vessel, like the Planet Neptune, too large for the vendee's dock. Under these circumstances, even if parol evidence were admissible, and Stewart's testimony were taken as accurate against Mahler's denial, it would still be unfair to hold the vendee to a fixed rate of discharge, where the discharge was into lighters, and could not have been had at the vendee's wharf, even had that been completed, because of the excessive size of the steamer. Was the consignee bound to the vendee to discharge 1,000 tons a day? I think not, and yet both parties were bound or neither. It was said in argument that the consignee, who was bound by the charter party to the shipowner, could not be supposed to have left uncertain the rate of discharge guaranteed by the vendee, but a lack of definite stipulation respecting demurrage is not uncommon. See *The Viola* (D. C.) 90 Fed. 750. It was suggested that, inasmuch as the vendee knew the charter rate of discharge, his contract must be taken as made subject to it. But the parties are still at issue concerning the meaning of the charter party. Because of the congestion of the port, the consignees contended before this court, and may still contend before the Court of Appeals, that they were not required to discharge at the charter rate. This court has decided against them, but the matter is not yet finally determined. The vendor's attempt, here made by parol evidence, to insert in a written contract, apparently complete, an oral agreement which he says was evidently implied from the circumstances of the case, comports ill with his argument just addressed to this court in his contention with the shipowner—that the circumstances of this case relieved him from a like agreement. The situation illustrates the wisdom of the rule which compels parties to abide by their contracts as written. The letter of the vendee to the vendor after the discharge was effected lends some support to the vendor's contention that the vendee admitted its liability for part of the demurrage, but, upon the whole, the acknowledgment is not sufficient to control the plain language of the written contract. Mahler was urging that the congestion of the port excused his delay in furnishing lighters. If the vendee guaranteed only that it would receive discharge at a rate reasonable under the circumstances, it was practically admitted at the trial it had fulfilled its contract. The evidence regarding congestion at its wharf of final delivery was too indefinite to affect the result.

In accordance with this opinion, the decree will provide that the consignee pay the demurrage and costs.

In the case of *The Meridian* the opinion of Lowell, District Judge, is as follows:

This is a libel in personam, brought by the consignees, who paid the demurrage, against the vendee, based upon facts similar to those stated in *The Cargo ex Planet Neptune*, to which reference is hereby made. The decision here must follow that rendered in the case just mentioned. The steamer *Meridian*, here in question, was not too large to have discharged at the vendee's dock, but this difference in the facts is not sufficient to change the decision.

Libel dismissed, with costs.

Arthur H. Russell, for appellants.

Arthur P. Stone, for Boston Elevated Ry. Co.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. These appeals arise out of two cargoes imported in two different steamers, but covered in one agreement of sale by Furness, Withy & Co., Limited, to the Boston Elevated Railway Company, of 10,000 tons of Welsh small admiralty steam coal. The question before us arises solely between Furness, Withy & Co., Limited, and the Boston Elevated Railway Company. In each case there was a decree in the District Court in favor of the Boston Elevated Railway Company, and Furness, Withy & Co., Limited, appealed to us. The origin of the transactions, so far as the same appears by anything written, is shown by the following correspondence:

Boston, Oct. 3d, 1902.

Edward Mahler, Esq., Purchasing Agent, Boston Elevated Railway Co., Converse Building—Dear Sir: We beg to confirm sale, up to 10,000 Tons Welsh Small Admiralty Steam Coal, for shipment last half October and first half November at a price of \$5.45 per Ton of 2240 Lbs. delivered alongside your Company's Pier at Lincoln Wharf, or overside in the Harbor into Lighters.

This Price to include Cost, Insurance and Freight to Boston, also United States Duty of 67c. per Ton, and it is agreed that should your Company be able to procure any reduction of the Duty such rebate will be for account of the Boston Elevated Railroad Co.

It is also agreed that should the work of discharge be effected at Lincoln Wharf by the Boston Elevated Railroad Co. a rebate of 20c. per Ton will be allowed for this work.

Kindly confirm and we shall be pleased to be advised should you desire to make further purchases.

Yours faithfully,

For Furness, Withy & Co., Ltd.,
Robt. E. Burnett.

Boston, Mass., Oct. 3d, 1902.

Furness, Withy & Co., Ltd., 85 Water Street, Boston, Mass.—Dear Sirs: Have your favor of the 3rd inst. beg to confirm sale to this Company of 10,000 tons of Welsh Small Admiralty Steam Coal, shipment the last half of October and the first half of November at terms and conditions as stated.

In making charters of steamers, of course we would prefer steamers that would be able to discharge from our Lincoln Wharf Dock. The length of wharf is 283 feet; the dock was dredged for 22 feet at low water.

Kindly advise when charters are made giving the name of steamers, dimensions, etc. When we are again in the market will advise you.

Yours truly,

Ed'wd Mahler,
Purchasing Agent.

85 Water Street,

Boston, October 4, 1902.

Edward Mahler, Esq., Purchasing Agt. Boston Elevated R. R. Co., 101 Milk St., Boston—Dear Sir: We are favored with your letter of October 3rd, which is in order, except that of course all sales made are subject to the usual strike & Colliery conditions.

We shall be pleased to be advised whenever you are in the market for further importations.

Yours faithfully,

For Furness, Withy & Co., Ltd.,
Robt. E. Burnett.

One cargo came forward by the steamer *Meridian*, under a charter dated at London on the 3d day of October, and the other by the steamer *Planet Neptune*, under a charter dated also at London on the 2d day of November, each in 1902. These charters were executed between the owner of the steamers, or the agents of the owner, and Hull, Blythe & Co., coal exporters at London and Cardiff, who were apparently the parties from whom the coal was originally purchased by Furness, Withy & Co., Limited. The charters are of the class known as "Chamber of Shipping Welsh Coal Charter, 1896," and they contain the stipulation found in that class of charters; providing that the cargo be taken from alongside by the consignee at the port of discharge at a rate per day named therein. Furness, Withy & Co., Limited, claims that by its sale to the Boston Elevated Railway Company the latter corporation assumed the burden of that stipulation; but the latter claims that, as between Furness, Withy & Co., Limited, and itself, it was bound only by the implied obligation to discharge with ordinary or customary expedition, which obligation arises as of course on the face of the correspondence. On this issue the District Court found, as we have said, in favor of the Boston Elevated Railway Company.

The opinion passed down by the learned judge of that court went over the facts more in detail than we need to, in view of the disposition which we conclude to make of these appeals. In view of the expression with which its letter of October 3d commences, "We beg to confirm sale," Furness, Withy & Co., Limited, claims that there had been a previous oral agreement covering the terms of the sale, by virtue of which the Boston Elevated Railway Company assumed the burden of the stipulation in the charters to which we have referred, and that this expression adopted that oral agreement, so that Furness, Withy & Co., Limited, is entitled to supplement the correspondence by proof of it. The learned judge of the District Court was of the opinion, first, that, under the rules of law, the correspondence constituted on its face a complete contract, and so could not thus be varied by parol; and, second, that, if it could be varied, Furness, Withy & Co., Limited, failed to support its proposition as to the oral understanding. For the details of these conclusions, we refer to his opinion, which we adopt so far as the issue before us is concerned; supplementing the same with the following suggestions:

In our view, the expression in the letter from Furness, Withy & Co., Limited, of October 4, that is, the words "which is in order," especially in connection with the single exception which follows, show that the correspondence was intended to express and did express the entire contract. Moreover, it is to be observed that the first letter in the series contains the following:

"It is also agreed that should the work of discharge be effected at Lincoln's Wharf by the Boston Elevated Railway Co. a rebate of 20c. per ton will be allowed for this work."

This is persuasive from two points of view: First, there is nothing in either charter which in any way corresponds with this special stipulation, or calls for it. Therefore, in the particular of the provision in the charters with regard to the discharge of the cargoes, the correspondence makes a departure so peculiar that, whatever might be the possibility

of maintaining that in some other particulars there was a prior oral agreement to which the words already quoted, "We beg to confirm sale," might be thought to relate, it follows that, on the sole issue between the parties before us, the correspondence is the master.

Again, it is apparent that this particular provision for a rebate arose from the fact that, when or before the correspondence occurred, the Boston Elevated Railway Company had assured the sellers, or had expressed the hope, that it would be able to receive delivery at the wharf named. It is also apparent that, if the coal had been received at that wharf, it certainly could have been discharged at the daily rates stipulated in the charters, and perhaps even more rapidly, and no other advantage could apparently have come therefrom. If the Boston Elevated Railway Company had assumed the stipulations with reference to the daily rates of discharge, it would necessarily have been a matter of absolute indifference to Furness, Withy & Co., Limited, whether the coal was discharged at Lincoln's Wharf or elsewhere, so that in that event the stipulations for rebate would have involved pure gratuities on their part. The stipulated rebate, therefore, is necessarily inconsistent with any understanding, oral or otherwise, such as is now claimed by the vendor of the coal. All this brings the case within the practical rule by which several writings, although informal, taken together, may be seen to constitute a complete legal engagement, as stated by Judge Aldrich, in behalf of this court, in *Church v. Proctor*, 66 Fed. 240, 241, 13 C. C. A. 426. Consequently, in any view, we conclude that the Boston Elevated Railway Company was bound only to the implied ordinary or customary diligence, and that the decrees of the District Court were correct.

In each case the judgment is: The decree of the District Court is affirmed, and the Boston Elevated Railway Company recovers its costs of appeal from Furness, Withy & Co., Limited.

THE TRESCO.

(Circuit Court of Appeals, Third Circuit. February 9, 1905.)

No. 42.

1. SHIPPING—DISCHARGE—INJURIES TO SERVANT—DEFECTIVE CABLE—NEGLIGENCE—INSPECTION.

Plaintiff, a stevedore, was injured by the pulling out of the splicing of a cable used in unloading buckets of ore weighing about 2,000 pounds. The cable, of foreign manufacture, had been received from a sister ship, and was capable of lifting about 10 tons. Before the unloading was begun, the day prior to the accident, only a visual inspection of the cable was made, and it appeared that, if the tarred twine serving covering the splice had been removed, the defectiveness of the splice would have been discovered. *Held*, that the ship was guilty of negligence in failing to properly inspect.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 349-351.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Evidence that the splice was not smooth, and that libellant noticed the ends of wires protruding some two or three hours before the accident,

and that he failed to report the same because he thought it was spliced so that it would not come apart, was insufficient to charge him with contributory negligence.

Dallas, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 128 Fed. 780.

J. H. Brinton, for appellant.

Henry R. Edmunds, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal from a decree of the District Court dismissing a libel in an action brought by Oscar Griffling against the steamship Tresco to recover damages for personal injuries suffered by the libelant on the evening of December 4, 1902, about 11 o'clock, while he was assisting as a stevedore in the hold of the vessel in discharging a cargo of iron ore from the steamship, then unloading in the port of Philadelphia. The libelant's duties required him to help in filling with ore large iron buckets as they were lowered into the hold by a steam windlass and wire cable, the cable being supplied by the vessel for the above-stated purpose. At the time in question the libelant had assisted in filling with ore one of the buckets, and during the process of hoisting the loaded bucket the splicing in the lower end of the cable pulled out, and the bucket fell. In its fall the bucket overturned, and part of its contents was thrown against the libelant, thus inflicting the injuries complained of. It was shown that the splice was covered with a serving of tarred twine, that the weight of a filled bucket was about 2,000 pounds, that the breaking strain of the cable was at least 10 tons, and that the discharging began 4 o'clock on the afternoon of the day before the libelant was injured.

The testimony, based upon examination of the cable since the splicing pulled out, establishes that the splice was not properly made. The expert witnesses agree that it was defectively made, and the court so found. The evidence satisfies us that the splice was grossly defective in its construction. The indications warrant the belief that the splice was not the work of an experienced mechanic. The master or owner of the Tresco had the means of showing the origin and history of the cable, but did not do so. Nothing was shown save that the cable, spliced and served with tarred twine as when it gave way, was brought to New York and delivered to the Tresco in August, 1902, by a sister ship belonging to the same owner. The Tresco's witnesses say the cable was then apparently new, and that it was used on the Tresco only once before the disaster in question. The extent or character of that use was not shown. The cable was not tested at the time it was brought on board the Tresco, nor afterwards. Neither was the splice ever uncovered for inspection. In regard to the inspection of the wire cable on the occasion when the splicing drew out, the learned District Judge says:

"Before the laborers began to take out the ore in Philadelphia, the first mate of the Tresco examined the rope carefully, and nothing was found to

indicate that it was unsafe. The serving covered the splice and was not removed, since there was no external sign to suggest that the rope might be unable to do its work. A wire rope of this size should lift at least 10 tons. Several times after the hoisting began the mate examined the rope, the last inspection being about 4 o'clock on the afternoon preceding the accident, and found nothing that should have put him on his guard."

It may be assumed, not uncharitably, that the testimony of the mate as to his inspection would be as favorable to the ship as was at all consistent with the truth. Now, his testimony was as follows:

In chief, for Tresco:

"Q. Did you inspect this fall which was used at No. 3 hatch before the discharge began at Philadelphia on that occasion? A. Yes, sir. Q. What sort of inspection did you make of it? A. As I generally do, in fact always do, when I am rigging the cargo gear. I inspect the ropes; I take them up in my hand, and examine them to see if they are fit for work. Q. Did you examine the splice of this rope at No. 3? A. Yes, sir. Q. When did you do that? A. I examined it particularly, before we started to work, while rigging the gear. Q. How long before the accident? A. That would be on the 3d. Q. What time of day? A. Between 3 and 4 o'clock. Q. What time did you begin discharging? A. 4 o'clock. Q. On the 3d day of December? A. Yes, sir. Q. What was the condition of the splice then? A. Good. Q. Describe how that splice was fixed. Was there serving around where the wire was spliced? A. The rope was served around where the thimble was and the splice; it was served over. Q. Was the splice all covered up with the serving? A. All covered up with the service. Q. Did it all look in good order? A. All in good order. Q. Was this service tarred? A. Yes, sir; tarred spun yarn. Q. Did you look at this fall again during the discharge? A. Yes, sir. I periodically go around on purpose. I hardly ever pass a gangway without I look at the gear. Q. What was the last time before the accident happened when you examined this splice to see whether it was all right? A. Between 4 and 5 o'clock, before dark. Q. Did you examine all the other splices, too? A. Yes, sir. On this occasion I did not take it in my hand. Q. On this last examination? A. No. Q. How near were you to it when you examined it? A. Within a foot or two. Q. You were looking at it then to see whether it was in good order? A. Yes, sir. Q. Did it show any signs of giving away? A. No signs of ever giving away."

On cross-examination by libellant's counsel:

"Q. Were you present when this rigging was put up? A. Yes, sir. Q. Did you help do it? A. No; I directed how it should be done. Q. You brought it out of the forecandle; then what did you do with it? A. Rove it in its place, and sent it up on a derrick. Q. Then what? A. Then they went to work. Q. That was all that was done? A. Yes, sir; of course it was examined. I examined it before it was rove. Q. While it was coiled? A. No; after it was turned out of the coil and rove into its place I examined it, or while it was getting rove. Q. Describe what 'reeving' is. A. Putting it in its place. Q. Give us a little description. A. It is rove through the blocks—through the pulleys. Q. By steam power? A. No, by hand. You simply pick up the end and put it through. Q. You run it through your blocks and fall? A. Yes, sir. Q. While these men were reeving it, you cast your eye over the cable as it was pulled out and put in position? A. Yes, sir. Q. That was the character of examination you made at that time? A. Yes, sir. I took it and pulled it through my hand. Before I started to discharge the ship I picked it up and examined it to see if there were any bad places in it—if there was a flaw in it of any kind. Q. That is, after the fall has been put in position? A. While it is being put in position. Q. Do you mean to say that while these men are putting this cable in position you pass every foot of it through your hand? A. No, not exactly that, because with the experience I have had I do not want even to do that. I can tell a piece of rope when I see it. I picked the rope up to make sure. I do not exactly pull the rope altogether through my hand. Q. But you cast your eye over it generally and note any defects? A. Yes, sir."

Giving the fullest weight to the testimony of the mate, his so-called "inspection" of the wire cable seems to us to have been little more, if any more, than a mere visual inspection. But at the best it was very superficial. In view of the circumstances, we think it was altogether inadequate. The workmen were about to engage in a service involving hazard, in the hold of the ship, under ore-loaded buckets which were lowered and hoisted by means of the cable operated by the steam windlass. So far as the evidence shows, the cable had not before been subjected to such a strain. It had not been tested while aboard the Tresco. Whether or not it had ever been tested was not known to the ship's master. He did not know where or by whom the cable was manufactured, or where or by whom the splice was made. The covering had not been removed from the splice for the inspection of the latter since the cable was delivered to the Tresco. Before the cable was put to use on the occasion in question, reasonable prudence required the removal of the tarred service and an examination of the splice. This could have been done readily and in a very short time. We cannot accept the suggestion that, if the serving had been taken off, the defect in the splicing might not have been discovered. We think the defect would have been disclosed and the disaster prevented. In the circumstances, we think that the owner and master of the Tresco failed in their duty to the libelant, in that the cable was neither tested nor properly inspected before he was put to work in discharging the cargo of iron ore.

The Tresco, it will be perceived, is in no position to invoke the established principle that, if one "purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that as delivered to him, it is in a fair and reasonable condition for use." *Richmond, etc., R. R. Co. v. Elliott*, 149 U. S. 266, 272, 13 Sup. Ct. 837, 37 L. Ed. 728; *Westinghouse Elec. & Mfg. Co. v. Heimlich*, 127 Fed. 92, 62 C. C. A. 92. For, although the evidence must be within the reach of the owner and master of the Tresco, it has not been shown who the manufacturer of the cable was, or (what is more important) by whom the cable was spliced.

The views we have expressed above, and our conclusion that negligence in this matter is justly chargeable to the Tresco, find support in decisions of the courts. *The Rheola* (C. C.) 19 Fed. 926, 928; *The William Branfoot*, 52 Fed. 390, 3 C. C. A. 155; *The King Gruffydd* (C. C. A.) 131 Fed. 189.

There was, we think, no evidence upon which a charge of contributory negligence on the part of the libelant could be sustained. The evidence in support of the charge was simply this: Two of the libelant's fellow workmen testified that the splice was not smooth, and that they saw ends of wire protruding from it. The libelant testified that two or three hours before the accident he noticed the ends of the wire. When asked if he reported it, he answered, "No, I did not, because I thought it was spliced in a decent way and tucked in so that it would not part." We do not see why the roughness or protruding ends of wire should have alarmed the libelant. They did

not indicate to him any weakness, and he had a right to rely upon the care and vigilance of his employer.

The decree of the District Court is reversed, with costs, and the cause is remanded to that court with directions to proceed to the assessment of libellant's damages and enter a decree in his favor in accordance with the views expressed in this opinion.

DALLAS, Circuit Judge (dissenting). The casualty in question resulted from the imperfect splicing of the cable employed in doing the work in which the plaintiff was engaged. The cable in all other respects was fit for the work to which it was put, and it matters not what the general character of the inspection given it may have been, for nothing short of the removal of the "tarred service" in which the splicing was enveloped would have disclosed its defectiveness, or have availed to avert the accident. This, in the opinion of the majority of the court, "reasonable prudence" required to be done, but I am unable to concur in that opinion. The legal obligation of a master to be regardful of the safety of his servant is not founded upon any doctrine which is peculiar to the contract for personal service, but upon the general rule that every one is bound, in his acts and conduct, to be duly careful to avoid doing hurt to others. Wherever one man is, as a matter of business, supplied by another with any article which is liable to inflict injury when being used, he, though not a servant, is entitled, precisely as if he were, to assume that ordinary care has been taken to see that the article is a reasonably safe one. *Dixon v. Bell*, 5 Maule & S. 198; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Smith v. R. R. Co.*, 19 N. Y. 127, 75 Am. Dec. 305; *Caswell v. Worth*, 5 El. & Bl. 849; *Blakemore v. Railroad Co.*, 8 El. & Bl. 1035; *MacCarthy v. Young*, 6 Hurl. & N. 329; *Copeland v. Draper*, 157 Mass. 558, 32 N. E. 944, 19 L. R. A. 283, 34 Am. St. Rep. 314; *Story*, *Bailm.* §§ 275, 390, 391a; *Redf. Carr.* § 513, note. The duty of the officers of this vessel, with respect to the cause of the plaintiff's injury, was completely discharged if they omitted no precaution concerning it which an ordinarily prudent person would have taken, and I do not believe that any man, except an uncommonly distrustful one, would have thought it necessary to take the cover from this splicing. *Reilly v. Campbell*, 20 U. S. App. 334, 59 Fed. 990, 8 C. C. A. 438; *Baulec v. Railroad Co.*, 59 N. Y. 359, 17 Am. Rep. 325; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; *Tuttle v. Railroad Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114. The cable itself was amply strong, and there was nothing to excite suspicion that it had been so improperly spliced as not to be of substantially uniform strength throughout. The badly made connection was a snare for which ordinary caution would not be on the watch, and the defect was a latent one which ordinary vigilance would not detect.

I do not think that the judicial decisions referred to in the opinion of the majority support the views which are there expressed. In *The Rheola* (C. C.) 19 Fed. 928, "the chain was defective. * * * It was rusted, and considerably worn in appearance. The breaking of the other chain was a circumstance to direct attention, and put the

master of the steamer on inquiry." In the present case there was nothing in the appearance of the splicing to indicate its weakness, or to put any officer of the vessel on inquiry respecting it. In *The William Branfoot*, 52 Fed. 392, 3 C. C. A. 155, it was said:

"It is true that the floor of the ship covered the flanges of the stanchion and the bolts fastening them to the tank, but the tests of an inspection are not merely those of eyesight, and, although the absence of rivets at the bottom of the stanchion might have been concealed, it must be assumed that whether the stanchion was secure or insecure could have been discovered without involving tearing up the deck to ascertain, in the first instance, the exact defects which existed."

In the case before us, without taking off the service, the defect in the splicing could not have been perceived. In *The King Gruffydd* (C. C. A.) 131 Fed. 191, the charge of negligence was, upon the special facts of that case, sustained; but although the captain had testified that gear of the kind there in question "ought to be examined every time they are taken down and put up," yet the court said that, "under the authorities, there was no obligation to take the structure apart on each of these examinations," and in support of this statement cited *The Olympia*, 61 Fed. 120, 9 C. C. A. 393, and *Killman v. Robert Palmer & Son Co.*, 102 Fed. 224, 42 C. C. A. 281. The opinion of the court in each of these cases may be profitably read in connection with this one, but I content myself with briefly stating that in the first it was held that an accident which resulted from the breaking of a rope in which there were no patent defects was one which, for that and other reasons, "could not have been prevented by that degree of foresight, care, and caution required by law"; and in the second that, in the absence of anything to put him upon inquiry, the defendant, the employer of the plaintiff, was not negligent in failing to remove an eyebolt, which had been in use for about a year or a year and a half, for the purpose of searching for latent defects in it.

In my opinion, the decree of the court below (128 Fed. 780) was right, and therefore I dissent from this judgment of reversal.

SUPREME COUNCIL A. L. H. v. LIPPINCOTT.

(Circuit Court of Appeals, Third Circuit. February 13, 1905.)

No. 17.

INSURANCE—CONTRACT—BREACH—RESCISSION—ELECTION.

An insurance society, having issued to plaintiff a certificate for \$5,000, passed a by-law reducing insurance certificates of \$5,000 to \$2,000, and thereafter refused to consider plaintiff's certificate in force for more than that sum. Plaintiff protested against such attempted reduction, offered to pay assessments on the full face of his certificate, and thereafter paid assessments based on the reduced amount under protest for a period of two years and five months, when he notified defendant of his intention to cancel the insurance, and demanded repayment of assessments paid. Held that, though plaintiff was entitled to such relief on defendant's breach of its contract in the first instance, he, having elected to treat the contract as continuing, notwithstanding defendant's breach, by pay-

ment of assessments during such time, was not entitled to make a second election to rescind.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 457-464, 1888.

Mutual benefit insurance contracts as affected by subsequent provisions and amendments of charter, constitution or by-laws, see note to Supreme Council A. L. H. v. Champe, 63 C. C. A. 285.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 130 Fed. 483.

F. P. Prichard, for plaintiff in error.

J. H. Brinton, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. It was decided by this court in Supreme Council American Legion of Honor v. Black, 123 Fed. 650, 59 C. C. A. 414, that by reason of the adoption by the corporation of the by-law reducing the insurance certificate from \$5,000 to \$2,000 and putting the by-law into effect by making assessments on the reduced basis and notifying the certificate holders, a certificate holder who had performed his part of the contract, and had not consented to the reduction, might elect to treat the contract as rescinded, and sue immediately to recover back all the assessments he had paid under his certificate. We applied to the case the principle enunciated in *Hochster v. De La Tour*, 2 El. & Bl. 678, *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460, and *Rochm v. Horst*, 178 U. S. 1, 13, 20 Sup. Ct. 780, 44 L. Ed. 953, that when one party to a contract to be performed at a future time announces his intention not to perform it, the other party, if he chooses, may elect to act upon such announcement as a wrongful renunciation of the contract, and may thereupon treat the same as a breach of the contract, and bring suit at once for such breach. Black had given immediate notice that he regarded the by-law as a breach of the contract, and he promptly brought his action. In the subsequent case of *Supreme Council American Legion of Honor v. Daix* (C. C. A.) 130 Fed. 101, we held that the certificate holder there suing had not lost his right to treat the contract as rescinded, and recover back the assessments he had paid, simply because of a delay of two years and three months in giving notice of his election to do so, he having done nothing in affirmance of the by-law or indicating a waiver of his right to treat the contract as rescinded, and having done no act tending to mislead the corporation, and it not appearing that the corporation had suffered any injury from the delay of the plaintiff in signifying his election to rescind. The present case differs from the two former ones (the cases of *Black* and *Daix*) in this: that immediately upon the adoption and putting into effect of the by-law the plaintiff (Lippincott) made his election not to treat the contract under his \$5,000 certificate as at an end, or broken, but to keep the contract in full force, and to maintain unimpaired all his rights thereunder; and to that position he steadfastly adhered for a period of two years and five months. The court below, in its opinion, says: "The unquestioned facts show plainly that the plaintiff, by his words and conduct, declared his intention not to assent to the reduc-

tion of his certificate, but to hold on to the original agreement." To this latter end he protested against the attempted reduction, offered to pay assessments upon the full face of his certificate, and thereafter paid assessments based upon the reduced amount, but always under protest, until February 28, 1903, when he wrote to the local council: "I shall discontinue to pay the dues and assessments on the \$5,000 certificate issued to me, and will ask you to return me the amount paid by me on the same up to October 1, 1900, at which time, by the adoption of the resolution, you abrogated your contract with me." Now, undoubtedly the plaintiff had kept his contract alive, so that, if he had died between October 1, 1900, and February 28, 1903, his beneficiary (Mrs. Lippincott) could have recovered the amount of his insurance certificate, \$5,000. The protests which accompanied the plaintiff's payments of assessments were intended merely to preserve his contract rights under his \$5,000 certificate, and had no other effect.

This action was brought on March 18, 1903, for the recovery of the dues and assessments paid by the plaintiff under his certificate prior to October 1, 1900, the date when the reducing by-law of August, 1900, went into effect. Anticipatory breach of the contract is the ground of recovery relied on. Can the plaintiff recover, in view of his election, made in October, 1900, not to accept the defendant's action as an anticipatory breach, but to treat the contract as continuing in full force, his subsequent retention of membership in the order, and his payments of assessments down to February 28, 1903? This question can best be answered by referring to what was said in *Hochster v. De La Tour*, *Johnstone v. Milling*, and *Roehm v. Horst*, *supra*, the leading cases on the subject of anticipatory breaches of contracts. We extract from these cases the following principles: Where one party to a contract to be performed in the future, before the time for performance arrives, refuses to perform, or declares his intention not to perform, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such renunciation, however, in and of itself does not work a rescission, for one party to a contract cannot, by himself rescind it. But by making the wrongful renunciation he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect to such wrongful rescission. L. R. 16 Q. B. Div. 467. A declaration by the promisor, before the time for performance has arrived, of his intention not to perform, is not in itself, and unless acted on by the promisee, a breach of the contract. Such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. Id. 473. In *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460, 467, Lord Esher, Master of the Rolls, said:

"The other party may adopt such renunciation of the contract by so acting upon it as, in effect, to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation. If he does not wish to do so, he must wait for the arrival of the time when, in the ordinary course a cause of

action on the contract would arise. He must elect which course he will pursue."

Now, the plaintiff was not bound by the action of the corporation in adopting the by-law of 1900 and putting it into effect. His contract remained unaffected. But he acquired the right of electing either to treat the attempted reduction of his certificate as a breach of the contract and ground for making an end of it with an immediate right of action for the recovery of damages, or else to hold fast to his contract. The plaintiff chose the latter course. He elected to keep the contract alive, and did so. The court below did not doubt that the plaintiff had elected to keep the contract alive. In its opinion the court states the question here to be "the right of a member of the defendant order to rescind his contract after having once elected not to rescind." And the court held that the plaintiff was not precluded, even after the lapse of two years and five months, from making a second election to rescind the contract. To this view we cannot assent. In the circumstances we think it was not open to the plaintiff to make a second election, reversing his former one. *Clough v. London and Northwestern Ry. Co.*, L. R. 7 Exch. 26, 34. Speaking of the right of election to avoid a sale of personalty, the court there said:

"And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. And as is stated in Com. Dig. Election, c. 2, if a man once determines his election it shall be determined forever; and as is also stated in Com. Dig. Election, c. 1, the determination of a man's election shall be made by express words or by act. And consequently we agree with what seems to be the opinion of all the judges below that, if it can be shown that the London Pianoforte Company have at any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, their election has been determined forever."

The principle of the finality of an election once made is applicable, we think, to the present case.

We see no ground upon which the plaintiff can avoid the election he made in October, 1900. We cannot agree that it was "a hasty and ill-advised decision." It seems to us to have been intelligently and deliberately made upon full knowledge of all the facts. Moreover, the plaintiff rested content with his election for two years and five months. His election to keep the contract alive is not now open to reconsideration. Nor can we give our assent to the proposition urged by the defendant in error that the breach of contract was a continuing one, and therefore that the plaintiff could rescind the contract at any time up to the time set for performance. All the grounds warranting rescission existed and were complete at the time the plaintiff made his original election. The right of the plaintiff to abrogate the contract was gone forever when he elected not to rescind. His exercise of the right of election fixed the contractual relations of the parties. Those relations were not thereafter subject to change at the mere pleasure of the plaintiff.

The views we have above expressed require us to render the judgment following: The judgment of the Circuit Court is reversed, and the cause is remanded to that court, with direction to enter judgment in favor of the defendant non obstante veredicto.

BARNSDALL et al. v. O'DAY et al.

(Circuit Court of Appeals, Third Circuit. February 6, 1905.)

No. 29.

1. FRAUD—ACTION FOR DAMAGES—EVIDENCE.

In an action by purchasers against their vendor to recover damages on the ground that plaintiffs were induced to purchase the property by a false and fraudulent representation as to its actual production of petroleum, and "that the pipe-line statements of the runs of oil from said property showed the correctness of the aforesaid representation." evidence of what the pipe-line statements did in fact show was pertinent and admissible, to be considered by the jury, even though they may not in themselves have correctly shown the amount of actual production.

2. SAME—DEFENSES—RATIFICATION OF CONTRACT MADE BY AGENT.

The bringing of an action by a principal against his agent in the purchase of lands for the amount of a commission secretly paid him by the vendor does not operate to ratify the contract, so as to discharge the vendor from liability in damages for fraud and deceit, by which, with the assistance of the agent, the sale was induced.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 636, 637, 643.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Eugene Mackey and James W. Lee, for plaintiffs in error.

S. S. Mehard, for defendants in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. It is not necessary to refer to the several specifications in this case. The three points made in the brief for plaintiffs in error present the only questions which it is necessary to consider.

1. The action was brought to recover damages for injury alleged to have been sustained by the plaintiffs below (defendants here) by reason of their having been induced to purchase certain property from the defendants below by a false and fraudulent representation of its actual production of petroleum oil, and "that the pipe-line statements of the runs of oil from said property showed the correctness of the aforesaid representation." This is a brief, but, for the present purpose, a sufficient, abstract of the plaintiffs' allegation of their cause of action; and that evidence of what the pipe-line statements did show was directly pertinent to the issue joined upon that allegation seems to us to be obvious. But if the only legitimate subject of inquiry had been as to the quantity of oil actually produced, regardless of what the pipe-line statements showed, yet we could not agree that those statements ought to have been excluded. It was not essential to their relevancy that they should, in and of themselves, accurately disclose how much oil had been really produced from the premises. There was testimony that they did not do so, but they supplied information which, in connection with the other evidence, might reasonably be considered by the jury in determining that matter for themselves, and this sufficed to justify their admission.

2. The agent of the plaintiffs below, in making this purchase for them, asked and received from the defendants the sum of \$8,700 for himself. This payment was secretly made, and it is admitted, as it must be, that by reason thereof the sellers were precluded from maintaining that whatever knowledge the agent had respecting the real production of the property was imputable to his principals. But it is averred that the learned court erred in declining to rule that because, when the plaintiffs below, long afterward, learned of this misconduct of their agent, they made it the ground of an action against him, they "legalized the payment and receipt of such commission, and he thereby became their full agent for all purposes of the purchase, and all knowledge of the production or condition of the property acquired by him at or before the time of the sale would be knowledge to his principals, the plaintiffs herein." This proposition was properly negatived. It could not have been affirmed without holding that a principal, who seeks redress against his agent for having wrongfully accepted money from those with whom he was authorized to deal, thereby discharges the latter from all liability for a fraud by which they, with his assistance, had misled the principal to his hurt. We know of no rule or principle of law which would justify us in so deciding. "Agents are, in a sense, trustees, and they owe to their principals a similar duty to that which trustees owe to their cestui que trust"; and it would hardly be claimed, we think, that a cestui que trust could not require his trustee to account for money he had accepted from persons whose interest was opposed to that of the trust, without condoning a fraud which had been perpetrated in the course of the transaction in connection with which that money had been received. No authority has been cited which lends support to the contention that by bringing their action against the agent the defendants in error ratified the contract which was induced by the fraud in which he had participated. The subject-matter of this action is not the same as that of the action against the agent; the two frauds were different. *Keator v. St. John* (C. C.) 42 Fed. 585, was an action brought by Keator against St. John on the ground that, while St. John was his agent for the purpose of purchasing some pine lands, he (St. John) received \$18,000 from the other side. St. John set up as a defense a former judgment against him of \$5,000, which he alleged was for the same subject-matter; but, on motion for new trial, Mr. Justice Miller said—

"That the judge of the Circuit Court was right in refusing to hold that the first suit was a bar to the second action. The frauds were different, any way. The first fraud for which a recovery was sought was for false representations made to the plaintiff by St. John as to the value of the property. * * * Mr. St. John professed to have that knowledge, and made false statements about it, for which the jury held him liable in the sum of \$5,000. That was totally different from the \$18,000 which he actually received as his reward from Gillespie [Glaspie] for helping to sell their land." *Keator et al. v. St. John* (C. C.) 42 Fed. 585.

Subsequently Keator sued the seller of the same pine lands, and, upon writ of error in that suit, the Court of Appeals for the Eighth Circuit said:

"It is further contended that the Circuit Court erred in instructing the jury that the case in hand was not barred by a previous recovery in an action by Keator & Son against St. John. The merits of this contention can be best tested by a brief statement of the facts upon which the defense was based. Keator & Son first brought an action against St. John to recover damages for the same fraud and deceit that is complained of in the case at bar, and in such suit recovered a judgment for \$5,000, which judgment has not been satisfied. In the course of the trial of the latter suit for fraud and deceit, Keator & Son discovered that St. John had received \$18,000 from Glaspie of the sum which they had paid for the pine lands. They thereupon brought an action against St. John for the latter sum, and recovered the amount sued for, with interest, which judgment has been paid. The last-mentioned action was brought and maintained solely upon the ground that St. John was their agent in negotiating the purchase of the pine lands, and that the profit which he had secretly made in that transaction through connivance with Glaspie belonged to his principals. In stating their damages in the present action, the plaintiffs below have given credit for the amount of the second judgment which was recovered against St. John, and was by him paid. It is now insisted that the payment of the second judgment against St. John for \$18,000 and interest operated to satisfy the first judgment against him for \$5,000 in the action for fraud and deceit, and that the satisfaction of the latter judgment bars a recovery against Glaspie in the present action. We are of opinion that the Circuit Court properly directed the jury to disregard the plea of a former recovery, for the reason that the cause of action sued upon in the second suit against St. John was totally unlike the cause of action in the first suit, and totally unlike the cause of action in the suit at bar. There might have been a recovery against St. John in the second action even though no misrepresentations had been made by him as to the quantity of timber that the pine lands would yield, and the evidence which was sufficient to warrant a recovery in the second suit was utterly insufficient to justify a verdict in the first action. Furthermore, the damages recoverable in the respective suits were essentially different. These considerations warrant the conclusion that the payment of the second judgment against St. John did not operate to satisfy the first judgment for fraud and deceit, as was practically held by Mr. Justice Miller in *Keator v. St. John* (C. C.) 42 Fed. 585." *Glaspie v. Keator*, 5 C. C. A. 481, 56 Fed. 210.

We concur in the views expressed by the learned judges in these cases, and we think that the position taken by the appellants in this one cannot be reconciled with them.

3. The complaint of the answer which was made by the court below to an inquiry of the jury is without merit. The answer was simply responsive to the question propounded. It did not confine attention to the aspect of the case which the question presented. On the contrary, the learned judge said:

"And if you accept that which the parties put in their contract as the value of the property, based on a 402-barrel production, and you find that the production was, in point of fact, less, and, as we stated to you, that there was fraud, as we defined before in charging you, then you would be warranted in awarding as damages the difference between 402 barrels and what the production actually was."

We find no error in this record, and therefore the judgment of the Circuit Court is affirmed.

WERNER CO. et al. v. ENCYCLOPÆDIA BRITANNICA CO.*

(Circuit Court of Appeals, Third Circuit. January 11, 1905.)

No. 53.

1. COPYRIGHT—INFRINGEMENT—PRELIMINARY INJUNCTION—REVIEW.

The granting of a preliminary injunction in a suit for infringement of a copyright being within the discretion of the trial court, an order granting the same will not be set aside on appeal unless it is clearly shown that the court abused its discretion, or was mistaken in its view of the situation.

2. SAME—OBJECTIONS NOT MADE AT TRIAL.

Where, on an application for a preliminary injunction in a suit for infringement of a copyright, defendant did not object or introduce proof to show that complainants' articles, alleged to have been infringed, were not derived from original sources, such objection could not be considered on appeal from an order granting such injunction.

3. SAME—LACHES.

Where, in a suit for infringement of copyright, it appeared that complainants and their predecessors in title had no knowledge of the alleged infringing articles until December, 1902, less than a year and a half before suit brought, and that complainants prior to that time were not charged with notice thereof, and the infringing articles did not appear in defendant's publication at first, complainants were not barred by laches.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 70.

Laches as a defense to action for infringement of copyright, see notes to *Taylor v. Sawyer Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.]

Acheson, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 130 Fed. 460.

John G. Johnson, for appellants.

Frederic R. Kellogg, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from an order made in the Circuit Court of the United States for the District of New Jersey, granting a preliminary injunction against the Werner Company and the American Newspaper Association, defendants below and appellants here, at the suit of the Encyclopædia Britannica Company, complainant and appellee, restraining the publication of certain articles, entitled "Georgia," "Homestead," "Honduras and British Honduras," "Indian Territory," "La Fayette" and "Louisiana," in the American edition of the Encyclopædia Britannica, known as the "Werner" edition. The bill alleged that the said articles were infringements of certain copyrights owned by complainant and appellee. This injunction was granted on bill, answers and affidavits. We are therefore called upon to review the propriety of the discretion exercised by the court below, in granting a preliminary injunction.

As the granting or withholding of a preliminary injunction is within the sound discretion of the court whose jurisdiction is invoked, reviewing courts are reluctant to interfere with the exercise of this dis-

* For dissenting opinion, see 134 Fed. 1024.

cretion, unless it is made clear that there has been an abuse of such discretion, or that the court below was mistaken in the view taken by it of the situation, with reference to which the order was made. A careful reading of the pleadings and moving papers in this case, does not convince us that the court below abused its discretion in the premises, or that it was so mistaken in the exercise thereof as to make a reversal of its action necessary or proper.

The wrong complained of being an infringement of copyrights, the learned judge of the Circuit Court has received testimony of the comparisons made by expert witnesses, as aids to the court, but has chiefly relied, for the making out of a *prima facie* case, upon such comparisons as he himself has made, between the alleged infringing articles published by defendants below, and the copyrighted articles which they are alleged to infringe. We incline to the opinion that the learned judge has justified himself by these comparisons, in making the order complained of. We therefore refer to his opinion in *extenso*, as sufficiently stating the grounds of his decree. 130 Fed. 460. We purposely abstain from expressing any views of our own, that might seem determinative of the result after final hearing. The suggestion was made by counsel for the appellants, at the argument before us, that inasmuch as these articles are not works of imagination, but are compilations and compendiums of facts necessarily gathered from many sources already published, the similarity between them results from the common sources from which the facts were derived, and further, that it was necessary for complainant below, not only to allege but prove that his copyrighted articles were original and not mere copies from other published works.

The bill of complaint does state that the several copyrighted articles were the new and original productions of their several authors. The *prima facies* of this statement, though slight, will serve for the motion before the court until some evidence is adduced by defendants to impugn the originality of the said articles. Consideration must be had of the truth that it is hard to prove originality, except by the affidavit of the author, and an attempt to prove it is something like attempting to prove a negative; that is, that the articles in question are not plagiarized. Nevertheless, the right of complainant to maintain a suit for infringement of his copyright depends upon the originality of his own production, and some *prima facie* proof at the hearing must be made in this regard. And still more, if the originality is impugned by evidence at the hearing, tending to show want of originality, that evidence must be overcome by the complainant to the satisfaction of the court. The record discloses no such evidence in the affidavits on behalf of the defendants below, nor was the suggestion to which we have alluded, as made at the argument before us, namely, that the similarity of defendants' articles was due to their both having been derived from common sources, made in the court below, much less supported by any testimony. This suggestion, if supported by proof, may be very important at the final hearing, or on a motion made at any time before final hearing, for a dissolution of the injunction, but it cannot now affect our judgment of the propriety of the order made for a special injunction, on the case as made before the court below.

We have also carefully considered the contention of the defendants below, that a preliminary injunction should not be allowed, because of the laches of the complainant and his predecessors in title. We think this defense has been properly disposed of in the opinion of the learned judge of the court below. Not only is there no proof that, at the time of the suits of *Black v. Ehrich* (C. C.) 44 Fed. 793, and *Black v. Henry G. Allen Co.* (C. C.) 56 Fed. 764, either complainant or its predecessors in title had any notice of the alleged infringement of the complainant's copyrights, by the articles herein referred to, but there is in the record an affidavit by Charles Scribner, an agent of the Blacks during the litigation, and produced by the appellants here, to the effect that certain of the articles charged by the complainant in this suit to be infringements, were not found in complainant's tenth volume, thus strongly negating knowledge or notice at that time of the alleged infringements.

The said order is therefore affirmed.

BICKMORE GALL CURE CO. v. KARNS et al.

(Circuit Court of Appeals, Third Circuit. February 1, 1905.)

No. 14.

1. UNFAIR COMPETITION—IMITATION OF LABELS AND DRESS OF GOODS.

Where two persons are engaged in selling like goods, while neither can acquire the exclusive right to aptly designate and describe them, or to attractively present them for sale, with appropriate directions for their use, neither has the right to do any of those things in such manner as to mislead purchasers into the belief that his goods are those of his competitor; and, where it is shown that the resemblances in such particulars are so calculated to mislead that they can reasonably be accounted for only on the hypothesis of simulation and design, a case of unfair competition is made out, which entitles the older dealer to an injunction, even though actual deception is not shown.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 78-86.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. SAME.

The boxes, cartons, labels, and advertising matter used by complainant and defendants in the sale of their respective remedies for galls on horses and cattle *held* to disclose such similarity as to evidence a design to deceive purchasers on the part of defendants, who entered the business after complainant's remedy had become generally known, and to constitute unfair competition.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 126 Fed. 573.

J. F. Gould and Edmund Wetmore, for appellant.

S. S. Mehard and John G. Johnson, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree dismissing a bill in equity which charged the defendants (here the

appellees) with infringement of certain trade-marks adopted and registered by the complainant (here the appellant) for use upon its "gall cure," and also with unfair competition in trade with respect to that commodity. Whether the first-mentioned ground for relief was established need not be decided, for, in our opinion, the evidence, in its entirety, at least made out a case of unfair competition, and nothing more was requisite to the maintenance of the suit.

A brief statement of the more important facts which the record discloses is necessary to a just consideration of the rights of the respective parties. About 20 years ago, Abiel P. Bickmore put his gall cure upon the market. He manufactured and sold it, but not very extensively, until about January, 1892, when he transferred to the appellant all his rights therein or connected therewith; and that corporation succeeded him in the business, and has since actively prosecuted it. Early in the year 1897 the appellees entered the field by distributing a circular advertising their gall cure. Mr. Alexander S. Karns himself has testified that this circular was copied, to a material extent, from the circular and other publications of the appellant; and there can be no doubt, as was said by the learned judge below, "that his originally contemplated purpose was to use the phraseology of commendation and description long used by complainant." The appellant promptly gave notice that this was an invasion of its rights, and thereupon the appellees ostensibly undertook to designate, describe, and dress their product in such manner as to prevent purchasers exercising such care as is ordinarily taken in buying articles of that sort from accepting it as being that of the appellant. This we are asked to believe was in good faith intended, but we find it impossible to do so. If it had been really purposed to distinguish the appellees' gall cure from that of the appellant, that purpose might have been accomplished without any curtailment of the right of the appellees to suitably name and characterize their own. But the fact is, as the evidence has convinced us, that the object actually in view was not to obviate confusion, but to escape responsibility for causing it. Undoubtedly, where two persons are engaged in selling like goods, neither of them has or can acquire the exclusive privilege to aptly designate and describe them, or to attractively present them for sale, with appropriate directions for their use. But neither of them has the right to do any of these things in such manner as insidiously to mislead purchasers into the belief that his wares are those of his competitor; and we cannot agree that the resemblances in designation, description, presentment, and directions which are complained of in this case "may fairly be attributed to the fact that both parties sell remedies of the same kind, and intended to accomplish the same result." They exhibit something more than a family likeness. Mutuality of relationship to the same kind of thing does not suffice to account for them, and, except upon the hypothesis of simulation and design, their adaptation to mislead would be inexplicable. The two preparations themselves are alike in appearance, but this may arise from their being composed of like

ingredients, and therefore would not alone be sufficient to warrant the inference of fraudulent intent. But the fact that they are so nearly the same in color and consistency as scarcely, if at all, to be distinguishable by inspection or use, is not without pertinency, because, by reason of that fact, a lesser degree of similarity in the devices attending their sale is sufficient to induce the belief that they have a common origin, than would have been requisite if the substances themselves had been obviously different. The appellant spent a considerable sum in advertising, and had finally succeeded in establishing a profitable trade, when the appellees attempted to appropriate the phraseology which it had long used, and so to reap the benefit of its efforts and expenditures. They learned that the law would not permit this to be done, and then they made some changes; but they were only colorable. The wrongful purpose was neither abandoned nor hindered. It was only more speciously, but still potently, pursued. In consequence of its long-continued use of the picture of a working horse, in connection with the phrase, "Be sure to work the horse," the appellant's remedy had become well known as "Work the Horse Gall Cure" before the appellees applied to their remedy the picture of four working horses in connection with the words "Four Horse Gall Cure," and the phrase "Always work the horse while using the cure." These matters, with some slight and unimportant variations, prominently appear upon their several packages, circulars, display cards, and directions. Their larger boxes, in which the smaller ones are delivered to dealers, are of substantially the same size, and of exactly the same shape, as those of the appellant. Both are yellow or yellowish in color; and the smaller boxes, in which the respective salves are sold at retail, present like features of correspondence. It is not practicable to reproduce the several packages and publications of the respective parties, and, without doing so, it would be difficult to convey an adequate impression of the significance of the particular points of resemblance which they display. But this need not be attempted, for the true question is not whether the boxes, circulars, advertisements, and directions of the appellees are, in their details, the same, or nearly the same, as those of the appellant, but whether the general effect produced by those of the appellees is such as would be likely to lead ordinary purchasers to accept their gall cure as being that of the appellant; and our consideration of the evidence, and especially of the exhibits, has irresistibly led us to the conclusion that it is. The complainant would have been entitled to protection against the attempt to deprive it of its trade or customers even if it had not proved that such attempt had been successful. *McLean v. Fleming*, 96 U. S. 252, 24 L. Ed. 828. The means devised to that end were well calculated to mislead, and it was not essential that any particular person should have been actually misled. *Scheuer v. Muller*, 74 Fed. 225, 20 C. C. A. 161; *Swift & Co. v. Bronner* (C. C.) 125 Fed. 826. But we may add, without referring to the testimony in detail, that we think it sufficiently shows that, in at least some of the instances to which it relates, the object designed was accomplished.

The decree of the circuit court is reversed, and the cause will be remanded to that court for further proceedings in pursuance of this determination, and in conformity with the foregoing opinion.

PACIFIC LUMBER CO. v. MOFFAT.

(Circuit Court of Appeals, Eighth Circuit. December 5, 1904.)

No. 1,973.

PRINCIPAL AND AGENT—POWERS OF AGENT—CONTRACT IN FRAUD OF PRINCIPAL.

Defendant's agent in charge of a lumber yard, pursuant to an agreement between him and an agent for plaintiff, signed an order on plaintiff in defendant's name for a large quantity of shingles at prices in excess of the market price, the purpose being to compel defendant without his knowledge to pay a debt due plaintiff by a former owner of the yard, which was insolvent. The order was accepted by plaintiff's agent, and placed in escrow to be delivered when defendant's manager should quit his employment, but, so far as shown, it was never delivered. *Held*, that defendant's manager, however broad his authority in the management of the business, had no power to bind him to pay the debt of another; and that the order, never having been ratified by defendant, was wholly fraudulent and void, and would not support an action to recover damages for its breach, although defendant's manager without his knowledge had accepted and paid for certain shipments thereunder.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 313, 314, 589-592.]

In Error to the Circuit Court of the United States for the District of Colorado.

The Pacific Lumber Company, plaintiff in error, and plaintiff below, is a California corporation engaged extensively in the manufacture and sale of redwood lumber and shingles, and during the year 1897 had made large sales of such products to the Chicago Lumber Company of Denver, which at the end of January, 1898, was indebted to the plaintiff in about the sum of \$2,700. On January 31, 1898, the Chicago Lumber Company, having become insolvent, to provide for the payment of its indebtedness to a Denver bank of which the defendant, Moffat, was a managing officer, sold, transferred, and delivered to the said Moffat its entire stock of lumber and shingles and all its assets, and thereupon the said Moffat, as successor of the Chicago Lumber Company, engaged in the business of dealer in lumber, shingles, and lumber products at the same place in Denver, and employed as his agent in the management of said business one B. F. Vreeland, who had been one of the officers of the Chicago Lumber Company, and in the general charge of its business. The plaintiff, upon learning of the insolvency of the Chicago Lumber Company and the sale of its entire stock in trade and assets to the defendant, sent L. D. McDonald, its agent in charge of its Eastern sales, to Denver to endeavor to get payment or security for the said indebtedness of the Chicago Lumber Company to the plaintiff. It was the purpose of Moffat, known to Vreeland, to soon transfer and turn over to a new corporation, to be formed for that purpose, the stock in trade and business of dealing in lumber and lumber products which Moffat was then carrying on in his own name. The plaintiff's agent, McDonald, conferred with Vreeland, whom he found in charge of the defendant's business, respecting the indebtedness of the Chicago Lumber Company to the plaintiff, and, in accordance with an agreement then made between said McDonald and said Vreeland, a written order was then made, dated at Denver, February 12, 1898, signed "D. H. Moffat, By B. F. Vreeland, Agent," directing the Pacific Lumber Company

to ship and charge to D. H. Moffat or his incorporated successor, Denver, Colo., 90 carloads "Clear" and "Star A Star" redwood shingles, averaging 150,000 shingles to the car, at the prices of \$2.40 per thousand for "Clears" and \$2.20 per thousand for "Star A Star," delivered at Denver, the brands to be named later; terms, 60 days, or 2 per cent. discount for cash. This order was, in writing at the foot thereof, accepted for the Pacific Lumber Company by L. D. McDonald, agent. At the time of such making and acceptance of said order, the market value at Denver of "Clear" redwood shingles was \$2.20 per thousand, and of "Star A Star" redwood shingles \$2 per thousand. The excess of 20 cents per thousand above the market prices at the date of the order amounted upon the whole order to \$2,700, and it was the expressed purpose and intention of the said McDonald and said Vreeland to thus enable the plaintiff to obtain from Moffat, over and above the market value of the shingles so ordered, the whole amount owing to plaintiff by the insolvent Chicago Lumber Company. The said order, though accepted as aforesaid, was not delivered, but was put in a sealed envelope and inclosed in a letter to one C. R. Johnson, of San Francisco. The letter is as follows:

"Denver, Colo., Feby. 12, 1898.

"C. R. Johnson, Esqr., S. F., Cal.—Dear Sir: We enclose in sealed envelope a document which we desire to place in your hands as escrow holder—to be delivered to Pacific Lumber Co. of your city at such time as Mr. Vreeland may cease his connection with D. H. Moffat or his successor in lumber business in Denver, Colo., otherwise to hold same until such time as you may be called upon to deliver the document referred to—to either party on an order signed by both the parties whose signatures are appended. B. F. Vreeland,
"L. D. McDonald."

The defendant, Moffat, had no knowledge nor information of the making or acceptance of said written order, and it was the purpose and intention of the said Vreeland and McDonald to keep the defendant in ignorance thereof until such order should be delivered to the plaintiff by said Johnson pursuant to the terms and directions of their letter to said Johnson above quoted.

The defendant, Moffat, gave very slight attention to this lumber business at Denver during the time it was carried on in his name, but it was practically under the control and management of said Vreeland, who, in Moffat's name, bought of plaintiff several invoices of lumber and lumber products, which were paid for, and, among them, received and caused to be paid for four car loads of shingles as delivered on said written order. About April 1, 1898, Moffat's lumber business and lumber stock in Denver was turned over and transferred to the Chicago Lumber & Manufacturing Company, a new corporation, of which said Vreeland became president and manager.

Later, the defendant refused plaintiff's demand that he receive and pay for 86 car loads of shingles at prices such as are named in said written order, and this action was begun to recover \$4,515, the excess of the prices fixed in said written order above the market price of the same shingles at Denver when this action was begun. Defendant had never authorized nor in any way ratified the said written order, and never learned of its existence until October, 1898, and was not fully apprised of its terms until after this action was begun.

All these matters appeared in the testimony introduced by plaintiff upon the trial, and it did not appear that said written order had ever been delivered to the plaintiff, or that it was not still held by said Johnson as directed in the above quoted letter to him. After plaintiff had rested, the jury, under the direction of the court, returned their verdict for the defendant.

J. E. Robinson (William H. Jordan, on the brief), for plaintiff in error.

Gerald Hughes (Charles J. Hughes, Jr., on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

The order by Vreeland, as agent of defendant, upon plaintiff for 90 car loads of shingles at prices 20 cents per thousand above the then market prices, and the acceptance of the order by McDonald as plaintiff's agent, was the means then devised and adopted by those two persons purposely to defraud the defendant by causing him to pay the indebtedness of about \$2,700 then owing to plaintiff by the insolvent Chicago Lumber Company, in which debt the defendant had no concern. Vreeland's authority as agent to purchase and sell lumber and shingles and to manage that business for defendant, however general, did not authorize him to obligate and bind his principal to pay the debt of another. *Mechem on Agency*, §§ 307, 313, 392, 400. The testimony of plaintiff's agent, McDonald, shows clearly that this was the scheme agreed upon between these persons, and that they figured carefully the amount of shingles on which the excess price of 20 cents per thousand would cover that debt of the Chicago Lumber Company, and made the order for the amount of shingles which would accomplish that result. The personal letter of McDonald to Vreeland of August 19, 1898, speaks plainly of this device. The alleged contract upon which this action is based was therefore entered into by defendant's agent without authority, and was palpably fraudulent and void as to defendant, the fraud being participated in by plaintiff through its agent. There is in the evidence no color for claiming that it was ratified by defendant, and, indeed, he could not have ratified it, as he was without knowledge of its terms and the circumstances under which it was entered into. Plainly, the moving purpose for entering into this contract between these two agents was to defraud the defendant. There is nothing in the case to indicate that the business of defendant then, or for any reasonable time in the then future, could call for such a large quantity of shingles, if they could be had at or even somewhat below the then market price. The contract was indefinite as to when they were to be delivered. The definite matter agreed on was that defendant should be made to pay the debt of the insolvent company. Not only was all knowledge of the contract kept from defendant, but it was agreed that, while Vreeland should continue in the employ of defendant or of the corporation which was expected soon to succeed him, the contract should not be delivered to the plaintiff, but, unless sooner called in by order signed by Vreeland and McDonald, should remain in escrow in the hands of Johnson, to whom it was then transmitted by express, and in whose hands, and never, so far as appears, delivered to plaintiff, it still remains. This secrecy in respect to the contract for the sale of shingles is convincing evidence that the two agents fully appreciated its fraudulent character. Because the alleged contract was fraudulent and void, and because it never took effect by delivery, there was no evidence upon which a verdict for plaintiff could have been supported, and the direction of a verdict for the defendant was right. *Commissioners v. Clark*, 94 U. S. 278, 284, 24 L. Ed. 59.

The particular assignments of error not abandoned on the argument have been considered, and are not sustained.

The judgment is affirmed.

EDINBURG COAL CO. v. HUMPHREYS, Judge.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1905.)

No. 1,129.

1. MANDAMUS—JUDICIAL ACTION—NECESSITY OF DEMAND AND REFUSAL.

A writ of mandamus will not be granted to compel action by a court for which no application has been made to such court.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 44-46.]

2. SAME—NATURE AND GROUNDS.

The appointment of a receiver for a corporation, with power to borrow money, on the filing of a petition in involuntary bankruptcy against the corporation, is within the jurisdiction of the District Court, and neither the validity of such an order nor the effect thereon of a subsequent dismissal of the petition on a finding that the corporation was not subject to bankruptcy proceedings can be reviewed or determined by the Circuit Court of Appeals on an application for a writ of mandamus.

Mandamus. On demurrer to petition.

The petition here represents that upon a petition filed in the bankruptcy side of the District Court of the United States for the Southern District of Illinois, to adjudge the relator an involuntary bankrupt, and the resistance of the relator, that it was not a company engaged principally in mercantile pursuits, an order was entered finding that the court had no jurisdiction to declare the relator a bankrupt; sustaining a demurrer to the petition; and dismissing the petition.

The petition in the District Court to have the relator declared a bankrupt, was filed on the fifteenth day of June, 1900, and the order of dismissal was not entered until the sixth day of February, 1903. In the meantime, a receiver pendente lite was appointed to control and manage the property; who was directed to issue receiver's certificates to the amount of five thousand dollars, bearing interest at six per cent, and to borrow money upon the same.

The petition in this court further represents that the money was raised; that the receiver is still in possession of the property; and that the District Court is now entertaining a petition for the sale of the property, to answer to the obligations incurred by the receiver in the issuance of the certificates. The petition prays for a writ of mandamus directed to the respondent, commanding him forthwith to make such orders and entries as may be proper, and necessary, to enforce its judgment of dismissal; to restore to the petitioner completely and entirely, the property without loss or diminution; and for such other order as may be made in the premises.

To this petition the respondent has demurred upon the following grounds, among others: That no proper application has been made by the relator to the respondent to take the action asked for by the former, and no unwarrantable refusal to so act is shown; that the relator does not show that he has a clear legal right to the performance of the alleged duty at the hands of the respondent; that it does not appear that the law affords no other adequate and specific remedy; that the relator has other adequate and specific remedy; and that the relator has slept upon its rights for an unreasonable length of time.

John M. Dickson, for relator.

Clinton L. Conkling and James M. Graham, for respondent.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts). Were the proceedings in the District Court coram non judice, the relator's petition would fail because of want of application to the District Court before

the presentation of the petition here. Were this the correct view of the relation of the District Court to the relator, the petition for mandamus would be analogous to a writ of replevin, or a suit in detention, looking to the delivery of the property. In no such suit is a writ ever issued until demand has been made upon the party withholding the property. Under no view of this case, then, can this petition, on its present averments, be sustained.

But we do not think that the receivership proceedings in the District Court were *coram non judice*. Whether the relator was a company engaged principally in mercantile business or not—and whether, pending such determination, a receiver should have been appointed, with authority to borrow money—were judicial questions properly within the jurisdiction of the District Court, in the first instance, to determine. So also, what effect the order of dismissal should be held to have upon the receivership proceedings pending such order, is itself a judicial question to be determined according to legal principle, and primarily, by the District Court. *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; *In re Blake et al.*, 175 U. S. 114, 20 Sup. Ct. 42, 44 L. Ed. 94. Questions of this character cannot be revised in this court by a writ of mandamus. They must come up through the regular channels of appeal and error.

The demurrer of the respondent is sustained, and the petition of the relator is dismissed.

RUSSELL et al. v. RUSSELL.

(Circuit Court of Appeals, Third Circuit. February 1, 1905.)

No. 32.

RES JUDICATA—MATTERS CONCLUDED BY DECREE—EFFECT OF AFFIRMANCE ON OTHER GROUNDS.

A question expressly determined by a court of equity, whose decree is affirmed on appeal, is *res judicata* between the parties, although such question was not considered by the appellate court, whose affirmance was based on other grounds.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1026, 1156.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 129 Fed. 434.

Walter H. Bacon and Robert H. McCarter, for appellants.

John H. Hazleton, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The conclusion we have reached upon the question raised by the seventh specification of error is determinative, and no other will be considered. The Circuit Court adjudged that a certain indenture of antenuptial agreement, dated November 22, 1892, between John Russell of the first part, Herschell Mulford of the second part, and Lottie R. Brown of the third part, was "void and of no effect," and ordered "that the same be delivered up to be canceled."

In a case in which the parties were the same as in this one, and in which the same relief was prayed, the Court of Chancery of New Jersey had previously entered a final decree (47 Atl. 37) dismissing the bill, and the learned judge below was of opinion that if that decree had not been appealed from it would have precluded the complainant from maintaining this suit. He said:

"The vice chancellor, * * * taking the evidence of the agreement as a matter of independent and alternative relief, passed upon it, and decided adversely to the complainant's rights. If, then, the case stood on his rulings, she would be unquestionably concluded by them."

Thus far he was clearly right. He added, however:

"But the appeal removed the case in its entirety to a higher court, and it is the judgment there rendered that must control; which has to be determined by the views expressed by the court in the opinion filed."

We are unable to concur in this latter statement, and, as the decision of the court below upon the vital question of *res judicata* was founded upon it, we are constrained to hold that its decree was erroneous. The judgment in *Turley v. Turley*, 85 Tenn. 251, 1 S. W. 891, does not support it. In that case there had been a reversal, whereas the decree of the New Jersey court, with which this case is concerned, was affirmed. In the one instance the judgment relied upon had been revoked and annulled, while in the other it had not ceased to exist, but had been expressly continued in force. It was a subsisting judgment of a court of competent jurisdiction. It was rendered in a proceeding between the same parties, and it decided, on the merits, the point sought to be again controverted. It determined, not merely for that case, but for all cases between the same parties, that the instrument which the court below adjudged to be void and of no effect was a valid and effective one. *Wilson's Executors v. Dean*, 121 U. S. 531, 7 Sup. Ct. 1004, 30 L. Ed. 980; *Lyon v. Mfg. Co.*, 125 U. S. 698, 8 Sup. Ct. 1024, 31 L. Ed. 839; *Hughes v. U. S.*, 71 U. S. 237, 18 L. Ed. 303; *Baird v. U. S.*, 96 U. S. 432, 24 L. Ed. 703; *Nesbit v. Riverside District*, 144 U. S. 618, 12 Sup. Ct. 746, 36 L. Ed. 562; *Johnson Co. v. Wharton*, 152 U. S. 256, 14 Sup. Ct. 608, 38 L. Ed. 429; *Westcott v. Edmunds*, 68 Pa. 34.

For this reason the decree of the Circuit Court must be reversed, and the cause be remanded to that court, with direction to dismiss the bill of complaint, with costs.

It is so ordered.

UNITED STATES V. WINTER & SMILLIE.

(Circuit Court of Appeals, Second Circuit. December 7, 1904.)

No. 595 (2851).

CUSTOMS DUTIES—CLASSIFICATION—BUFFALO HIDES—CATTLE.

The hide of the mud buffalo of the Straits Settlements, an animal killed in the chase, is not within the provision for "hides of cattle" in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 437, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1676], but is free of duty under section 2, Free List, par. 664, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1688], covering "hides not specially provided for."

Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision in question reversed a decision of the Board of General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Winter & Smillie. This merchandise consisted of buffalo hides, which were classified under the provision for "hides of cattle," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 437, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1676], and which the importers contended were free of duty under section 2, Free List, par. 664, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1688], as "hides not specially provided for." The ground of this contention was that the particular kind of buffaloes from which the hides were taken are not "cattle," within the meaning of said paragraph 437, and that therefore the hides fall within the provisions of paragraph 664.

The evidence in the case was to the effect that the hides in question were taken from the mud buffalo of the Straits Settlements, an animal that is killed in the chase.

Compare *Rosbach v. U. S.*, 122 Fed. 1020, 57 C. C. A. 678, affirming (C. C.) 116 Fed. 781.

D. Frank Lloyd, Asst. U. S. Atty.

Frederick W. Brooks, for importers.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

At the conclusion of the argument the decision of the Circuit Court was affirmed in open court, without opinion; the merchandise being held to be free of duty as contended by the appellees.

CHRISTOPHER et al. v. NORVELL.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1905.)

No. 1,414.

NATIONAL BANKS—MARRIED WOMAN AS STOCKHOLDER—LIABILITY FOR ASSESSMENTS.

A married woman, who was a stockholder in a national bank at the time it became insolvent, is subject to the statutory liability for an assessment made thereon, at least in the absence of any state statute disabling her from owning the stock in her own right.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 921.

Who are liable as shareholders in national banks, see notes to *Beal v. Essex Sav. Bank*, 15 C. C. A. 130; *Earle v. Carson*, 46 C. C. A. 503.]

In Error to the Circuit Court of the United States for the Southern District of Florida.

H. H. Buckman, for plaintiffs in error.

Duncan U. Fletcher, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The plaintiff in error, Henrietta S. Christopher, wife of John G. Christopher, was a stockholder in the First National Bank of Florida, and as such stockholder was liable under the statutes of the United States for the assessment made by the Comptroller of the Currency on the stockholders of said bank. See sections 5151-5234, Rev. St. U. S. [pages 3465-3507, U. S. Comp. St. 1901]. Even if a defense on such line would avail the plaintiff in error, we find nothing in the laws of Florida disabling married women from owning in their own right stock in national banking associations and incurring the liabilities resulting therefrom. On the whole case we conclude there was no error in the judgment of the Circuit Court. See *Keyser v. Hitz*, 133 U. S. 139, 10 Sup. Ct. 290, 33 L. Ed. 531. And we say, as said by the Supreme Court in that case:

"But the question as to what property may be reached in the enforcement of such judgment is not before us, and we express no opinion on it."

The judgment of the Circuit Court is affirmed.

In re LAWRENCE et al.

(Circuit Court of Appeals, Second Circuit. December 22, 1904.)

No. 105.

BANKRUPTCY—REVIEW ON APPEAL—FINDINGS OF FACT.

A finding of fact by a referee, approved by the district judge on review, will not be disturbed by the appellate court, unless manifestly unsupported by the evidence.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Southern District of New York.

W. M. Marshall, for appellant.

Albert Reynaud, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This case depends upon a question of fact, which has been decided adversely to the appellant by the referee, and by the district judge in review of the referee. This court should not disturb these findings, unless they are manifestly unsupported by the evidence. So far from this being so, we are of the opinion that the evidence abundantly supports them.

Order affirmed, with costs.

HOFFMAN v. WILSON.

(Circuit Court of Appeals, Third Circuit. January 16, 1905.)

No. 63.

On Rehearing.

For former opinion, see 130 Fed. 694.

PER CURIAM. Since the reargument this case has again received the attentive consideration of the court, with the result that the judges respectively adhere to their views as heretofore expressed. 130 Fed. 694. Therefore the judgment of reversal stands as heretofore announced, upon the opinion of the majority of the court on file.

EASTMAN v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. December 15, 1904.)

1. PATENTS—VALIDITY—PRIOR PUBLIC USE.

The use of an unpatented invention upon a machine in actual service, continued for years without any change therein, although it may have been experimental in the beginning, becomes a public use from the time the success of the invention is demonstrated, and a patent therefor issued on an application filed more than two years after such time is invalid.

2. SAME.

Under section 7, c. 88, Act March 3, 1839, relating to patents (5 Stat. 354), a patent was void if the invention covered thereby was in public use more than two years before the application was filed, whether or not such use was with the consent or allowance of the inventor, at least unless it appears that the use was fraudulent, surreptitious, and piratical.

3. SAME—SURREPTITIOUS OR FRAUDULENT USE.

Where the inventor of an improvement in pumps for fire engines had the device placed on an engine of which he was in charge as engineer, where it was publicly tested, and thereafter used successfully for many years without material alteration, and was shown and explained by the inventor to the manufacturers of the engine without any injunction of secrecy, the action of the manufacturers in placing the device on an engine which they subsequently built for another city did not involve any breach of trust or confidence such as to render the use of the invention on the new engine surreptitious, fraudulent, or piratical, and defeat its effect as a public use, even though they knew that the inventor contemplated applying for a patent.

4. SAME—EXPERIMENTAL USE.

An inventor has a reasonable time in which to experiment for the purpose of perfecting his invention and demonstrating its utility, and the time thus spent, if in good faith, is no part of the two-year period of limitation.

5. SAME.

The experiments made during the experimental use of an invention must be in perfecting the invention as described and shown; experiments made in testing parts of the machine not covered by the invention will not have the effect of extending the two-year period of limitation.

6. SAME.

As soon as an invention is completed, viz., in such condition that the inventor can apply for a patent for it, the two-year period of limitation begins to run, and the application must be made within this period. The

fact that the invention has been improved since its original embodiment does not demonstrate that it was then embryonic or incomplete.

7. SAME—BURDEN OF PROOF.

When a clear case of prior public use is established, the burden is on the inventor to prove by convincing proof that the use was experimental.

8. SAME—MISTAKE OF SOLICITOR.

The fact that an inventor delayed making application for a patent, under the advice of his solicitor, does not prevent the running of the statutory period of limitation from a prior public use from rendering the patent invalid.

9. SAME—PUMP FOR FIRE ENGINE.

The Knibbs patent No. 42,920, for an improvement in fire engine pumps, while covering an invention of great merit, was void for prior public use of the invention on at least two engines for more than two years prior to the filing of the application.

Appeal from the Circuit Court of the United States for the Southern District of New York.

See 105 Fed. 631.

This action was commenced November 13, 1877. The original opinion, sustaining the patent on final hearing, was filed November 9, 1881, and is reported under the title of *Campbell v. The Mayor, etc.* (C. C.) 9 Fed. 500. The opinion sustaining the demurrer to supplemental bill is reported in 35 Fed. 14. The opinion dismissing the bill on rehearing because of public use for more than two years prior to the application is at 35 Fed. 504, 1 L. R. A. 48. The opinion reopening the case for additional proof upon the question of public use and permitting the complainant to show that such use was, as to the inventor, surreptitious and fraudulent, is at 36 Fed. 261. The opinion denying complainant's motion to suppress testimony is at 45 Fed. 243. The opinion reinstating the original interlocutory decree (9 Fed. 500) on the ground that the prior public uses occurred without the knowledge of the inventor and while he was using due diligence in perfecting his invention by experiment is at 47 Fed. 515. The opinion on exceptions to report of master is at 81 Fed. 182.

John R. Bennett and John J. Delany, Corp. Counsel, for appellants.

Charles Benner and D. Walter Brown, for appellee and George L. Crum.

William T. Washburn and Mayo W. Hazeltine, for estate of Benjamin Richardson.

Richard L. Sweezy, for intervener, Frederic A. Davis.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. This is an equity action for the infringement of letters patent, No. 42,920, granted May 24, 1864, to James Knibbs, assignor to himself and Marcus P. Norton, for "Improvements in Pumps for Steam Fire and other Engine Pumps."

The inventor conceived the invention April 21, 1860, and applied the device to a steam fire engine April 29, 1860. The application was filed May 13, 1864.

The Patent.

As stated in the description the nature of the improvement consists in the employment of a pipe by means of which the force or discharge part of said pump is connected to and with the suction or supply part, so that one or more discharge pipes or hose may throw streams of water at the same time and stroke of the piston. This is accomplished

without waste of water, by the opening of a valve or discharge pipe, to enable the pump to work successfully and without injury in throwing streams of water.

The description states that prior to the invention great difficulty had been experienced when an engine was required to throw a less number of streams than its total capacity permitted. In such circumstances, the suction being greater than the discharge, relief could only be obtained by opening a waste valve and discharging the water upon the ground. If this were not done the pump would become strained and flooded and the engine would cease to work. This primitive method of relieving the strain was injurious to the engine, wasteful, inconvenient and resulted in flooding the street, thus making it difficult for the firemen to operate, particularly in winter when ice was liable to form. All these difficulties and disadvantages were obviated by the invention. By connecting the force part with the suction part of the pump the extra quantity of water thrown into the force part and not discharged through the hose is conducted back into the supply or suction pipe, thus relieving the force part from any excessive quantity of water.

The connection between the two sections of the pump, as shown in the drawings, is made by means of a pipe placed on the outside of the pump, the excessive quantity of water to be returned through this pipe to the suction part, being regulated by a valve which remains closed if all the hose pipes are discharging. If less than the whole number of pipes are discharging at the same time or stroke of the piston this valve must be opened sufficiently to allow the return of the water which cannot be discharged by reason of the closing of some of the hose pipes.

The claim involved is the second, which is as follows:

"The connecting of the discharge or force part or section of a steam fire or other engine pump to and with the suction or supply section thereof by means of the tube GG and the regulating-valve H, or an equivalent therefor, substantially as and for the purposes herein described and set forth."

The invention, though simple and easily comprehended, was one of unusual merit and contributed largely to the success of the steam fire engine. The testimony shows that prior to the application of the Knibbs device to the engine it was not an effective and reliable machine; afterwards, there was little difficulty in operating with a limited number of hose pipes without waste of water or damage to the engine.

The Defenses.

The usual defenses of anticipation, lack of invention and noninfringement were interposed and are reasserted by the assignments of error. We do not deem it necessary to discuss any of these defenses further than to say that were they the only obstacles in the complainant's path it would not be difficult to sustain the decree. Infringement, though not admitted, is not seriously disputed.

The principal controversy, during the quarter of a century that this litigation has occupied the attention of the courts, arises over the defense of public use for more than two years prior to the filing of the application. The application was filed May 13, 1864, so that a well-established case of public use, prior to May 13, 1862, will invalidate the patent. The defendant insists that the proofs show that before May

13, 1862, the invention was publicly on the fire engines "Arba Reade" and "Jason C. Osgood," in the city of Troy, N. Y., on the "Phoenix," in the city of Hartford, Conn., on the "Atlantic," in the city of Lawrence, Mass., and on the "Gov. Hill," in the city of Concord, N. H. That the Knibbs device was placed on each of these engines and publicly used, prior to May 13, 1862, is established by convincing proof. The facts, however, differ in each instance, and, as it will subserve no useful purpose to state the evidence in its entirety, we have selected the prior uses in connection with the Osgood and the Phoenix—and incidentally the Arba Reade—as presenting all the facts necessary to a complete determination of the controversy.

The Arba Reade.

Knibbs, the patentee, was the engineer in charge of the steam fire engine Arba Reade, manufactured by the Amoskeag Manufacturing Company, of Manchester, N. H., and delivered to the Troy fire department March 28, 1860. On April 21, 1860, while the Reade was operating at a fire in Troy, it became necessary, in order to relieve the pressure on the pump, to open one of the gates and discharge the water onto the street, thereby causing some damage. The idea immediately occurred to Knibbs of relieving the pressure by the means described in the patent. Before the 30th of the same month he had connected the discharge section with the supply section of the pump by means of a crooked pipe with a globe regulating valve seated therein, the mechanism being the exact mechanical counterpart for that described in the patent four years afterwards. On April 30, 1860, the Reade was taken out and publicly tested, the official entry being "All worked well during trial at Fulton Street." The device originally placed on the Reade remained unaltered for nearly three years, during which time the engine was in constant use by the fire department of Troy and was several times the subject of public exhibition. On one occasion, about the middle of July, 1860, when the agent of the Amoskeag Company was at Troy, for the purpose of receiving pay for the Reade, there was a successful public exhibition at Green Island during which the relief valve and water passage was the subject of examination, the agent remarking "that it seemed to operate very nicely." Knibbs replied that they could hardly have gotten on without it and that as soon as he had it patented he would like to open a correspondence with the Amoskeag Company.

As early, then, as July, 1860, the necessity for a patent had occurred to Knibbs, not for any new or improved device, but for the mechanism then on the Reade, which, after a trial of nearly three months, had proved to be a practically successful operative device. If the apparatus were inchoate it is evident that Knibbs did not so consider it, for in his judgment it was ready for patenting in 1860. From the time it was placed upon the engine, in April, 1860, until February 12, 1863, when a larger pipe and an automatic valve were substituted, the engine was in constant use in circumstances which required the frequent operation of the relieving mechanism and seems to have given entire satisfaction. This use

was frequent, satisfactory, successful, public, open and notorious. The device was explained by the inventor to many interested persons and among others to the employes of the Amoskeag Company, including its mechanical engineer. This company, it will be remembered, built the Reade and was engaged in the business of manufacturing steam fire engines. That the change of February 12, 1863,—when a two-inch pipe one foot in length was substituted for a one-inch pipe two feet in length and an automatic valve was substituted for a hand valve—did not go to the essence of the invention or change its character is demonstrated by an examination of the patent itself, which makes no reference to the diameter or length of the tube or the character of the valve. The valve shown in the drawing is a hand valve. Any valve-regulated connection between the two sections of the pump, whether the tube be large or small, inside or outside, is within the claim. The change was an improvement, but nothing more.

The Osgood.

The chief of the fire department of Troy, who, until March 23, 1861, had been captain of the Arba Reade Company, wrote, under date of March 26, 1861, to the general agent of the Amoskeag Company, asking how soon and at what price he could furnish the city another engine, "same as the Arba Reade." The negotiations thus commenced culminated in an order for the Jason C. Osgood. The language of the order, so far as it is necessary to refer thereto, is as follows:

"City of Troy, N. Y., Aug. 22nd, 1861, by J. C. Osgood.

"One steam fire engine like the 'Arba Reade' except the following, viz. steam cylinder little higher, water connection inside," etc.

There is a dispute as to who suggested the inside water connection. Knibbs says that he proposed the change, but there is evidence to the effect that the suggestion came from the mechanical engineer of the Amoskeag Company. In strong corroboration of the defendants' contention in this regard is the letter, written August 12, 1861, by Starbuck—the Troy Chief—to the company, in which he says, speaking of the pump connection, "Mr. Bean suggested having that an inside fix." Bean was the mechanical engineer of the Amoskeag Company.

We do not deem it important to determine who made the original suggestion, as in our view it is immaterial. The inside connection was placed on the Osgood with the knowledge and concurrence of Knibbs and all interested parties. So much is certain. It probably was an improvement, as all of the apparatus, except the valve wheel, was safely out of the way and the entire structure was more symmetrical and compact. But, whether outside or inside, the connection was a perfect embodiment of the invention.

The Osgood was completed and sent to Troy in January, 1862, with the Knibbs invention thereon in its latest and most improved form. The pump sections were connected by a two-inch inside passage or opening. The improvements made a year later on the Reade only increased the diameter of the connection passage to con-

form to that of the Osgood. If, then, the improved engine operated, if she did her work satisfactorily, it would seem that the proposition that her use thereafter by the fire department for the four months preceding May 13, 1862, was a prior public use cannot be controverted.

On January 17, 1862, the Osgood was tested and the Knibbs device worked successfully. Knibbs was present and ran the engine. The entry in the official record book is as follows:

"Friday, Jany. 17.

"Quiet. Steamer Osgood tried by crew of Read (fuel furnish. by Read) from new hydrant corner of Third & Division. Work well, made 25 lbs. steam 5 minutes; run around pump worked satisfactory: steam valve too much lap."

On the 27th of January, 1862, the Osgood was put in commission, with her own engineer, and remained in the service of the city for years, performing her work efficiently and well. The Knibbs device was on the engine at least as late as December, 1878, when the testimony of her engineer was taken, and had worked successfully without change during the entire period. The official record shows that she was actually engaged in extinguishing fires on February 22, April 2 and May 10, 1862, the latter being the most extensive fire in the history of the city, destroying a vast amount of property.

The Osgood was ordered, in the due course of business, by the city of Troy for use in the city's fire department. She was built, delivered and used by the city as the other engines were built, delivered and used. That she should have the pump connection, iron wheels "and other obvious improvements" was part of the specifications for her construction.

Knibbs knew the details of the Osgood's inside pump connection, of her arrival at Troy, her satisfactory test in January, her subsequent public employment by the city and her complete and unquestioned success.

It is not easy to see how attaching the Knibbs device to the Osgood in such circumstances can be regarded as an experiment; but assuming it to be such, the moment its success was demonstrated the experiment became merged in the invention. Nothing more was needed, all doubt was then removed, the use ceased to be experimental, the invention became an accomplished fact. No one ever suggested any change in or addition to the Osgood's pump after the trial test and no change or addition was ever made. Knibbs testified that from the time she was accepted and put into commission as one of the city engines he never ran her or made inquiries regarding her.

The Phoenix.

It is admitted by the complainant that the steam fire engine Phoenix was built by the Amoskeag Company for the city of Hartford, Conn., delivered to the city on November 9, 1861, and used as part of the Hartford fire department for at least 25 years thereafter. The defendants admit that the prior use of the Phoenix was without the knowledge or consent of Knibbs. Unquestionably the Phoenix had upon it the patented device for many years subsequent to June, 1865, but the complainant contends that it was then placed upon the engine, when

she was sent back to the Amoskeag Company for repairs. The defendants insist that the relief mechanism was a part of her original construction and was never removed or changed. The only question of fact, therefore, relates to this controversy.

The Phoenix was ordered in July, 1861, the order appearing on the Amoskeag's books August 21, 1861, the day before the date of the Osgood order. The construction of the two engines being substantially contemporaneous it might be inferred that so obvious an improvement as the relief mechanism would not be placed upon one and omitted from the other, but the matter is not left to inference. The engineer of the Phoenix, who represented the city, and the engineer of the Amoskeag Company both concur in stating that the engine when delivered was provided with the relief mechanism. The Phoenix was originally constructed to be drawn by hand and was delivered with the hand rigging upon her. This remained until the department was reorganized and transformed from a volunteer to a paid department in December, 1864. Two photographs of the Phoenix are in evidence which must have been taken prior to December, 1864, for they show the hand rigging which was not removed until that date. They also show the relieving mechanism, or such portion thereof as was visible, viz.: the valve stem and wheel. The demonstration is complete that the Knibbs device was on the engine prior to June, 1865, when the repairs were made, and as it is not pretended that it was added intermediate the date of delivery and the date of the general repairs, the presumption is conclusive that the device was on the Phoenix when she first arrived in Hartford.

The repairs authorized in June, 1865, were new boiler tubes and new tires, but not a new pump or changes in the old pump. In some way the relief device got on the Phoenix, for it was there in 1888 when the testimony was taken. How did it get there if not when the engine was built in the autumn of 1861? In the absence of any reliable testimony to the contrary the court has no alternative but to find that relief mechanism was part of the original construction. Indeed, the court understands that complainant does not seriously contend to the contrary but does maintain that the evidence shows that the device was placed there secretly and without authority.

The judge of the Circuit Court reviews with care all the proof relating to the Phoenix and reaches the conclusion, in which we fully agree, that the Phoenix as originally constructed had upon it the Knibbs device. *Campbell v. Mayor (C. C.)* 47 Fed. 515, 517.

We have, then, leaving out of view the other engines built by the Amoskeag Company, three plain and unmistakable instances of prior use—the Reade, the Osgood and the Phoenix. The first was in public use four years and thirteen days, the second two years, three months and twenty-six days and the third two years, six months and three days before the application for the patent. The use of the Reade is complicated by a number of considerations which do not apply to the others and hereafter we shall confine the discussion to the Osgood and Phoenix. The principal difference between these two is that the use of the Osgood was with the knowledge and consent of Knibbs and the use of the Phoenix was not.

The Law of Prior Public Use.

Before proceeding further it is well to ascertain what is the law as applicable to this situation. The patent was applied for and granted in May, 1864. At that time the act of 1839—explaining, supplementing and superseding the act of 1836—was in force. Act March 3, 1839, c. 88, § 5 Stat. 354. The seventh section of that act is as follows:

"Sec. 7. * * * That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid, by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

The last clause of this section, which is particularly applicable to this controversy, has been condensed and tersely stated by Mr. Walker in his work on Patents (Fourth Ed. § 93) as follows:

"A patent is void if the invention covered thereby was in public use or on sale earlier than two years before the application for the patent."

The entire subject has been thoroughly examined and the conclusion of the Supreme Court stated in *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160, and reaffirmed, after a second exhaustive examination, in the same case, 124 U. S. 694, 8 Sup. Ct. 676, 31 L. Ed. 557. The question now at issue was directly involved in that case. The court says, speaking of the numerous defenses:

"It is necessary to consider only one of them, which, in our view, is fatal to the validity of the patent, and that is, that the invention was used in public at Cortland, in the state of New York, by others than Green (the inventor) more than two years before the application for the patent."

The court says, in construing the section quoted supra:

"The evident intention of Congress was to take away the right (which existed under the act of 1836) to obtain a patent after an invention had for a long period of time been in public use without the consent or allowance of the inventor; it limited that period to two years, whether the inventor had or had not consented to or allowed the public use."

After an examination of every reported case upon the rehearing the court was confirmed in its opinion that its former decision was correct and closes the elaborate discussion in the following language:

"The second clause of the seventh section seems to us to clearly intend, that, where the purchase, sale, or prior use referred to in it has been for more than two years prior to the application, the patent shall be held to be invalid, without regard to the consent or allowance of the inventor. Otherwise the statute cannot be given its full effect and meaning."

Among the authorities thus examined and overruled was *Campbell v. The Mayor*, 20 Blatchf. 67, 9 Fed. 500, which was the original decision holding the Knibbs patent valid.

Surreptitious Use.

As before stated the Phoenix was sold and delivered to the city of Hartford and paid for November 9, 1861. She was used by the city thereafter for many years publicly, as part of the Hartford fire department. It cannot be pretended that the Phoenix did not contain a perfect and complete development of the invention. The only contention as to the Phoenix is that this use of the relief mechanism was unknown to and unauthorized by the inventor and that the sale to and use by the city, though open and notorious, was "fraudulent, surreptitious and piratical."

In distinguishing the Driven Well Case from *Kendall v. Winsor*, 21 How. 322, 16 L. Ed. 165, the court, in *Andrews v. Hovey*, 124 U. S. 708, 8 Sup. Ct. 680, 31 L. Ed. 557, makes use of this language:

"It may be that a fraudulent, surreptitious, and piratical purchase or construction or use of an invention prior to the application for the patent would not affect the rights of the patentee under either clause of the seventh section."

The complainant seizes upon this language as creating a broad exception to the general rule and insists that the facts regarding the Phoenix establish such a use. The doctrine thus enunciated, though not advanced until the argument at the rehearing, may be a fair statement of the law where the facts justify a finding of fraud and piracy. The court, immediately after the statement quoted, says:

"But the present is not such a case as that which existed in *Kendall v. Winsor*."

The driven well was invented by Green in 1861. The application for the patent was filed in March, 1866. A public exhibition was made in 1861. More than two years prior to the application Suggett and Mudge put down nine wells having obtained their knowledge from Green and having acted without his knowledge, allowance and consent.

"There is nothing," says the court, "that indicates in regard to these wells fraud or piracy or surreptitiousness, in the sense of the decision in *Kendall v. Winsor*."

In other words, a person may obtain his knowledge of an invention direct from the inventor and may practice it publicly without his knowledge or consent and such use will invalidate a patent unless the application is filed within the statutory period thereafter. In order to relieve the inventor from the consequences of such use, assuming that relief is possible, it must appear that the knowledge was obtained by deception and that the use was fraudulent or piratical. The meaning of "fraudulent" is too well known to require definition, but it may be wise to recur to the meaning of the other adjectives used by the Supreme Court. "Surreptitious" means, "Fraudulently obtained. Falsely crept in. Obtained by falsehood, fraud or stealth, by suppression or concealment of facts." "Piratical" means, "Acquired by piracy or robbery." It is entirely clear that when the courts have used these words in patent causes they intended them to apply to acts done *mala fide*, clandestinely,

treacherously and by means of falsehood, fraud or breach of trust. It is equally clear that they have never been used to characterize knowledge obtained openly in the due course of business or applied to an act which is neither *malum prohibitum* nor *malum in se*.

Kendall v. Winsor was an action at law. The jury found for the plaintiff. The defendant sued out a writ of error. One of the instructions to the jury sustained by the Supreme Court was:

"That if Aldridge, under a pledge of secrecy, obtained knowledge of the plaintiff's machine—and he had not abandoned it to the public—and thereupon, at the instigation of the defendants, and with the knowledge, on their part, of the surreptitiousness of his acts, constructed machines for the defendants, they would not have the right to continue to use the same after the date of the plaintiff's letters patent."

There was testimony to show that the inventor did not work the patented machines in public and that he pledged his employes to secrecy. No one who did not take such a pledge was allowed to view the machines. One of these workmen was Aldridge who obtained his knowledge by promising not to divulge the inventor's secret and, thereafter, deserted his employer and entered into an arrangement with the defendants to copy the patented machine for them, and did so. In plain language Aldridge stole the invention and sold it to the defendants with their knowledge and procurement. At least the testimony warranted such a conclusion and the jury so found.

The controversy arose wholly under the first clause of the seventh section of the act of 1839, and it will be more and more manifest as we proceed that neither on the facts nor the law has the decision any but a remote bearing on the questions now in issue.

Pennock v. Dialogue, 2 Pet. 1, 7 L. Ed. 327, was decided before the act of 1836 and has no bearing upon the case at bar apart from the fact that Mr. Justice Story asserts, tentatively, what may for the purposes of this case be conceded, that "in respect to a use by piracy, it is not clear, that any such fraudulent use is within the intent of the statute; and upon general principles, it might well be held excluded."

Shaw v. Cooper, 7 Pet. 292, 8 L. Ed. 689, arose under the act of April 17, 1800, c. 25, 2 Stat. 37, and simply reiterates the opinion of Mr. Justice Story, just quoted. It throws little light upon the present controversy although it may not be inappropriate to note that the judgment for the defendant was affirmed although the plaintiff gave evidence that for the purpose of making experiments he imparted the secret of the invention to his brother who subsequently divulged it for a reward. The court observed:

"Whatever may be the intention of the inventor, if he suffers his invention to go into public use through any means whatsoever, without an immediate assertion of his right he is not entitled to a patent; nor will a patent obtained under such circumstances protect his right."

In *Smith & Griggs Mfg. Co. v. Sprague*, 123 U. S. 249, the court, at page 256, 8 Sup. Ct. 122, at page 126 (31 L. Ed. 141), says:

"The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition."

A not unreasonable construction of this language is that an experimental use is the only one excepted, the fair implication being that a surreptitious use is not excepted.

Pierson v. Eagle Screw Co., 3 Story, 402, Fed. Cas. No. 11,156, was an action at law, tried in 1844 before Mr. Justice Story and a jury. There was no dispute as to the facts; but what the facts were relating to the surreptitious use of the invention by the defendant's vendor, does not appear. It may be safe, however, to assume that he was guilty of grossly unfair conduct, otherwise the court would hardly have been justified, when explaining the law to the jury, in using such expressions as the following:

"A mere wrongdoer, who by fraud or artifice, or gross misconduct, had gotten knowledge of the patentee's invention."

"A person who pirates the invention of any party."

Again, in speaking of the first clause of section 7 of the act of 1839, the judge charged the jury that:

"It could never have been the intention of this clause to confer on a fraudulent purchaser, or a purchaser with full notice a right to use an invention pirated from the original inventor by wrong."

The question, what constitutes a fraudulent, piratical or wrongful appropriation, sale or use of the invention, is left very much as the earlier authorities leave it, in obscurity. We have been referred to no case since the clear exposition of the law in *Andrews v. Hovey* where a plain case of public use earlier than two years before the application for the patent has been held to be ineffectual as a defense because the use was surreptitious. When the question is fairly presented it may be that the courts will hesitate to introduce exceptions to the rule as broadly stated by the Supreme Court, with the confusion and uncertainty incident thereto.

If it be once understood that the object of the act "was to require the inventor to see to it that he filed his application within two years from the completion of his invention, so as to cut off all question of the defeat of his patent by a use or sale of it by others more than two years prior to his application," the courts will no longer be vexed by the perplexing questions which must frequently arise when the intent of the user and the bona fides of the use are questions to be determined on oral testimony. Isolated instances of injustice to inventors may result, but the remedy is certain and sure. The inventor is master of the situation and has it in his power by prompt action to make the defense of prior public use impossible. Surely two years after he has completed his invention is ample time in which to file his application. If he fails to take so simple and reasonable a precaution why should it not be said that the risk is his and that he cannot complain of the consequences of his own supineness?

Phoenix Use not Fraudulent.

We do not deem it necessary to decide the question just stated for the reason that we are unable to find that the sale and use of the Phoenix was either fraudulent, surreptitious or piratical. The purchase and use by the city of Hartford was in the usual course of business and was

in perfect good faith so far as the city officials were concerned. No unfair conduct can be, and, indeed, none is imputed to them.

Was the Amoskeag Company guilty of fraud or surreption? The judge of the Circuit Court, in the opinion dismissing the bill, 35 Fed. 504, after the decision in *Andrews v. Hovey*, finds expressly that there was nothing fraudulent, surreptitious or piratical in the conduct of the officers of the Amoskeag Company and he sees no way to distinguish their acts from those of Suggett and Mudge in putting down the driven wells without the knowledge of the inventor. Subsequently, after additional proofs were taken, the judge still refused to find that there was anything fraudulent in the use of the Phoenix and other engines, but he says that it was "a breach of trust and confidence not wicked and probably not thought to be wrong." He also finds that the Amoskeag people appear to have thought that Knibbs had no right "which they were invading."

It may be doubted whether this finding is sufficient to warrant the conclusion that the use was surreptitious, fraudulent and piratical, but it is unnecessary to decide the point for the reason that we are unable to find that the officers of the Amoskeag Company were guilty of a breach of trust and confidence.

Where a breach of contract is alleged the first step is to prove the contract. The same is true of a breach of trust. Where there is no relation of trust there can be no breach of trust. Knibbs was engineer of the Arba Reade in the employ of the city of Troy. The city needed another engine and contracted with the Amoskeag Company to build it. Knibbs was never employed by the company or asked to furnish information or advice in the construction of the new engine—the Osgood. He had no relations of any kind with the company. At the request of the chief engineer and with the consent of the city's fire commissioners the invention was placed upon the Osgood. Knibbs did not employ the Amoskeag Company "to embody the invention to enable him to continue his experimental use." He explained his invention in the summer and autumn of 1860 to the officers of the company, after the invention had been on public exhibition, and he testifies that he then referred to the subject of a patent. He also testifies that he told Bean when the Osgood was under discussion that he wanted his device placed on the engine for experimental purposes only. The natural interpretation of this remark is that he desired to know whether "an inside fix" were feasible. Bean could not have understood him to mean that he wished a device, the utility of which had not been proved or tested, placed upon the engine in order that he might make it successful by subsequent experiment. Neither Bean nor the fire commissioners would have consented to any such use of the city's property. The city bought the engine, not as an experiment but as a completed and efficacious machine, ready for immediate use. At no time were any disclosures made by Knibbs under the seal of secrecy; at no time was any information imparted in confidence. Indeed, when the Osgood was ordered the invention had been in open and notorious use upon the Reade for more than a year and the invention was as well understood by Bean as by Knibbs.

There could, therefore, be no secret information imparted in the summer of 1861; there was none to impart. At no time did Knibbs request the officers of the Amoskeag Company to regard their knowledge of the invention as secret or confidential.

We are unable to distinguish the case from *Andrews v. Hovey*. In both cases there was a public exhibition of the invention; in both the user derived his knowledge from the inventor; in both the use was without the consent of the inventor. It is impossible on any rational theory to hold the one honest and innocent and the other fraudulent and piratical.

The fact that the officers of the Amoskeag Company knew that Knibbs thought of having the invention patented and that he wished the device applied to the Osgood for the purposes of experimentation by him does not alter the legal aspect of the case. If a patent were obtained they took the risk of being treated as infringers in case the application was made prior to the use, but until then they were as free as any other person to use information which was open to any one who had curiosity enough to examine the Arba Reade.

If the mere announcement of an intention to patent has the effect contended for by the complainant it will only be necessary to make the announcement general to extend indefinitely the monopoly of the patent. The patent law recognizes the rights of the public as well as of the inventor and at all stages of the proceedings requires that he act with reasonable promptness. The contention that the Amoskeag Company was debarred from doing what any other manufacturing company could have done with propriety cannot be maintained. It is not doubted that another manufacturer to whom the device had been explained by Knibbs could have placed it on a new engine without being subjected to a charge of fraud. It is argued that "a surreptitious use is a secret invasion of another's rights, and it is in evidence that Mr. Knibbs knew nothing of this misuse of his invention." But the Supreme Court has said not only that knowledge is unnecessary, but that proof of the absence of knowledge of the inventor does not render the use surreptitious.

The contention that the invention was not completed till February 13, 1863, and that a use prior to that date was during the experimental period, can be treated more appropriately when we come to consider the use of the Osgood.

Osgood Use Not Experimental.

There is no pretense that there was anything surreptitious, fraudulent or piratical in the use of the Osgood. If we accept the testimony of Knibbs, and we do so for present purposes, the mechanism was placed upon her at his request for the purposes of experiment. From her arrival at Troy in January he was familiar with all the details of her construction and made the first test on January 17, 1862, which demonstrated the success of her relief connection.

That the Osgood contained the invention in its completed condition is admitted. Knibbs testified:

"Question. Did you regard this valve of 1860 at the time, or subsequently down to 1863, as a perfected or practical contrivance? Answer. It was not perfected. Question. Do I understand you that it never was perfected or practical down to 1863? Answer. Not in the Arba Reade steamer. Question. Was it ever on any other steamer? Answer. It was on the J. C. Osgood No. 3, of Troy, put on that engine at my request."

Again, as showing that in the opinion of the inventor it was a complete invention and ready for patenting in January, 1862, Knibbs testifies:

"As soon as I saw the successful working of it on the J. C. Osgood I applied to Mr. Norton (the patent solicitor) as to what course to pursue."

The only question, therefore, regarding the use on the Osgood which is even debatable, is whether it was an experimental use or occurring within the experimental period.

Law of Experimental Use.

The law upon the question of experimental use is well settled and counsel do not disagree regarding it. It is the duty of the inventor to file his application within two years from the completion of his invention. He is permitted to take the time necessary to complete the invention and to make experiments for that purpose, but the moment the invention is completed the two-year period begins to run. The leading case is *Elizabeth v. Pavement Company*, 97 U. S. 126, 24 L. Ed. 1000. An experimental public use of six years was there held not to be unreasonable. The invention was for a pavement and durability was the principal object sought to be attained. An invention must not only be new, it must also be useful. A pavement that would not last six years was useless, no one would want it, no one would incur the expense of laying it down. There is but one way to ascertain whether a newly invented pavement is durable and that is to test it by public use. A trial of two years will demonstrate nothing. It may stand the test for that period and then suddenly disintegrate. These were the considerations which induced the court to uphold the *Nicholson* patent. As we shall presently see there were no such problems to be solved in the case in hand.

Smith & Griggs Mfg. Co. v. Sprague, supra, is authority for the following propositions:

First. Where it is clearly shown that there was a public use of an invention by the inventor for more than two years prior to the application the burden rests on him to establish by convincing proof that the use was for the purpose of perfecting an incomplete invention by tests and experiments.

Second. Where the invention is one of many embodied in a single machine or where the device contains features not included in the invention or covered by the claims, experiments intended to produce more perfect working of these extrinsic features are not such as will prevent the running of the statutory limitation. In other words, the experiments must be made for the purpose of developing the invention as described and claimed and nothing else. When the invention is completed the time begins to run and it is

of no moment that something else, not a part of the invention, is incomplete and requires tests and experiments to perfect it.

In *Egbert v. Lippmann*, 104 U. S. 333, 26 L. Ed. 755, the Supreme Court held that the use of one of the patented articles in public was sufficient to constitute public use. The court further observes that:

"Whether the use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known. If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use may be confined to one person."

When *Egbert v. Lippmann* was in the Circuit Court, Judge Blatchford said:

"The policy introduced by the act of 1839, and thus continued, is, that the inventor must apply for his patent within two years after his invention is in such a condition that he can apply for a patent for it." 15 Blatchf. 295, 297; Fed. Cas. No. 4,306.

In *Root v. Railroad*, 146 U. S. 210, 13 Sup. Ct. 100, 36 L. Ed. 946, the court, while quoting at length from the *Pavement Case* and fully recognizing its doctrine, observes:

"It cannot be fairly said from the proofs that the plaintiff was engaged in good faith, from the time the road was put into operation, in testing the working of the structure he afterwards patented. He made no experiments with a view to alterations, and we are of opinion, on the evidence, that sufficient time elapsed to test the durability of the structure, and still permit him to apply for his patent within the two years. He did nothing and said nothing which indicated that he was keeping the invention under his own control."

In *Worley v. Tobacco Co.*, 104 U. S. 340, 26 L. Ed. 821, the court says:

"The invention was made by Worley alone. He at once began using his invention in McCabe's factory. He testifies that it was complete, and he became satisfied with the results, in 1871. It is true that after that date he made experiments to decide upon the best mode of constructing his finishers so as to secure the requisite strength; but the finisher constituted no part of his patented invention. In 1871 his invention was complete, and in his opinion successful, and was adhered to from that date, without change."

In *Perkins v. Paper Co.* (C. C.) 2 Fed. 451, the court says:

"An improvement has now been made, but it is not described in the specification or shown in the model. At all events, a machine which, whether entirely satisfactory or not, has been run in the ordinary course of business for 20 or for 30 years, and which is patented precisely as it was used, cannot be properly called an experimental machine."

See, also, as bearing on the questions involved: *Hall v. Macneale*, 107 U. S. 90, 2 Sup. Ct. 73, 27 L. Ed. 367; *Harmon v. Struthers* (C. C.) 57 Fed. 637; *Swain v. Holyoke Co.*, 109 Fed. 154, 48 C. C. A. 265; *Lettelier v. Mann* (C. C.) 91 Fed. 917.

From these authorities we deduce the following propositions, as applicable to the present controversy:

First. An inventor has a reasonable time in which to experiment for the purpose of perfecting the invention and demonstrating its utility.

Second. The time thus spent, if in good faith, is no part of the two-year statute of limitations.

Third. The experiments must be made in perfecting the invention as described and shown.

Fourth. Experiments made in testing parts of the machine not covered by the invention will not have the effect of extending the two-year period.

Fifth. As soon as the invention is completed, viz.: "in such a condition that the inventor can apply for a patent for it," the two-year period begins to run and the application must be made within this period.

Sixth. The fact that the invention has been improved since its original embodiment does not demonstrate that it was then embryonic or incomplete.

Seventh. When a clear case of prior public use is established the burden is on the inventor to prove by convincing proof that the use was experimental.

Long Period of Experimentation Unnecessary.

The Knibbs invention, though one of unusual merit, was an exceedingly simple one. All agree upon this proposition. One of complainant's counsel says of it:

"The device is undoubtedly a very simple one, but does not, on that account, any less exhibit invention of a high order."

Another counsel says:

"Mr. Knibbs' perfected invention resulted simply in a hole in the partition between the supply and discharge chambers of a pump. Nothing can be more easily understood than this."

And yet it is contended that it required over two years and nine months of experimentation to demonstrate its utility. Invention, in so far as it relates to machines, may, for the purposes of illustration, be divided into two general classes: First, where the invention is the result of a happy creative thought; and, second, where it is developed by arduous and patient toil. To the first class belong the safety lamp and the driven well; to the second the "Lino-type" and the typewriter. The moment the idea of surrounding the lamp with wire gauze occurred to Davy and its practicability was demonstrated by a simple test, the invention stood revealed. Mergenthaler, on the other hand, was not rewarded so much for the inspiration and originality of his idea as for the ingenuity and skill with which he built up his intricate and marvelous machine. The invention of Knibbs belongs to the first class. Undoubtedly his conception showed the genius of the inventor as distinguished from that of the mechanic. It did not, however, require a long series of laborious experiments to prove its efficacy. As soon as the two sections of the pump were connected by a hole on the inside or a tube on the outside and satisfactory tests demonstrated that the old difficulties were thus obviated, the invention was in a condition for patenting. That the application for the patent could have been made before the delivery of the Osgood, in January, 1862, is not disputed. Indeed, the patent as granted describes and shows the apparatus as originally placed on the Reade without, so

far as we are able to see, the slightest change either in the details of the mechanism or the principles of its operation.

Ample Time for Experiments.

But we now assume, for the purposes of argument, that the entire time from April, 1860, to January, 1862, belonged legitimately to the period of experimentation. Knibbs says that the inside connection was placed on the Osgood at his suggestion and a few days after her arrival she was tested by him and worked satisfactorily. After this test what more was needed? It convinced Knibbs that the invention was then complete, for he says as soon as he saw its successful operation on the Osgood he applied to his patent solicitor. It convinced the solicitor for he advised Knibbs to make the apparatus work on the Reade as successfully as it already worked on the Osgood.

It is admitted by the complainant after the enlarged pipe was placed on the Reade, February 12, 1863, a single test was sufficient to demonstrate its success and complete the invention. The record of this test was entered in the following words:

"Friday February 13 1863; trial, engine taken at 3 P. M. to well on Third Street, South Troy, for the purpose of testing arrangement put on yesterday; relieve pressure at sixty pounds with gates shut, valve open, work freely. keeping up speed all satisfactory, worked about half an hour, made 3,378 revolutions."

With the exception of an automatic valve which had been added to the Reade, and which we will refer to later on, the relief mechanism was identical in principle on the two engines. In such circumstances it is difficult to understand upon what theory the test of February 13, 1863, should be accepted as final and conclusive, and that of January 17, 1862, should be rejected as insufficient and indeterminate. The mechanism was the same, the test was the same and the result was the same in each instance. If one was sufficient to end the experimental period so was the other.

Suppose that Knibbs had conceived his invention January 7, 1862, had applied it on the 16th to the Osgood, in the form of an inside connection, and on the 17th had tested it and found it worked satisfactorily in every particular, can there be a doubt that the invention would be complete on that day and ready for patenting? If so, how is the case altered because the machinists of the Amoskeag Company did the work at his request rather than the machinists of Troy? The alterations made on the Reade did not advance the invention a hair's breadth any more than if Knibbs had taken the Osgood's pump and applied it bodily to the Reade.

But it is said that it was impossible to tell whether the device possessed the requisite utility until it had been tested by actual use at fires. This contention seems inconsistent with the complainant's position regarding the Reade where, as we have just seen, the two-inch pipe connection was attached one day and the next day after an experimental test, but no test at a fire, the invention was pronounced complete and ready for patenting. But even if this were not so the position seems to us untenable. When the ques-

tion is whether a device on the inside of an engine's pump works successfully what possible difference can it make whether a fire is or is not burning in the immediate vicinity? Will not the result be precisely the same whether the water from the hose is discharged on a hot surface or a cold surface, a bank of fire or a bank of snow? If any difference at all can be suggested it would seem to be in favor of the experimental use when the conditions are entirely in the control of the engineer and when tests can be applied which the exigencies of a fire might make impossible.

But if tests at actual fires were necessary such tests were had. The device had been in use on the Reade since the spring of 1860 and its general utility had been proved at a large number of fires. It was thought, however, that the connection between the two sections was too small and the question whether or not a two-inch aperture would furnish the necessary relief was the only question of importance to be determined when the Osgood arrived at Troy. Prior to May 13, 1862, there were three occasions when the Osgood was actually tested at fires. Counsel are not in accord as to the date of one of these fires, but they all agree that the Osgood participated in three fires during the period in question, one of them being the great fire of May 10, 1862, which destroyed a third of the city. And yet Knibbs waited for more than two years after this supreme test before filing his application.

It thus appears that when the Osgood was delivered at Troy she was a complete and successful machine, embodying the invention in its most approved form, a form which has never been changed, and that every test which the ingenuity of counsel can suggest was applied without revealing a single imperfection. Two years passed after the last test was made and still no application was filed.

Automatic Valve no Part of Invention.

But it is said that Knibbs was experimenting upon an automatic valve to take the place of the hand valve and that this valve was not completed until placed by him upon the Reade in February, 1863. Several answers are suggested but a sufficient one is found in the fact that an automatic valve is no part of the invention. Upon this question the patent is the best evidence and no hint of an automatic valve is found either in the drawings, description or claim. On the contrary "the regulating valve H" is plainly shown as an ordinary hand valve. The new valve was probably an improvement although Knibbs testifies:

"Question. Did you regard the automatic form of the valve, which you made in February, 1863, as an improved and better form than the simple hand relief? Answer. Well, I am not prepared to say as to that; it was merely an experiment, that spring was; it was not essential to the successful working of that valve."

Concede it to be an improvement, the situation is not altered. Knibbs was not justified in delaying his application until the invention had reached a stage where improvements were no longer possible. Few inventions spring Minerva-like into instantaneous and absolute perfection. The inventive spirit engendered by the rest-

less activity of competition in all the mechanical arts is ever watchful to suggest changes which will enable existing machines to do their work to better advantage. It is safe to say that in all the great mechanical inventions of the present day the primitive apparatus of the patent can hardly be recognized in the perfected machine which a few years of actual use has developed. To declare that the inventor may withhold his application until the last improvement has been made will extend his monopoly indefinitely and nullify the plain provisions of the statute. The period of experimentation must end at some time and that time arrives when the invention, as described and claimed in the patent, is complete.

Solicitor's Mistake.

Finally, it is suggested that Knibbs acted throughout under the direction of his solicitor and is not responsible for his solicitor's mistakes. That the advice thus received was unwise cannot be doubted. Having a complete embodiment of the invention on the Osgood there was no necessity for duplicating it on the Reade. It must be remembered, however, that this advice was given in the early part of 1862. Had it been followed promptly and had the application been filed within a reasonable time thereafter no question of prior public use could have arisen. But leaving out of view every other consideration it will hardly be contended that the mistaken advice of a patent solicitor can override a statute of the United States. We cannot resist the belief that to the inventor's procrastination and delay can be attributed the disaster which has overtaken his patent.

Conclusion.

We entertain no doubt as to the correctness of our conclusion that in at least two instances—the uses on the Phoenix and the Osgood—the invention was in public use for more than two years prior to the application and that the patent is therefore invalid.

The decree of the Circuit Court is reversed with costs and the cause is remanded to the Circuit Court with instructions to dismiss the bill with costs.

WOLFF et al. v. E. I. DU PONT DE NEMOURS & CO.

(Circuit Court of Appeals, Third Circuit. January 27, 1905.)

PATENTS—INFRINGEMENT—PROCESS OF MAKING SMOKELESS POWDER.

The Von Freeden patent, No. 429,516, for a process for manufacturing smokeless gunpowder from nitrocellulose, as to claim 1, *held* valid, but not infringed. Claim 2 *held* void for lack of invention.

Appeal from the Circuit Court of the United States for the District of Delaware.

For opinion below, see 122 Fed. 944.

Julian C. Dowell and Osgood H. Dowell, for appellants.
Frederick P. Fish and Charles Neave, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and LANNING, District Judge.

LANNING, District Judge. By their bill of complaint the appellants seek an injunction to restrain the appellee from an alleged infringement of letters patent No. 429,516, issued June 3, 1890, to Richard Von Freeden, and by him duly assigned to the appellants. The Circuit Court dismissed the bill, and the cause is now before us on appeal from the decree of that court.

The appellants' patent is for an improvement in the manufacture of smokeless gunpowder from nitrocellulose, a substance commonly known as "gun cotton." The process referred to in the first claim of the patent, the successive steps in which we have designated by numbers, is set forth in these words:

"I claim as my invention the process of gelatinizing and granulating nitrocellulose, or a compound thereof with other substances, which consist in (1) adding to the said nitrocellulose or compound a solvent of the former, (2) kneading the mass until the same has become plastic and the nitrocellulose thoroughly gelatinized; (3) introducing thereto a liquid or vapor chemically indifferent to the constituents of the mass, and (4) stirring the latter until complete granulation has been produced, substantially as described."

The description of this process in the specification preceding the language of the claim, the successive steps in which we have also designated by numbers, is in the following words:

"The nitrocellulose, or compound thereof with other substances, is (1) first mixed with a liquid adapted to dissolve the former, such as ethyl-ether, methyl-ether, a solution of camphor in ether, a mixture of ether and alcohol, dinitro-toluol, etc.; and the mixture is (2) kneaded or rolled until it has become plastic, and the nitrocellulose completely dissolved. To the mass thus obtained I (3) introduce a liquid or vapor incapable of dissolving or otherwise acting chemically either on the nitrocellulose, or on the ingredients of the said compound thereof. Preferably, I employ water or steam, or both together. At the same time (4) the mass is stirred. By these means the mass is caused to split up into particles or grains, which become smaller in the measure as the stirring is continued and the temperature is raised."

It will be observed that the steps in the process described in the first claim and the steps in the process described in the specification preceding that claim are the same.

The appellee's process of manufacture is as follows: (1) The nitrocellulose is put into a churn containing a large quantity of water, where it is beaten or stirred until a thorough mixture has taken place, and the nitrocellulose is uniformly suspended in the water; (2) an emulsion of a solvent, previously prepared in a separate vessel by the mixture of the solvent with water, is poured into the churn, the agitation being meanwhile continued; (3) the globules of the solvent contained in the emulsion are by the agitation distributed through the contents of the churn, and thereby brought into contact with the suspended particles of nitrocellulose; and (4) the globules gelatinize the particles of nitrocellulose with which they come in contact, and thus convert them into a mass of plastic floccules or soft and pulpy grains.

In the opening words of the specification contained in the appellants' patent, Von Freeden, the patentee, declared:

"My invention is based on the discovery made by me that gelatinized nitrocellulose, still containing the solvent employed for its gelatinization, on being exposed to certain liquids or to vapors thereof, undergoes a kind of coagulation and a division into small lumps, which latter is promoted by stirring. This peculiar behavior of the gelatinized nitrocellulose I make use of in the manufacture of granulated gunpowder from nitrocellulose, or compounds thereof with other substances. In view of producing such gunpowder, which is not affected by moisture, the nitrocellulose, whether pure or mixed with other materials, is at present either converted in its original state into particles, which are thereupon gelatinized on the surface, or it is at the onset thoroughly gelatinized, and subsequently divided by mechanical means into small pieces or laminae."

This language admits, what the proofs abundantly show, that prior to Von Freeden's discovery granulated gunpowder was made from gelatinized nitrocellulose. Gelatinized nitrocellulose is nitrocellulose that has been partially or wholly dissolved in some solvent thereof. By the first and second steps of the process described in the first claim of the patent, gelatinization only is effected. By the third and fourth steps, granulation only is effected. Furthermore, before the date of Von Freeden's discovery, nitrocellulose, a solvent thereof, and water (that being a liquid that does not dissolve or act chemically upon the nitrocellulose), had been used in the manufacture of granulated gunpowder. The first claim of the patent therefore covers only the process of using these three materials. It will be observed, then, that the problem to be solved is, has the appellee appropriated the substance of the process described in the first claim of the appellants' patent?

A careful examination of the evidence relating to the two processes above set forth discloses to our satisfaction these facts: The appellee adds water to the nitrocellulose before gelatinization; the appellants add it after gelatinization. In the appellee's process there is no kneading or rolling such as is described in the appellants' patent, nor do we find anything which we deem an equivalent thereof. The plastic mass obtained by the appellants is a homogeneous and more or less cohesive mass; that obtained by the appellee is a mass of plastic flocules. In the appellants' process the function of stirring is to break up the plastic mass of gelatinized nitrocellulose into grains; in the appellee's process it is to keep the fibers of the ungelatinized nitrocellulose and the globules of the solvent equally distributed through the water. The appellants first gelatinize and then granulate; the appellee gelatinizes and granulates at the same time. The appellants' gelatinization, which is effected by kneading or rolling the nitrocellulose with its solvent, and their granulation, which is effected by stirring the plastic mass created by the kneading or rolling, consume about 45 minutes; the appellee's gelatinization and granulation are effected in about 5 minutes. The appellants' granulation is secured by stirring the homogeneous, plastic mass, and thereby dividing it "into small lumps," or causing it to be "split up" into particles or grains; the appellee's granulation is effected by bringing the particles of nitrocellulose, as they are suspended in water, into contact with the globules of the solvent. By the appellants' process the product, owing to its thorough gelatinization (and very

probably, also, to a slight compression caused by the kneading and rolling of the mass at the time of gelatinization, though this point is disputed), is hard, impervious to moisture, and possesses a gravimetric density of about 600; by the appellee's process the product is porous, capable of absorbing moisture, and possessing a gravimetric density of not more than two-thirds of that of the appellants' product. Without incumbering this opinion with a detailed examination of the evidence bearing on this branch of the case, we think it sufficient to say that these facts, in our opinion, show that the two processes differ in material respects, and that we agree with the Circuit Court that, as to the first claim of the patent in suit, there is no infringement.

In the opinion of the Circuit Court, the further conclusion was expressed that the language of the appellants' patent insufficiently describes the process referred to in its first claim. The evidence as to whether the patent is in such full, clear, concise, and exact terms as to enable any person skilled in the art of making gunpowder to follow with success the process described in the first claim is conflicting, but we think it preponderates in favor of the validity of the claim. It is not necessary that the description should be clear to one not skilled in the art. This point was aptly illustrated by Mr. Justice Bradley in *Loom Co. v. Higgins*, 105 U. S., at page 585, 26 L. Ed. 1177, where he said:

"When an astronomer reports that a comet is to be seen with the telescope in the constellation of Auriga, in so many degrees of declination and so many hours and minutes of right ascension, it is all Greek to the unskilled in science, but other astronomers will instantly direct their telescopes to the very point in the heavens where the stranger has made his entrance into our system. They understand the language of their brother scientist."

In the case at bar the appellee's expert Mr. Little sought by his testimony to show that the language of the appellants' patent is obscure. But he is not a practical powder maker. His experiments in powder making have been confined to the laboratory. We are not satisfied that the process adopted by him in his experiment with the appellants' patent, which seems not to have been successful, is one that any person skilled in the art of making gunpowder from nitrocellulose would have adopted. It certainly is very different from the process which the appellants' expert Prof. Munroe says he would adopt. It is also unlike the process which the appellants' agent, Oscar Hesse, declares the appellants, in actual practice, have adopted. The fact is that for nearly 10 years before the bill in this cause was filed the appellants sold in this country a smokeless granulated gunpowder, as a product protected by the letters patent which the appellee now insists are void for obscurity of language. Never until this cause was instituted, so far as we are informed, was the validity of the patent disputed. During all that period of 10 years there seems to have been a public acquiescence in its validity. With these facts before us, we think we are not justified in holding the first claim of the patent to be invalid.

The second claim of the patent is in these words:

"I claim as my invention the process of treating grains composed of gelatinized nitrocellulose, or of a compound thereof with other substances, and still containing the solvent employed for the purpose of gelatinization, the

said process consisting (1) in exposing the grains to a heated liquid or vapor chemically indifferent to the solid constituents thereof, and (2) afterward drying the grains, substantially as described."

In the specification of the patent preceding this claim, this process is thus described:

"The grains are (1) heated together with the same or any other like liquid, vapor, or steam, unadapted to act chemically thereon; the temperature being carried to a degree somewhat above the boiling point of the solvent employed in order to completely drive out the latter. The said solvents are thereby extracted from the grains and evaporated, but they may be recovered by distillation. Thereupon the grains are (2) separated from the liquid or withdrawn from the steam or vapor and dried."

We are forced to the conclusion that the patent, as to this claim, sets forth no patentable invention or discovery. The drying of the grains was necessary, and an old practice. Expelling the solvent from a substance by heating it in water had been practiced in other arts before the date of the appellants' patent. In 1882 a patent was issued to Henry A. Clark for a process of expelling oils and spirits from india rubber, which consisted in subjecting the india rubber to heat in water until the oils or spirits were removed. The expulsion of the solvent from nitrocellulose grains was commonly known to be necessary in order to secure uniformity in the chemical constitution and explosive power of the grains, and it was commonly effected by evaporation or by the use of water or steam, or both. Neither do we find that Von Freeden anywhere in the appellants' patent claimed to have been the discoverer of the process described in the second claim. The thing which he really invented was a new method of granulating gelatinized nitrocellulose, and that invention, he declares, was based on his discovery of the "peculiar behavior" of gelatinized nitrocellulose when, still containing its solvent, it is exposed to certain liquids and stirred. That discovery, and the invention based thereon, are embodied in the first claim. We therefore concur with the Circuit Court in holding the second claim to be invalid.

The result reached is that the decree of the Circuit Court should be affirmed, with costs.

RAYMOND v. KEYSTONE LANTERN CO. et al.

(Circuit Court of Appeals, Third Circuit. January 23, 1905.)

No. 56.

1. PATENTS—INFRINGEMENT—LANTERNS.

The Wright patent, No. 476,506, for an improvement in wick-raiser attachments for lanterns, is merely for a new combination of old parts performing an old function, and entitled to only a narrow construction in view of the prior art. As so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 132 Fed. 30.

Otto R. Barnett and Francis T. Chambers, for appellant.
Charles B. Collier, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This bill was brought for alleged infringement of letters patent No. 476,506, for "an improvement in wick-raiser attachments for lanterns," granted on June 7, 1892, to Frederick K. Wright, assignor to the Steam Gauge & Lantern Company. The patent has two claims which are as follows:

"(1) The combination, with a lantern frame and a detachable bottom, secured to the lantern frame by a releasable fastening, of an oil pot permanently attached to said bottom and capable of rotative movement therein, a burner provided with a laterally projecting wick-raiser shaft, and a stop-arm attached to the lantern frame and adapted to come in contact with the bottom of the wick-raiser shaft, substantially as set forth.

"(2) The combination, with the lantern frame and a detachable bottom, secured to the lantern frame by a releasable fastening, of an oil pot capable of rotative movement therein, and provided with beads or projections below and above the said bottom, a burner provided with a laterally projecting wick-raiser shaft, and a stop-arm attached to the lantern frame and adapted to come in contact with the bottom of the wick-raiser shaft, substantially as set forth."

Several defenses were set up in the court below, including want of evidence to show title in Raymond, trustee, who sued, and lack of necessary parties plaintiff; but the court considered only the defense of noninfringement, which the court sustained, and thereupon dismissed the bill.

The invention of the patent in suit relates to a class of lanterns, theretofore well known, in which the wick is raised or lowered by a rotative movement of the oil pot carrying the wick-raiser shaft. The claims are for combinations, and one of the elements of each of the two claims is "a stop-arm attached to the lantern frame and adapted to come in contact with the button of the wick-raiser shaft." This member of the combination of each claim is described in the specification thus:

"N represents an upright stop-arm, which is secured with its lower end to the inner side of the collar, A, and extends upwardly on the inner side of the globe to the vicinity of the button, m, where it terminates with a number of inwardly projecting teeth, n, which are adapted to come in contact with the button and turn the same when the oil pot is rotated within the lantern."

This stop-arm device has a small number of teeth, forming a short segmental rack which extends over a comparatively short part of the circular path of the wick-raiser button; and the toothed head of the stop device is supported by an arm which extends downwardly from the head, and is affixed at its lower end to the inner side of the body hoop or lower ring of the lantern frame. The defendants' structure, instead of the short segmental rack, has a complete toothed ring or circular gear face with which the pinion of the wick-raiser engages, and the toothed annulus or circular head is secured to the upper end of a cylindrical shell or casing surrounding the oil pot, which shell or casing at its lower end is affixed to the lan-

tern bottom. The above-noted differences in construction result in these differences in operation, namely, Wright's segmental rack permits of engagement with the button of the wick-raiser shaft during an extremely short period of its rotation, whereas the defendants' circular gear face secures the continuous engagement of the pinion therewith; and again, while Wright's stop-arm remains in the lantern frame when the bottom and oil pot are removed, in the defendants' structure when the bottom of the lantern is removed the wick raising and lowering mechanism is also removed and remains constantly in perfect operative position.

It is certain that Wright was not a pioneer inventor in lantern construction. The class of lanterns which he essayed to improve was old. The real basis of his improvement, namely, means for raising and lowering the wick without removing the oil pot from the body of the lantern, did not originate with Wright. He found it already in the art. The patent to Merrill of 1865, No. 46,010, shows a rotatable oil cup, a fixed rack, and a stem provided with a pinion for engaging the rack, whereby the wick may be raised and lowered by a rotary movement of the oil cup without its removal. The same method of adjusting the wick, by a wick raising and lowering attachment, is found in the patent to Feeny of 1889, No. 411,218. Feeny's wick-raising device in construction is substantially the same as Wright's. In principle it is identical. Feeny shows a rotatable oil pot, an arm-supported segmental bar provided with inwardly projecting teeth, and a wick-raising spindle carrying a toothed disk or pinion adapted to engage the teeth of the segmental bar, and the spindle is operated by the rotary movement of the oil pot. Indeed, the only difference between the structure of Feeny and Wright is that Feeny's oil pot is removably connected with the body of the lantern, while Wright's oil pot is permanently affixed to a detachable bottom. But Wright did not invent and was not the first to employ in connection with lantern construction a detachable bottom secured to the lantern frame by a releasing fastening. For this feature of construction we need only refer to the patent to Miller of 1875, No. 162,090.

The prior state of the art, we think, forbids any broad construction of the claims of the patent in suit. The rule here applicable, it seems to us, is that laid down in *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930, where, distinguishing between a primary invention and a mere improvement of a device, the Supreme Court said:

"But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not colorable invasions of the first."

The witnesses all agree as to the structural differences we have noted above between the defendants' wick raising and lowering mechanism and Wright's. But, as was to be expected, the expert

witnesses on the one side and on the other disagree as to the materiality of these variations between the two structures. An attentive examination of the proofs, however, has brought us to the conclusion that the differences which distinguish the wick-adjusting device of the defendants from the wick-adjusting device of the Wright patent are not colorable but substantial, and that the defendants' construction is not an invasion of Wright's patented improvement. By reason of the defendants' circular gear face being in continuous engagement with the teeth of the pinion, their wick-adjusting mechanism is always under the control of the operator, which is not the case in the device of the patent in suit. Again, while in Wright's structure, upon the removal of the lantern bottom from the frame, the toothed head of the stop-arm is disengaged from the toothed button of the wick-raiser shaft, the defendants' rack and pinion remain in permanent engagement, so that when, after removal, the lantern bottom is replaced, their wick-raiser mechanism is operative at once without any adjustment of parts.

We may add that the evidence warrants the conclusion that Wright's lantern never went into practical use, whereas the defendants' lantern has gone into extensive public use. Of course, these facts as to use are by no means decisive, but they tend to negative the charge of infringement made in this bill.

Upon the whole case we are of opinion that the Circuit Court was right in holding upon the proofs that the defendants had not infringed the plaintiff's patent, and accordingly the decree of the court dismissing the bill of complaint is affirmed.

J. STEVENS ARMS & TOOL CO. v. DAVENPORT et al.

(Circuit Court of Appeals, First Circuit. January 2, 1905.)

No. 527.

1. PATENTS—INVENTION—SHELL EXTRACTORS.

The Davenport patent, No. 565,605, for a shell-extracting mechanism for guns, discloses patentable novelty and invention; the device being an advance over the prior art in simplicity, strength, and durability. Also *held* infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

George L. Roberts and Reuben L. Roberts, for appellant.
Wilmarth H. Thurston, for appellees.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. There were issued to William H. Davenport on August 11, 1896, two patents relating to gun mechanism. One relates to ejecting mechanism, and the other to extracting mechanism. The ejecting mechanism is designed to automatically ex-

tract and eject the empty cartridge shell after the gun has been discharged. In other words, by tilting the barrel the cartridge is thrown out and away, while, under the simpler mechanism described in the extractor patent, the shell is loosened and forced back, so that it can be readily removed by the thumb and finger. The questions which we are to consider relate to the extractor mechanism which partly removes the empty shell, and that mechanism is covered by the Davenport patent, No. 565,605.

Mechanisms involving combinations for removing empty shells are old, but it seems to us that the conception of the patentee in the patent in question was an advance in the art in the direction of simplicity, durability, and certainty of operation under the varying conditions to which a gun may be subjected in actual use. Mr. Davenport declared his object to be "to produce an efficient positive-action shell-extracting device, the parts composing it being comparatively inexpensive, and not liable to become inoperative." We think he accomplished the object in view. After describing the *modus operandi* of the mechanism, he points out that "it will be seen that the device is positive in its action, both in opening and closing the gun. No springs whatever are employed, and it is comparatively inexpensive to make, and not liable to become inoperative." This we think is clearly so. To accomplish this result, he did what had never been done before, and it was this: He conceived the idea of carrying the barrel-lug so far forward of the pivot-pin on which the barrel of the gun had been secured to the framework in breakdown guns (and on which the barrel had been tilted in the operation of opening and closing the gun, thereby operating upon extracting and ejecting mechanisms in the rear of such pivot), that he might mount an extractor lever upon a pivot of its own in the barrel-lug in rear of the barrel pivot, so shaped and arranged that the mere operation of tilting the barrel in opening the gun would make the lever operate upon the extractor-rod, and through such operation eject the shell, and that the mere operation of reversing the tilt of the barrel and closing the gun would bring all the parts back into normal position. In doing this he discarded all springs, and otherwise simplified the previously existing extracting mechanisms. He reduced the number of parts, and created a combination with parts of greater strength, and one which at once reduced the expense of construction. It is well known that the effects of rust and the effects of dampness and frost, with shotguns in practical use, are less disastrous with mechanisms of strong and simple parts than with extracting mechanisms involving delicate springs and other slight parts. Under the patent in question, the parts are few and strong. The operation is simple and positive. It is this: The movement and operation of the lever upon the extractor-rod result from the fact that the barrel, when tilted forward and downward in opening the breach, forces the under surface of the lower part of the frame into contact with the heel or knee portion of the lever, which, when the gun is closed, extends below the barrel-lug. By means of such contact and resulting force the lever is moved upon its pivot, passing its upper and longer arm rearwardly, and, engaging the forward end of the extractor-rod, slides it endwise and rearwardly, and the head

of the extractor-rod, engaging the rim of the empty shell, forces it from its seat in the barrel. In reversing the operation, the act of closing the gun forces the head of the extractor-rod against the frame-face; the face of the head of the extractor-rod and that of the frame-face being so shaped that, when the rear end of the barrel is forced into position in closing, the extractor-rod is again forced endwise, but this time forward upon the long arm of the extractor-lever, thus forcing it into normal position, with its heel or knee again below that part of the barrel-lug in which it is pivoted.

We are quite satisfied with the treatment of the prior art by the learned judge below, and are content to leave it there with a single reference to the army revolver, about which considerable has been said in argument. We do not attach much importance to the extracting mechanism of the army revolver as applied to the extracting mechanism involved in the type of the light shotgun in question. In the army revolver, it is true, a somewhat similar leverage operating upon the extractor-rod forces it rearwardly and the cartridges out. Still it clearly differentiates itself in principle and in operation, because, while the barrel is still on its forward and downward tilt, the extractor-rod is thrown back into normal position by a spring.

We think the Davenport invention in question involved patentable novelty. It is of that class of worthy and sustainable inventions where, by adding a new idea and a new feature in assembling older features of a given mechanism, practically the same result is reached with less expense. The invention rests in a conception which simplifies complex mechanism and reduces the number of parts, at the same time raising the per cent. of durability and certainty of operation—in other words, in creating a condition of greater durability, and one which is more sure to produce practically the same result in emergencies, and not only with greater certainty, but with less expense. It is well known among those using guns in the woods in the fall of the year that stiffening waters and sleet are liable to render inoperative guns involving spring mechanism, and to put out of action automatic appliances, unless simple, secure, and strong.

Upon the question of infringement the situation is so plain as not to require discussion beyond that contained in the opinion of the court below.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

ÆOLIAN CO. v. HALLETT & DAVIS PIANO CO.

(Circuit Court, D. Massachusetts. February 14, 1905.)

No. 1,511.

1. PATENTS—SUIT FOR INFRINGEMENT—TITLE TO SUPPORT.

A bill of sale executed by a corporation, shown to have been at the time the owner of certain patents, conveying all of its stock in trade, assets, and property, specifically including "the patent properties which are held by the party of the first part," vested the purchaser with title to such patents, which will support a suit for their infringement, although no patents were specifically described therein.

2. SAME—VALIDITY AND INFRINGEMENT—MOTOR FOR MECHANICAL MUSICAL INSTRUMENTS.

The Kelly patents, Nos. 356,690 and 357,933, both relating to motors, in which bellows are employed to rotate a shaft for use in mechanism for playing musical instruments, cover combinations of elements not anticipated in the prior art, and which, in view of the peculiar adaptability of the motor shown for feeding the music sheet over the tracker board in playing a musical instrument, or for other analogous uses requiring light, quick, and sensitive work, disclose patentable invention. Claims 1 and 3 of the first patent and 1 of the second held infringed by a motor having in principle the same mode of operation and used to operate a mechanical piano player, whether or not such player comes within the strict definition of a "musical instrument."

In Equity.

Dickerson, Brown & Raegenar and Edward P. Payson, for complainant.

James Whittemore, for defendant.

HALE, District Judge. This bill in equity is for infringement of patents granted to George B. Kelly. The first patent is No. 356,690, dated January 25, 1887, for an improvement in mechanical musical instruments. The second patent is No. 357,933, dated July 15, 1887, for an improvement in motors for mechanical musical instruments.

At the threshold of the inquiry the defendant urges that the chain is not perfect by which the complainant derives his title to these patents. It appears in evidence that the original title to them was transferred by the patentee to the Mechanical OrguINETTE Company. In July, 1887, the Mechanical OrguINETTE Company executed and delivered to William B. Tremaine a bill of sale, conveying all of the stock in trade, assets, and property, specifically including "the patent properties which were held by the party of the first part, subject to payment of royalties, being conveyed subject to such royalties, which the party of the second part hereby assumes and agrees to pay." The schedule annexed includes patents which are inventoried at a certain specified amount. Immediately thereafter William B. Tremaine assigned an undivided two-thirds interest in and to the property described to James Morgan and John Nichol. On the same date the said Tremaine, Morgan, and Nichol conveyed to the Æolian Organ & Music Company. The last-named company is the complainant in this case, its name having been changed to the Æolian Company. The objection is made by the learned counsel for the defendant that the bill of sale from the Mechanical OrguINETTE

Company to Tremaine does not transfer the title to any patent by name, date, or number; that the schedule attached does not specify or set forth any patents; that no authority is shown in the president or treasurer to make the transfer. The other assignments are also objected to as insufficient to pass title to the patents in suit. The complainant, however, offers in evidence the fact that at a meeting of the trustees of the Mechanical OrguINETTE Company the president and treasurer were authorized to execute and deliver to Tremaine "a bill of sale sufficient in law to transfer to him the stock, property, and assets of the corporation." Pursuant to this authority, it appears that the bill of sale was executed, and that at the time the company was the owner of the patent in suit. We find that there appears the affirmative intention to convey absolutely all the patents, together with all the other property of the company. The bills of sale offered in evidence are, in our opinion, sufficient to show the intention of the parties to transfer the title to all patents, and to sufficiently identify the patents in suit as coming within the meaning and intention of the transfer. We think that both the legal and equitable titles to these patents were conveyed by the assignments offered in evidence.

The invention of both patents in suit relate to a motor in which bellows are employed to rotate a shaft. The use of the motor is in mechanism for playing musical instruments with the purpose of moving, over a tracker board, a perforated music sheet which determines the composition to be played. The elements of the motor are a wind-chest, a bellows with a communicating air passage, a crank shaft operated by the bellows, a chambered block or valve capable of movement over the air passages and always in communication with a passage leading to the wind-chest. The use of the chambered block or valve is to alternately put the motor bellows into communication with the wind-chest and with the outer air. The use of the motor is claimed by the complainant to be for a mechanical musical instrument or for analogous purposes. It is claimed that these motors "can only be used for performing work which does not require much power, and requires ready and quick response to changes in pressure." For such work the complainant says that it is desirable that such bellows motor shall be noiseless, durable, simple, light, compact; it is claimed, too, that its parts ought to be readily accessible; that it should be economical of power as well as simple in construction; and that there should be few devices connected with it which tend to increase the pressure of moving parts, or which tend to loss of power. In order that a motor should have all the above desired elements of a light motor for use in musical instruments and for other analogous purposes, it is urged by complainant that it should be operated by vacuum or exhaust bellows rather than by pressure bellows.

In the first patent in suit, No. 356,690, the inventor begins his specification by stating that "the object of the present invention is to provide means in a mechanical musical instrument for feeding the perforated music sheet, used in such instruments, through the instrument for the operation of the sounding devices, the winding of the music sheet upon the take-up roll, and the rewinding of the music sheet upon the

music roll." Claims 1 and 3 are brought in issue in this suit. They are as follows:

"(1) The combination, with a main wind-chest of a musical instrument, a bellows, and a shaft adapted to revolve in suitable bearings and connected to said bellows for operation of said shaft, of a chambered block having communication by its chamber with an air passage leading to said wind-chest and arranged to move back and forth over an air passage leading to said bellows, and thereby make and break communication between its chamber and the air passage to said bellows, said block being connected to said shaft for operation of said block.

"(3) The combination, with a main wind-chest of a musical instrument, one or more bellows, and a chambered block to each bellows, having communication by its chamber with an air passage leading to said wind-chest and arranged to move back and forth over an air passage leading to its bellows, and thereby make and break communication between its chamber and the air passage leading to its bellows, of a shaft adapted to revolve in suitable bearings and connected to each bellows for operation of said shaft, and by belt or gear connected to a music or take-up roll for winding the perforated music sheet thereon."

It will be seen that these claims relate only to a motor for rotating the shaft for drawing the perforated music sheet over the tracker board. The patent, as shown by these claims, is a combination patent. The elements of this combination are the main wind-chest, the bellows, the shaft, the chambered block or valve communicating by its chamber with an air passage leading to a wind-chest and arranged to move back and forth over another air passage leading to the bellows, thereby making and breaking communication between its chamber and the air passage to the bellows, the chambered block or valve being in communication with the shaft.

Claim 3 presents no vital elements in addition to those of claim 1. It merely shows the fact that one or more bellows may be used, and that the device is connected to a music roll for winding the perforated music sheet which causes the playing.

The instrument, as exhibited in the models and in the drawings, shows a wind-chest formed of two side boards set at an angle to each other, and united by two parallel end pieces, making a chamber in which pneumatics for operating the reed valves are located. At each end of the wind-chest are two pairs of upright bellows secured to the wind-chest by fixed boards; there are other boards adapted to swing on their hinges to and from the fixed boards. The fixed boards and the swinging boards are united by flexible material all around their edges. The two moving boards of each pair of bellows are connected at their upper end by a connecting rod or pitman. The arrangement and construction are such that when the movable board of one bellows is moved inwards the movable board of the other will be moved outwards, and so alternately. Each bellows on one side of the wind-chest is connected by a separate connecting rod or pitman pivoted at one end to a separate arm of a shaft, the two crank arms being set on the shaft 90 degrees apart. On this shaft is a gear wheel. This meshes with a larger wheel on the take-up roll, which propels the perforated music sheet. To secure the alternate expansion and collapse of the bellows, a passage leads from each bellows into each end piece, and then extends at a right angle to the outside of such end piece and in the same horizontal plane. Passages extend inward from the outside of each end piece in the same

horizontal plane, and between each of the two passages which we have just described. The last-named passages connect with a passage open at the lower end of the end piece into another passage communicating with the main wind-chest chamber. The passage leading from each bellows to the end piece and the passage extending inward from the outside of each end piece between the other passages are controlled by a chambered block or valve on the outside of each end piece, the said block or valve being attached to a pivoted bar, on which it can freely swing back and forth across and over the open ends of the passages above described. The patentee states in his specification that the chamber of this block or valve is of a length greater than the length of the openings at the end of the passages we have above described. The block or valve is also of a width to extend over and cover at the same time either one of said outer openings and the middle opening, so that, as the valve is swung back and forth across the openings, its chamber will be over each one of the two outer openings alternately, and at all times over the middle opening; so that air can pass into the middle opening alternately from each of the outer openings through the chamber into the several passages and into the main wind-chest, by which means, as the chambered block swings back and forth, the bellows of each pair are alternately exhausted; and while the air is being exhausted from one bellows of a pair into the wind-chest, atmospheric air can pass through the other passage, which is now open to the atmosphere, into the other bellows of its pair; and so on alternately. As it is necessary that the chambered block shall be moved back and forth over the openings at regular intervals, the patentee provides the following means for producing this movement, namely: The shaft above referred to, upon which the gear wheel is located which meshes with the larger wheel on the take-up roll, is provided at each end with an eccentric adapted to revolve in a socket in a block which is mounted to slide in its movements back and forth over the end of a rod, which rod is bent at right angles at the inner end; the right angular portion of this rod is adapted to turn in bearings on the upper edge of the wind-chest between each pair of bellows; this rod is bent downward along the outer surface of the end pieces, and its lower end engages the corresponding chambered block or valve. When this shaft is rotated, an axial rocking movement back and forth is imparted to said rod by means of said eccentric and said block; and this causes the part of the rod which extends downward to swing back and forth, causing the chambered block or valve to have a corresponding movement, for the purpose of alternately permitting atmospheric air to pass into the two bellows of a pair, and to exhaust the air from that bellows into which, at the time, atmospheric air is not passing. As two pairs of bellows are provided, one pair at each end of the shaft, and connected to said shaft as above described, the alternate expanding and collapsing of each pair causes a uniform rotating movement of the main shaft. This movement is transmitted to the music roll and to the take-up roll for the purpose of winding and rewinding the music sheet.

The complainant points out that the patentee throughout the specification often refers to the bellows as an exhaust bellows, and he claims that the patentee had in mind only an exhaust bellows, that he

must have had in mind the construction of a motor adapted to be operated by exhaust or vacuum, and that he did not have in mind a use of the motor with air under pressure. The complainant further claims that the statement of the patentee that the motor "can be operated with any suitable operating bellows" refers to any bellows suitable within the general description of the specification, and that this description cannot refer to anything except an exhaust bellows. The position of the complainant is, in short, that the main bellows is an exhaust bellows, and the main wind-chest is an exhaust wind-chest, and that the claim calls for a motor adapted to be operated by vacuum and not by compressed air.

In the second patent, No. 357,933, the motor appears by the model and drawings to be constructed with two upright bellows, having their movable boards connected by a rod. A connecting rod or pitman pivoted to the bellows board has its other end connected to a crank arm of a shaft secured in bearings upon a block. This shaft is rotated by the expansion and contraction of the bellows. The block has chambers, one communicating with one bellows, and the other with the other bellows. This block is also provided with a horizontal passage located between the said chambers open at its outer end and communicating at its inner end with the wind-chest. Each chamber has two openings forming communication between said chamber and the outer air. In order to establish communication alternately between the wind-chest and the outer air a chambered block or valve is provided, guided in ways; the block or valve is connected by a rod to the connecting rod above. When the two bellows are operated, the connecting rod or pitman swings on its pivot, and through the rod the valve is moved up and down in its guideways. The valve operates in respect to its openings upon the same principle which characterizes the operation of the valve in the first patent. The operation of the valve in this patent is in guideways and in an up and down movement. The complainant claims that the specification shows that the bellows are operated by exhaust and not by pressure. Claim 1 of this patent, which is the only claim involved, is as follows:

"(1) The combination, with a wind-chest and one or more bellows and a revolving shaft, of a chambered block arranged to move back and forth and make and break air communication between said wind-chest and each bellows and connected to the pitman connecting one of said bellows to said shaft for the operation of said block."

The learned counsel for the complainant, in describing the operation of the valve in this patent, says:

"The manner of mounting the chambered block or valve indicates that the motor is to be operated by suction. The chambered block or valve is mounted to reciprocate in a rectilinear path. All of the valve actuating parts are movable, and it is evident that a rectilinear reciprocating movement can be secured only through some fixed element, and that element in this case consists of the guides. That being the sole function of the guides, they are so constructed that they do not assist in holding the valve upon its seat; in fact, the guides are merely plain side pieces without grooves, and they are of such form as to permit the valve to be lifted from its seat. As constructed, if the motor was one to be operated by pressure the valve would be lifted from its seat, and hence the motor would be inoperative. When operated by suction, no retaining means are necessary for the valve, and the

absence of any retaining means is clear evidence of the intent to operate by suction."

We have entered into some detail in the description of the devices of the two patents, in order that we may show substantially what these devices are, without introducing drawings.

The learned counsel for the defendant presents the defense to this suit that both the patents brought in issue are invalid by reason of anticipation. Certain patents for mechanical musical instruments are brought to the attention of the court. Some of these patents present close and serious questions of anticipation. The Pain patent has required careful consideration in this regard. It has three bellows; the movable board of each bellows is connected by a connecting rod to a crank shaft; each bellows has a port opening into a passage, which passage is controlled by two poppet valves, one valve controlling communication with the atmosphere, and one valve controlling communication with the wind-chest. These two valves are connected by a rod, so that when one is open the other is closed. The crank shaft has cams which operate on levers for the purpose of raising the rod carrying the two valves. This patent has the wind-chest, the bellows, and the shaft, which represent the same elements in the patents in suit. But the chambered block or valve of the patents in suit, in our opinion, is not, in principle, embodied in the two poppet valves of the Pain patent. In these patents the valve is outside of the motor and rests freely upon its seat; at all times it extends over the passage leading directly to the suction chamber; it is held upon its seat by the pressure of air. This valve is especially adapted to the combination in which it is found, for use in the light, sensitive work of a motor adapted to musical instruments and for other analogous uses. The invention of those patents consist in the combination of the wind-chest, the bellows, the shaft, and the chambered block or valve. This valve we have fully described and considered in reference to its uses for light work such as is required in musical instruments. We think that this combination is not anticipated by a combination of a wind-chest, a bellows, a shaft, and two poppet valves, such as exist in the Pain patent. Taking this combination of a wind-chest, bellows, shaft, and the poppet valves, we think it required the inventive faculty to supplant the two poppet valves by one simple, light valve, working by suction, and especially suitable for ready and quick response in the light motors to be used in musical instruments and for other analogous uses. In the patent for the Parker motor, we also find two valves required to do the work of the single motor of the patent in suit. The Stone patent presents four valves, with levers, springs, and cams to control their movements. In both the Parker and Stone patents a more or less complicated system is presented, requiring the tension of springs and producing the friction of levers and cams which must be overcome with the loss of some power. In the case of the Stanley patent we find three or four bellows arranged around a common block, through which a shaft passes longitudinally. This shaft is provided with a crank, by means of which the shaft is rotated by the bellows as they expand and collapse alternately. Belt pulleys are provided on this crank shaft, and by suitable bellows the music rolls are rotated. For each bellows a duct is provided in the

block, on which the bellows are secured. Each duct is connected with one bellows, and extends from end to end of the block. On each end of the block a rotary valve is provided, the valve at one end serving for the purpose of successively connecting the several bellows with the air, and the valve at the other end being provided for successively connecting the several bellows with a suction chamber. This suction valve is contained in a valve chest, and is acted upon by a spring which presses it upon its seat. This spring is required, because, without its use, the loss of air would be so great that the motor would not operate. In our opinion, these two patents come the nearest to anticipation of any cited in the prior art; but they do not present a chambered block or valve which is identical with, or takes the place of, the valve of the patents in suit. The valve of these patents is mounted to move back and forth over the air passage leading to the bellows which is always in communication with the passage to the wind-chest. It works simply, lightly, and effectively; it is peculiarly adapted to the kind of motor in which it is used. In our opinion, it required a use of the inventive faculty to put this single valve in the place of the two or more valves presented in the patents to which we have called attention, and in place of the different valves of all the other patents cited in the prior art relating to musical instruments. We do not think it necessary to refer in detail to the other patents cited and claimed to be anticipatory in this art. None of them relate to motors for mechanical musical instruments having in combination a wind-chest, a bellows, a shaft, a single chambered block or valve, an air passage between the wind-chest and the chambered block, and an air passage leading to the bellows, the chambered block being mounted to move back and forth over the air passage leading to the bellows, but always in communication with the passage to the wind-chest. We do not think that any one of the motors presented in the prior art could be reconstructed so as to embody this combination without such a change as to entirely destroy its identity.

Certain patents are cited and brought to our attention relating to motors in use in steam engines, gas meters, and in other engines intended for heavy work. It is insisted with great emphasis and learning by the learned counsel for the defendant that these patents should properly be considered in the prior art, both under the general principles of patent law, and also because by the terms of one of the patents in suit the mechanism of that patent "can be applied to other uses and purposes as well as to a mechanical musical instrument," and it is urged that these words in the specification of the first patent must have their full and unreserved meaning. We think, however, that the language of the specification must be construed to mean that the motor may be used for other analogous purposes and for purposes for which it is especially adapted. In our opinion, the inventive thought of the patentee was to make a combination for a light class of motors, adapted for feeding by mechanism the perforated music sheet, for playing musical instruments; the combination may be used for motors adapted for other light, quick, and sensitive work. We think it required the inventive faculty to transfer the devices found in the heavy locomotives, steam engines and gas meters and make them applicable to adaptation for musical and other similar purposes; and so we do not think it neces-

sary to discuss in detail the group of patents which are brought before us in the art relating to locomotives, steam engines, gas meters, and other such devices.

We find nothing in the prior art to induce us to believe that the motor of the patents in suit could have been devised without the exercise of the inventive faculty. This motor is simple in operation and in construction. It is peculiarly adapted for feeding the music sheet over a tracker board in playing a musical instrument. It may be used for other light analogous purposes. We think it was invention to take any of the devices such as are exhibited to us in the prior art and make the vital change in them which produced the machine before us. While, after the fact, it may be urged that the changes which produced the whole combination of the patent in suit were obvious, in view of the prior art, and might have occurred to any skilled mechanic, still it must be admitted that those changes never were made by any one until made by the patentee of these patents. The evidence does not show that any such success has been achieved by this patent as was achieved by the great primary patents in the world of invention, but it does tend to show that the patentee took the last step which counted, and which made a successful machine.

Has the defendant infringed the patents in suit? The motor of the defendant, which is alleged to be the offending structure, has three bellows, each having a movable board connected by a connecting rod with a crank shaft. This shaft, by means of a sprocket wheel and chain, serves to rotate either the music roll or the take-up roll; the bellows are secured on a board which has a passage leading to the interior of the bellows and also has a passage leading to the wind-chest; the wind-chest has a crank connected with a suction bellows; for each bellows a chambered block or valve is mounted to slide up and down on the face of the board, the chamber of the block being at all times and in all positions in communication with the suction chamber by means of the passage. Each valve is connected by a pivoted rod with a connecting rod of its corresponding bellows. As long as the chambered block corresponding to any one bellows establishes communication between the passages, the air will be exhausted from the bellows; and as long as the passage of any one bellows is uncovered by its corresponding chambered block, atmospheric air will pass through said passage into the corresponding bellows to expand it. The three bellows are thus successively collapsed and expanded, and so uniform rotation of the shaft is secured.

In a motor made subsequently by the defendant it appears that there is no material change from the above-described motor. In this motor the reciprocating chambered block is connected directly to the crank shaft instead of attaching the connecting rod to the pitman. In both motors of the defendant the movement of the valve is effected in the same way.

It is urged by the learned counsel for the defendant that the first patent in suit is distinctly and solely for a mechanical musical instrument, and that the motor is claimed to be connected to "a main wind-chest of a musical instrument"; and it is urged that the defendant uses its motor only in a piano player, a separate instrument which has no

speaking devices, and which is intended to play a piano; that the piano is one instrument; that the piano player is another instrument; but that the mechanical piano player is never a "musical instrument," any more than a performer playing a piano by hand is a musical instrument. But in our opinion the use of the motor upon a piano player is clearly an analogous use and within the inventive thought of the inventor. In fact, there is much reason for holding that the mechanical piano player is itself a "musical instrument." A well-recognized definition of the word "musical" is "of or pertaining to music or the performance of music." The device of the defendant, namely, the mechanical piano player, clearly pertains to "music or the performance of music"; it seems to us to be within the definition of a "musical" instrument. While we do not think the inventive thought of the inventor can be extended to a steam engine, we think it must be capable of extension to a motor so closely and intimately connected with a musical instrument, if it is not indeed itself a musical instrument. The machines of the defendant submitted to us seem in principle to have the same mode of operation and to accomplish the same results as the motors of the patents in suit. We cannot escape the conclusion that they infringe.

After a careful study of these patents and of the prior art, and of all the questions raised in reference to the infringement, we are satisfied that the complainant has shown that the patents in suit are valid, and that they have been infringed by the defendant.

The decree must be for the complainant for an injunction and for an accounting.

GOSS PRINTING PRESS CO. v. SCOTT.

(Circuit Court, D. New Jersey. February 4, 1905.)

1. PATENTS—ASSIGNMENT OF INTEREST—INFRINGEMENT—SUIT FOR DAMAGES—PARTIES—VIOLATION OF INJUNCTION.

Where in a suit for infringement of letters patent an interlocutory decree was made for an injunction and an account, and thereafter the complainant assigned, to third persons its entire right, title and interest in and to the letters patent, and took from them a mere license, non-exclusive, and non-assignable except to the successors or assigns of the business then carried on by the complainant, *held*, (a) that the complainant could not, in the suit as it then stood with respect to parties, recover profits or damages on account of infringement occurring after the execution of the assignment, or proceed against the defendant for a violation of the injunction by reason of such infringement; (b) that to secure an account, in equity, of profits or damages for such infringement it would be necessary to resort to an original bill or a bill of a supplemental nature brought by the licensee and assignees as co-complainants; (c) that in order that proceedings might properly be had for violation of the injunction, by reason of such infringement while the complainant remained a mere licensee, recourse should be had to a bill of the latter character.

[Ed. Note.—Accounting by infringer of patent for profits, see note to *Brickill v. City of New York*, 50 C. C. A. 8.]

2. SAME—VIOLATION OF INJUNCTION—CONTEMPT.

Where alleged infringing machines were made and sold by the defendant under letters patent granted to him after the issue of the patent in suit, and before constructing them he consulted counsel and an expert and was advised by them, and believed, that such machines

would not embody or contain the subject-matter of the patent in suit, he should not, in view of his innocence of intention, although an infringer in fact, be punished in contempt proceedings, where they are in no sense remedial, but solely of a punitive character.

(Syllabus by the Court.)

In Equity.

M. B. Phillip and C. E. Pickard, for the motion.

Benjamin F. Lee, James G. K. Lee, and Wm. H. L. Lee, opposed.

BRADFORD, District Judge. The bill in this case was brought by the Goss Printing Press Company against Walter Scott and charged infringement by him of certain letters patent of the United States held and owned by the complainant, relating to multi-roll printing presses; among them being patent No. 415,321, dated November 19, 1889, granted to Joseph L. Firm for an "Improvement in Rotary Printing-Machines." An interlocutory decree was made July 12, 1901, sustaining the seventh claim of that patent, finding its infringement, directing an account of profits and damages, and awarding an injunction. Subsequently the defendant made and sold four printing presses respectively to the Halifax Press in Halifax, England, the Wichita Eagle in Wichita, Kansas, the Drovers' Telegram in Kansas City, Missouri, and the Dallas News in Dallas, Texas. These machines embraced two types of presses. Those sold to the Wichita Eagle and the Drovers' Telegram belonged to one type, and those sold to the Halifax Press and the Dallas News to the other. It is contended by the complainant that each of the four presses embodied the subject-matter of the seventh claim of patent No. 415,321 and was made and sold in violation of the injunction. During the taking of the testimony in the course of the accounting before the Master the defendant, by the advice of his counsel, declined to answer certain questions asked him relating to the amount received by him for those presses. The complainant has made application that the defendant be adjudged guilty of and punished for contempt in violating the injunction; that he be directed to answer the questions above referred to; that the four presses in question be included in the order of reference; and that the injunction be so extended as specifically to cover presses similar to them. The defendant, on the other hand, has made application that the accounting before the Master be limited to November 2, 1901, and that the injunction be "vacated as of said date." The applications on both sides are so related to each other that all of them conveniently may be considered in one opinion. It appears that the complainant executed November 2, 1901, an instrument in writing, bearing date on that day, in and by which it assigned to Robert Hoe and Charles W. Carpenter the "entire right, title and interest" in and to the letters patent therein mentioned, including among others patent No. 415,321, and "any and all reissues and extensions of the same throughout the United States and the Territories thereof, and the entire right, title and interest in and to the inventions contained in each of said letters patent; the same to be held and enjoyed by the said Robert Hoe and Charles W. Carpenter, for their own use and behoof and for the use and behoof of their heirs, executors, administrators and assigns, to the full end of the terms for

which said letters patent or any other letters patent for said inventions are or may be granted." The complainant thereby also assigned to Hoe and Carpenter all claims and demands, both at law and in equity, that it "has or may have for damages and profits on account of any infringement of the before mentioned letters patent, against any person, firm or corporation, except claims and demands against the aforesaid Walter Scott and the aforesaid Seymour-Brewer Printing Press Company, on account of the infringement of letters patent Nos. 399,659; 410,271; 415,321; 529,680 and 566,409," and authorized and empowered "the said Robert Hoe and Charles W. Carpenter to sue for in their own names and collect to their own use all such claims and demands." The presses for the Wichita Eagle, the Drovers' Telegram and the Dallas News were not, nor were or was any of them, ordered or negotiated for until after the execution of the above assignment. The press for the Halifax Press was ordered September 10, 1901, but its parts were not made and assembled until December, 1901, and the finished machine was not shipped until February 11, 1902. It is urged by the complainant that the assignment specifically reserved to it a right to damages and profits on account of all infringing machines that should be made by the defendant after its date. Stress is laid upon the words "has or may have" as indicating that the reservation or exception of claims and demands against the defendant for damages and profits were intended to extend, not only to claims for damages and profits existing at the date of the assignment, but to claims for damages and profits not arising until thereafter. This contention is inadmissible. It is more reasonable to attribute to the complainant redundancy of expression in the use of the words "has or may have" than to adopt a construction which would render the exception repugnant to the assignment. An intention that Hoe and Carpenter should have and enjoy the entire right, title and interest in and to patent No. 415,321, and the invention embodied in it, to the end of the term for which that patent was granted, is irreconcilable with an intention on the part of the complainant that it, to the exclusion of Hoe and Carpenter, should have the sole right to all future damages and profits arising at any and all times after the execution of the assignment and until the expiration of the term of the patent. The exception of claims for damages and profits on account of any infringement of patent No. 415,321 clearly has reference only to claims existing at the time of the execution of the assignment. By virtue of that instrument Hoe and Carpenter became the legal and equitable owners of the monopoly and invention of that patent. Hoe and Carpenter, November 2, 1901, and immediately upon the execution of the assignment to them, gave a license in writing under seal to the complainant to make, use and sell certain patented inventions including the press of patent No. 415,321. The portion of the assignment material in this connection is as follows:

"The said Robert Hoe and Charles W. Carpenter have granted, and do hereby grant, to the said The Goss Printing Press Company and the successors or assigns of the business now carried on by the said The Goss Printing Press Company, a license to make, use and sell the inventions of Joseph L. Firm assigned to the said Robert Hoe and Charles W. Carpenter by an assignment executed of even date herewith by the said The Goss Printing Press Company and by an assignment executed of even date herewith by the said The Goss

Printing Press Company and said Joseph L. Firm, copies of which assignments are annexed hereto, during the term of any letters patent that have been or may be granted for the aforesaid inventions in the United States, such license to be non-assignable to any person, firm or corporation, in whole or in part, except to the successors or assigns of the business now carried on by the said The Goss Printing Press Company, and provided that no right or privilege is granted in and by said license to the said The Goss Printing Press Company to make, use or sell any invention or inventions described and claimed in any letters patent owned or controlled by the said Robert Hoe and Charles W. Carpenter, or either of them, at the date hereof, or that may hereafter be owned or controlled by the said Robert Hoe and Charles W. Carpenter, or either of them, other than such letters patent as may be granted upon the applications of the said Joseph L. Firm."

This license is non-exclusive, and non-assignable, except to "the successors or assigns of the business now carried on by the said The Goss Printing Press Company." Under the settled law of procedure the complainant as such licensee cannot maintain in its name an action at law or, without the joinder with it of Hoe and Carpenter as parties complainant, a suit in equity for infringement by the defendant. Samuel G. Goss in his affidavit makes the following statement:

"Affiant further states that the said Robert Hoe and Charles W. Carpenter have further expressly agreed that they shall not and will not grant any license, shop-right or privilege to make, use or sell any of the inventions covered by the letters patent in the above named, assignment conveyed, including letters patent to Joseph L. Firm, No. 415,321, during the terms for which any of said letters patent have been granted, except the license to this complainant, The Goss Printing Press Company, or the successors and assigns of the business now carried on by the said Goss Printing Press Company."

This statement is indefinite, immaterial and inadmissible. It does not appear when or with whom such agreement was had. It may not have been made until after the sale and delivery of the four printing presses and immediately before the hearing. But, if it be assumed that such agreement was had with the complainant at or shortly after the time of the execution of the license, the aspect of the case would not be changed. There is nothing in the alleged agreement which could in any manner confer upon the complainant as against the defendant a right of action or suit not existing under the license. Further, it does not appear whether the alleged agreement was oral or in writing. In the absence of an averment to the contrary, it fairly may be assumed to have been merely oral. Clearly such agreement is not relied on by the complainant as a substitution for the license; and it is incompetent for the purpose of varying or explaining its scope or terms. The complainant, having conveyed the title, legal and equitable, to patent No. 415,321 to Hoe and Carpenter by the assignment of November 2, 1901, and none of the four printing presses above mentioned having been made, sold or delivered until after its execution, could not maintain a bill as sole complainant for infringement by reason of the making and selling of those presses. Its interest as licensee under Hoe and Carpenter would be insufficient to support such a bill. Nor is the complainant, as such mere licensee, entitled in this suit, as it now stands, to an account of profits or damages with respect to those presses, nor to proceed against the defendant for a violation of the injunction after the execution of the assignment. It is true that the assignment did not either terminate the suit or vacate the injunction. Notwithstanding

the assignment the complainant is entitled to an account for profits and damages until its execution; and should the complainant regain ownership of the patent before the expiration of its term, it may well be that it would be entitled to the full benefit of the injunction. But the interlocutory decree for an injunction and an account, while establishing the then ownership of the patent and its infringement and the rights of the complainant predicated upon such ownership, did not in any manner merge the patent or destroy or restrict its assignability. When that ownership ceased the complainant became a mere licensee, and under the decree possessed no right to proceed against the defendant for any violation of the injunction after the termination of such ownership, or to an account of profits or damages for any infringement occurring thereafter. To secure an account in equity of profits or damages for infringement so occurring it would be necessary to resort to an original bill, or a bill of a supplemental nature, brought by the Goss Printing Press Company and Hoe and Carpenter as co-complainants. And in order that proceedings may properly be had for violation of the injunction while the complainant continued a mere licensee recourse should be had to a bill of the latter character.

The writ of injunction served upon the defendant is directed against "directly or indirectly making, using, furnishing to others for use, or selling in any manner." None of the four presses complained of was made, used, furnished to others for use, or sold, prior to the execution of the assignment. The interlocutory decree, however, is broader in its prohibitive terms than the writ of injunction. It provides for an injunction against "directly or indirectly making or causing to be made, using or causing to be used, selling or causing to be sold to others for use, and from offering to make and sell in any manner." It is claimed that the writ of injunction possessed the same force and effect as it would have had if the above language were embodied in it, and that the defendant prior to the execution of the assignment offered to make and sell one of the four presses, in that the order for the press subsequently sent to Halifax was received and accepted September 10, 1901. On the assumption that the writ of injunction is so to be interpreted, and, further, that the complainant as a mere licensee is authorized, in this suit as it now stands, to proceed for a violation of the injunction prior to the execution of the assignment,—a point by no means clear,—the question remains whether the circumstances of the case as disclosed in the affidavits and exhibits would justify the court in adjudging the defendant guilty of contempt and inflicting punishment therefor. The printing presses for the Wichita Eagle and Drovers' Telegram embodied the subject-matter of patent No. 753,169, dated February 23, 1904, granted to the defendant, and those for the Halifax Press and Dallas News the subject-matter of patent No. 753,640, dated March 1, 1904, also granted to the defendant. Both patents were applied for in May, 1901. Their issue was attended with the usual *prima facie* presumption of patentable novelty involving patentable difference between the mechanism described and claimed in them and that of patent No. 415,321. *Ransome v. Hyatt*, 69 Fed. 148, 16 C. C. A. 185; *Miller v. Eagle Manufacturing Co.*, 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121; *Corning v. Burden*, 15 How. 252, 271, 14 L. Ed.

683. It appears that the defendant before constructing any of the four presses consulted with his counsel and a patent expert and was advised by them that such printing machines would not embody or contain the subject-matter of the seventh claim of the last mentioned patent. He states positively under oath that he then believed and still believes that such advice was correct. There is nothing in the evidence to warrant a conclusion that the defendant is not sincere in his statement. It may be that he has entertained a mistaken belief and is an infringer. Honest belief and advice of counsel will not of themselves in all cases relieve an infringer from responsibility for his violation of an injunction. Where the contempt proceedings are of a remedial rather than punitive nature, innocence of intention, while serving to mitigate the consequences of a breach of injunction, will not constitute a defense; but where the proceedings in contempt are solely punitive it is otherwise. Here the proceedings are not remedial in any proper sense. They can be of no direct benefit to the complainant. Under them the defendant cannot be compelled to account to him for profits and damages by reason of the mere offer to make and sell in violation of the injunction. The sale not having occurred until after the execution of the assignment to Hoe and Carpenter, profits and damages on account of that sale cannot, as before stated, be recovered in this suit as it now stands. Nor can a fine be imposed as an indemnity to the complainant; for no pecuniary damage has resulted to the complainant from the mere offer to make and sell. It may be questionable, under the circumstances of this case, whether it would be proper, in the absence of pleadings and plenary proofs, and on a mere rule to show cause, summarily to determine the validity or invalidity of patents subsequent to that in suit and ascertain whether the defendant acting under such subsequent patents has infringed that in suit. Certainly such a course would not be justified unless the evidence of infringement were clear and convincing. But the crucial question here is not whether the defendant prior to the execution of the assignment may have infringed through his acceptance of the order for the press sent to Halifax, but whether, on the assumption that such infringement occurred, he should, notwithstanding his belief and innocence of intention, be punished. I am satisfied that such punishment is not required or warranted either by the authorities or by reason. It results from the foregoing considerations that the rule to show cause why the defendant should not be punished for contempt, and why he should not answer certain interrogatories therein referred to, and why certain printing presses therein referred to should not be included in the order of reference in this case, and why the defendant should not account for the same, must be discharged; that the motion that the injunction be so extended as specifically to cover certain printing presses be denied; and that the accounting before the master be limited to November 2, 1901, the date of the assignment. The application for the "vacation" of the injunction as of that date is unnecessary and improper, and must be denied.

LIBRARY BUREAU v. FRED MACEY CO., Limited.

(Circuit Court, D. Massachusetts. February 13, 1905.)

No. 1,624.

1. PATENTS—INVENTION—CARD RECORDS.

The Williams patents, Nos. 623,857 and 624,597, for improvements in card records, consisting in placing an additional index tab on reversible record cards, designed to be symmetrically arranged in groups in their index order—the additional tab having the same index character on the back as the other tab, but marked in ink of a different color—are void for lack of invention, in view of the prior art.

In Equity. Suit for infringement of patents. On final hearing.

Roberts & Mitchell, for complainant.

Fred S. Chappell, for defendant.

COLT, District Judge. This is a suit for infringement of two patents granted to Stephen T. Williams for improvements in card records—No. 623,857, dated April 25, 1899, and No. 624,597, dated May 9, 1899. Patent No. 624,597, although later in date, was first applied for, and is therefore properly called the first Williams patent.

These card records comprise groups of cards, with index tabs upon their upper edges, symmetrically arranged in a box or drawer. It is found to be both convenient and economical to make entries on the back of these cards, especially when used for ledger purposes. In cards which have only one tab—as, for example, in the Gunn series—the user cannot tell, on running his eye over the tabs, whether there are entries on the back of any of the cards. To ascertain this fact with respect to any card, it is necessary to take it from the file, turn it over, and then replace it in its proper position in the series. To avoid this trouble, it occurred to Williams to put an additional tab on each card, and to mark the back of it with the same index character as the other tab, and to distinguish the two tabs by using inks of different colors. When there are records on the back of a card, it is reversed, back for front, and replaced in the box in its proper index order, and the difference in the color of the index number will convey the required information, without taking the card from the file and inspecting it.

In the first Williams patent, the two tabs, or “twin tabs,” as the patentee terms them, are both located on the upper edge of the card, while in the second patent they are located on opposite edges of the card. The material parts of the specification of the first Williams patent, No. 624,597, are as follows:

“It is frequently the case that both sides of a card are required for records. In that case the card, when removed from its group, must be turned over by the hand; and, after the records have been made, it must be turned back again, in order that the index character may face the recorder or searcher. If the card have only a single tab inscribed on the back, with the same index character as that upon the front of the tab, whenever the card is reversed as to face and back, but without reversing top and bottom, the tab will occupy a different position in the index order from its former one, and disconcert the searcher. This disarrangement of index order by such reversal of a card is unavoidable with any card group or series bearing but one index of consecutive letters or numbers. If every card of such a

group is reversed whenever the consecutive order of the index characters on the back of the card is consulted, the card must be taken from its place and turned over for inspection, and turned back again when restored to its place in the file. The motions involved in this taking out and turning over consume time, and when many hundreds or thousands of cards are to be handled in a day, whether by one person or many, the wasted time and energy become a very sensible quantity. An attempt to remedy this fault has been made, in which the backs of the cards are so ruled that records on the back begin at the bottom of the card and proceed upward, the intention being to enable inspectors to read the backs as well as the fronts without removal from the file. Practically the plan is a failure; the inspector being obliged to bend his body or neck into unnatural positions to read the back of the card at all, and obscuring the light necessary for rendering the records legible in a card-file. Again, with all tab-card indexes or records heretofore used in drawer or box files, only the person in front of or facing the file could conveniently read the index characters and use the file at one time.

"This invention has for its object, first, the saving of wasted motions and time in reading and handling such card indexes or record cards; and, second, providing for or facilitating the filing and inspection of such card records, etc., by two or more persons at the same time.

"I effect my purpose by providing two index tabs upon the same edge of each card in a group; these tabs, which I term 'twin tabs,' being in the same relative position, measured from the two ends or two opposite edges of the card, and so positioned that upon reversal of the card, side for side and back for front, the twin tabs exchange places in the index order. I indite the same index character upon the face of one tab and upon the back of its twin tab, preferably in inks of different colors for the front and back of the two tabs. My object in using different-colored inks for this purpose is to have the changed color inform the inspector that the card has been reversed, and that there are records on the reverse side. Otherwise the inspector, who wishes to know how much matter has been recorded, and if the reverse side has been used, must remove the card from its file and turn it over to ascertain the information."

The claims of the patent are as follows:

"(1) In a group of index or record cards or sheets consecutively indexed in opposite directions, twin index tabs provided upon one edge of each of such cards or sheets, so positioned that by reversal of a card, side for side and back for front, the twin tabs are caused to exchange places in the index order, substantially as and for the purpose herein described.

"(2) A group of index or record cards, each having upon one edge two tabs, with the same index character inscribed upon one side of one of said tabs, and upon the opposite side of the other one, substantially as and for the purpose herein described.

"(3) A reversible index card, having on one edge two index tabs, bearing—one on its face, and the other on its back—corresponding index signs, and having the faces of the index tabs distinguished from the backs thereof by different colors, substantially as and for the purpose set forth.

"(4) A reversible index card, having on one edge two index tabs, bearing—one on its face, and the other on its back—corresponding index signs, which are of one color on the face and another color on the back of the card, substantially as and for the purpose set forth."

In the second Williams patent, No. 623,857, the specification says:

"In my application, serial No. 694,520, for United States patent, filed October 25, 1898, I have described and claimed record cards having duplicate indexes, of which the index characters are inscribed upon what I call 'twin tabs,' which consist of two tabs on the same edge of each card, similarly indexed, one on one side, and the other on the other side. In such record cards the space for indexing either face—that is to say, the front or back of the card—is limited to one-half the length of that edge of the card on which the index is placed, and therefore such card must be of considerable length to admit of the double indexing.

"The present invention gives duplicate indexes on opposite sides of the cards, with cards shorter than any that would be practicable with the cards having twin tabs, above mentioned.

"The said invention is mainly distinguished by the provision of a single tab on each of two opposite edges of each card of a group used in an index: the two tabs on said two edges being exactly opposite each other, and having upon them similar index characters, but the said characters being on opposite sides of the card, so that, when any one of the cards of a group is reversed, the corresponding index character on the back will occupy precisely the same position in the index as was previously occupied by a figure on the face. This and other features of the invention are fully represented in the accompanying drawings, and will be hereinafter described in detail with reference thereto, and their novelty will be pointed out by the claims following the description."

The claims in issue are as follows:

"(1) A reversible index card having a tab on each of two opposite edges, the said tabs arranged opposite each other and having corresponding index characters, substantially as and for the purpose herein described.

"(2) In a group of index or record cards or sheets in which the several cards of a group are consecutively indexed, two index tabs upon each of said cards, arranged exactly opposite each other, on opposite edges of the card, and having corresponding index characters inscribed on one face of one tab, and on the other face of the opposite tab, substantially as and for the purpose herein described.

"(3) An index or record card having two tabs, one on each of two opposite edges of the card, and having corresponding index characters on said tabs, the said characters being of different colors, one on one face of one tab, and the other on the other face of the other tab, substantially as herein described."

"(5) An index or record card having index tabs on its edges, and corner tabs of greater projection than the index tabs, substantially as and for the purpose herein described."

The essence of the Williams inventions disclosed in the foregoing patents consists in placing an additional tab on record cards designed to be symmetrically arranged in groups in their index order; the additional tab having the same index character on the back as the other tab, but marked in ink of a different color, in order to distinguish it.

The exhibit of the twin-tab card ledger manufactured and sold by the complainant contains an elaborate system of combined signal tabs, index tabs, and color differentiation, which is neither disclosed in, nor covered by, the patents in suit.

In view of the prior art, as illustrated in the Gunn patent, No. 583,227, the Langstroth patent, No. 475,043, and the Stamford patent, No. 564,117, I am of opinion that the Williams patents are void for want of invention.

Bill to be dismissed.

PETTIBONE, MULLIKEN & CO. v. PENNSYLVANIA STEEL CO.

(Circuit Court, E. D. Pennsylvania. January 31, 1905.)

No. 23.

1. PATENTS—SUIT FOR INFRINGEMENT—WAIVER OF OBJECTION TO FAILURE TO PROVE ALLEGATION NOT DENIED.

Where a bill for infringement of a patent properly alleged that the patented machine of complainant was marked in accordance with the requirement of Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388], which allegation was not denied in the answer, and no objection was made on the hearing to the failure of complainant to prove it, such objection is waived, and cannot be taken for the first time on entry of the decree.

In Equity. Suit for infringement of patent. On objections to interlocutory decree.

See 133 Fed. 730.

Dyrenforth, Dyrenforth & Lee and Horace Pettit, for complainants.

Joshua Pusey, for respondents.

HOLLAND, District Judge. The bill in equity filed in this case alleging infringement was sustained. It contained an averment that the patented machine of complainants was marked in accordance with the requirement of Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388]. The answer neither affirmed nor denied, nor did it put the complainants to the proof of this allegation. No evidence was offered to establish the affirmative of this averment, and no objection was taken at the final hearing to this failure to introduce evidence on this point. It was not raised until the day fixed for entering the decree.

In *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426, the averment in the bill was denied in the answer, and passed upon at the final hearing. There the issue was squarely raised, denied in the answer, no proof offered to sustain the averment in the bill, and the court held that it was the duty of the complainant to allege the fact of marking, and the burden of proving this was upon him, and a failure to do so precluded his recovery of damages; but in the same opinion they approved the decision in *Rubber Company v. Goodyear*, reported in 76 U. S. 788-801, 19 L. Ed. 566, wherein the court held "it was too late for the defendant to raise the point before the master. They were concluded by their previous silence, and must be held to have waived it." The defendants made no denial of the allegation in the bill, and raised no objection at the final hearing to their failure to introduce evidence on this point. In view of these facts, under the decision of *Rubber Company v. Goodyear*, supra, it is too late to raise the point now, and it must be held to have been waived.

Objections to the entry of interlocutory decree overruled.

SAMPSON & MURDOCK CO. v. SEAVER-RADFORD CO.

(Circuit Court, D. Massachusetts. February 2, 1905.)

No. 1,937.

1. COPYRIGHT—INFRINGEMENT—USE OF COPYRIGHTED DIRECTORY.

A compiler of a general directory has the right to use a prior copyrighted general directory both to verify the results of his own work, and to show him and direct him to the persons on whom it may be worth his while to call.

2. SAME.

One who is compiling a general directory of a city has the right, after making his own canvass, to take a part of the names and addresses contained in another copyrighted general directory, go to the original sources of information, ascertain how far the existing facts concur with the statements of the first directory, and then to print and publish the result as his own, abandoning what is not found, and changing what his investigation shows should be changed, and printing without change what he has, by means of his own investigation, found to be correct at the time such investigation was made; and such right is not lost by the fact that a person, in going to the sources of information, takes with him memoranda of names and addresses copied from the first directory, changing them when his investigation shows they should be changed to correspond with the facts, and checking them as correct when they prove to be correct.

3. SAME—INJUNCTION—SCOPE.

The master found on a reference in a suit to enjoin infringement of complainant's copyrighted directory, that defendant had copied into its directory certain specific matter from complainant's directory, including certain fictitious and erroneous names and statements, and had also transferred to all parts of its directory from complainant's directory many names, and information connected therewith, which it did not obtain by its original canvass or from original sources; but such infringing matter was not specifically set out in the finding, except sufficient thereof, taken at random from defendant's book, to support the finding, and to indicate its character and the means by which it could be identified. *Held*, that such findings entitled complainant to an injunction, but that, it not appearing that the objectionable matter could not be expunged, the court would not decree a general injunction against the sale of defendant's directory, but the same would be limited to restrain the sale only of any copy containing any of the infringing matter, including that indicated in such general finding.

4. SAME—RIGHT TO INJUNCTION—PROOF OF DAMAGES.

Proof of damages is not essential to entitle a complainant to an injunction restraining the infringement of a copyrighted publication.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 79.]

In Equity. Suit for infringement of copyright. On exceptions to master's report.

This cause has already been before the court in the matter of a preliminary injunction. 129 Fed. 761. We made an interlocutory decree for a temporary injunction unless the defendant before a certain time should file a bond to the complainant in the sum of \$5,000, with sureties approved by the clerk, conditioned for the payment of any sum, except costs, which might be finally decreed against the defendant in this court or on appeal. The court further decreed that the defendant keep an account of sales of directories made by it. After the above decree the cause again came before this court

on May 17, 1904, and, under the practice in such cases, it was referred to John G. Stetson, as master, upon the bill, answer, and replication, to find the facts, and report to the court his findings of fact, his conclusions of law, and such portions of the evidence as either party might request or as he might deem useful to the court. The master has filed a complete report, which now forms the basis of action for the court. That report, omitting the introductory portion and schedules not material to be now considered, is as follows:

On May 17, 1904, this cause was referred to me, as master, upon the bill, answer, and replication, to hear the evidence, find the facts, and report to the court my findings of fact, my conclusions of law, and such portions of the evidence as either party may request. Mr. Alexander P. Browne represents the complainant, and Mr. Thomas Hunt represents the defendant, in the proceedings before me. I have heard the evidence offered by each party in the usual order. This evidence was taken stenographically by stenographers furnished by Mr. Browne, and copies of the evidence have been delivered to counsel for each party and to me. I have heard counsel for each party, and I now report my findings of fact and conclusions of law, and will report such portions of the evidence as either party may request.

Findings of Fact.

Master's Finding 1. The following allegations of the complainant's bill of complaint are true, namely:

"(1) That on or before the 29th day of June, 1903, and prior to the date of the publication thereof in this or any foreign country, the firm of Sampson, Murdock & Co., of Boston, the predecessors in business of your orator, deposited in the mails within the United States, addressed to the librarian of Congress, at Washington, District of Columbia, a printed copy of the title of a certain book entitled 'The Boston Directory,' containing the city record, a directory of the citizens' business directory and street directory, with map No. 99, for the year commencing July 1, 1903, in order to copyright the same, and claimed said copyright as authors and proprietors, and that they deposited in like manner the sum of fifty cents for copyright fees, and that thereupon, on the 11th day of July, 1903, and also before the date of publication in this or any foreign country, deposited in the mails within the United States, addressed to the librarian of Congress, at Washington, District of Columbia, two printed copies of such copyright directory, and that said title so deposited was duly recorded by the librarian of Congress upon the said 29th day of June, 1903, whereby they became entitled to the copyright upon said book under the laws of the United States.

"(2) That on the 1st day of October, 1903, the said firm of Sampson, Murdock & Co., for a valuable consideration, and by an instrument in writing, a copy of which is hereto annexed [that is, annexed to complainant's bill], conveyed the said copyright to the complainant herein, and that the complainant by the said conveyance became, and has ever since been, and now is the sole owner of said copyright, and of the exclusive rights thereby conferred under the laws of the United States.

"(3) That the two copies of the said book deposited as above set forth were printed from type set within the limits of the United States, or from plates made therefrom.

"(4) That the said Sampson, Murdock & Co., and the complainant as their assignee and successor in the business, have given notice of said copyright by inserting in the several copies of every edition published, on the title page thereof, the copyright notice required by law, in the following words, to wit: 'Copyright 1903, by Sampson, Murdock & Co.'"

Master's Finding 2. The copyright in suit and the complainant's title to the same are good and valid.

Master's Finding 3. The defendant company, within the term of the complainant's copyright, and without the consent of the owners thereof, has printed, published, exposed for sale, and sold many copies of a book entitled

"The 1904 City Directory of Boston," referred to in this report as defendant's directory; the complainant's copyrighted directory being referred to as complainant's directory.

Master's Finding 4. The defendant's directory differs from the complainant's directory in shape, size, style of type, and arrangement, containing three columns on each page, instead of two, and on these accounts is not liable to be mistaken for the complainant's directory. The complainant's directory is entitled "Boston Directory 1903," and the defendant's directory is entitled "1904 City Directory of Boston."

Master's Finding 5. In obtaining material for its directory, the defendant, by its agents and employes, made an original and substantial house to house and office to office canvass of the city of Boston.

Master's Finding 6. After making its original canvass, the defendant, by its agents and employes, divided a copy of the complainant's directory into sections called 'checkbooks,' and front-checked; that is, checked in front of each name in black pencil upon the pages of these checkbooks the names which it had obtained by its original canvass, except that it did not check all the names of barbers, hairdressers, laborers, and persons having no business stated in complainant's copyrighted directory. Having thus front-checked names obtained by its original canvass, the defendant, by its agents and employes, blue-dotted in the checkbooks such names as its agents and employes desired to draw questions upon, and, having drawn such questions, sought to verify the information substantially copied from the checkbooks by going to original sources of information; but in many instances, particularly set forth in master's findings 7, 10, 11, and 12, the defendant, by its agents and employes, failing to make such verification, transferred to its directory the information contained in the complainant's copyrighted directory.

Master's Finding 7. The defendant transferred to its directory from complainant's copyrighted directory the twenty-nine (29) names, and the information connected therewith, shown in Master's Schedule A, annexed to this report. These names are all blue-dotted in the checkbooks into which complainant's copyrighted directory was divided, indicating that questions were drawn upon them, but an actual verification of such questions from original sources of information was impossible, as the persons represented by these names died at various times from March 3 to July 18, 1903, and were dead at the times when the attempted verifications, if any, were made.

Master's Finding 8. The defendant transferred to starred pages 50 and 51 of its directory, from pages 733 to 734 of complainant's copyrighted directory, the thirteen (13) names, and the information connected therewith, shown in Master's Schedule B. None of these names were obtained on the original canvass, as none of them are front-checked, and questions were not drawn upon them, as none of them are blue-dotted. The persons represented by seven of those names moved from the residences or places of business given in both directories before the defendant commenced its original canvass.

Master's Finding 9. The defendant transferred to all parts of its general directory from the complainant's copyrighted directory many names, and information connected therewith, which it did not obtain by its original canvass, as such names are not front-checked in the checkbooks, and which it did not obtain by information from original sources on questions drawn upon such names, and information connected therewith, appearing in complainant's copyrighted directory, as such names are not blue-dotted in the checkbooks. This finding is supported by a comparison of the names on many two consecutive pages selected at random from the checkbooks, so called, with the same names as they appear in the defendant's directory. Master's Schedule C illustrates this as to pages 81-82, 181-182, 281-282, 381-382, and 481-482. On these ten pages are shown fifteen such transfers.

Master's Finding 10. The defendant transferred to its directory from complainant's copyrighted directory the forty-six (46) names, and the information connected therewith, shown in Master's Schedule D, annexed to this report. These names are all blue-dotted in the checkbooks into which complainant's directory was divided, indicating that questions were drawn upon them; but an actual verification of said questions from original sources of information was impossible, as the persons represented by these names moved from

the places of business, or from the residences shown in both directories, at various times previously to July 12, 1903, some of them one or two years previously, and all but three—(28) Horstmeier, (38) Owen, and (42) Wallberg—previously to July 1, 1903, and all of them had so removed previously to the times when the attempted verifications, if any, were made.

Master's Finding 11. In many instances the defendant has inserted in its general directory the names of persons, and information connected therewith, in two forms. In one form it has copied the names, and information connected therewith, from the complainant's copyrighted directory; in the other form, the names and information connected therewith were obtained from some other source. Master's Schedule E contains thirty-six (36) such instances of double insertion of names and information connected therewith. As to each person included in this schedule, the first line shows the name and information (business address and residence) as they appear in complainant's copyrighted directory; the second line shows them as they appear in defendant's directory, copied from complainant's copyrighted directory; and the third line shows them as they appear the second time in defendant's directory, from information obtained from some other source. None of these names were front-checked in the checkbooks, and all of them were blue-dotted; indicating that the defendant did not obtain them, and the information connected therewith, by its original canvass, and that questions were drawn upon them for verification. The complainant introduced evidence tending to show that there were errors in these names, or in the information connected therewith, as the names and information appeared in its copyrighted directory, which errors the defendant copied into its directory, and that these names, and information connected therewith, are correctly given by the defendant in the second form in which they appear in its directory. That the defendant obtained such information, namely, that appearing in the second form in its directory, from original sources and upon special inquiry, corroborates complainant's evidence as above stated; and I find as a fact that in the thirty-six (36) instances enumerated in Master's Schedule E there were errors in the names or information, or both, as they appeared in the complainant's copyrighted directory, and that the defendant copied these errors into its directory.

Master's Finding 12. The complainant inserted in its list of public offices, halls, blocks, etc., in its copyrighted directory, on page 66, the fictitious name and location, "McKinley Hall, 24 W. Concord." This was a trap intentionally set to catch copyists, and the defendant fell into it; transferring to its list of office buildings, halls, blocks, theaters, and public buildings, on page 173 of its directory, this fictitious name and location, "McKinley Hall, 24 W. Concord St."

Master's Finding 13. The complainant inserted in its business directory, making a part of its copyrighted directory, on page 1969, under the title of "Boots and Shoes (Retail Dealers)," the fictitious name and location, "Rogers Robert L. 312 Maverick," and on page 2151, under the title of "Hairdressers," the fictitious name and location, "Jones G. W. 1650 Dorchester av." The defendant copied both these fictitious names and locations from complainant's copyrighted directory, and inserted them in its business directory, making a part of its 1904 City Directory of Boston, "Rogers Robert L. 312 Maverick, E. B.," on page 1774, under the title of "Shoe Dealers," and "Jones G. W. 1650, Dorchester av. Dor.," on page 1613, under the title of "Barbers."

Master's Finding 14. The defendant copied the following name and residence into its general directory, making a part of its 1904 City Directory of Boston, from complainant's copyrighted directory:

C. D. (58) 179. Thomas Leo B. pastor Stoughton-st Baptist church,
Dor. h. 31, Stoughton, do.

D. D. 1**. Thomas Leo B. pastor, Stoughton st Baptist church
Dor res. 31 Stoughton, do.

C. D. (3) 1994. Thomas Leo B. (B), 31 Stoughton

D. D. 1633 (Business Directory, under the heading Clergymen).
Thomas Leo B. (B.) 31 Sumner, Dor.

The correct residence is 31 Sumner, Dorchester.

This name is blue-dotted in checkbook 58 from complainant's general directory, and is not front-checked in checkbook 3 from complainant's business directory; both indicating that the defendant did not obtain this name and residence by its original canvass and that questions were drawn upon this name for verification from original sources of information. The defendant did obtain the correct residence, 31 Sumner, Dorchester, and inserted it in its business directory under the title "Clergymen," as shown by the fourth line above, but copied into its general directory the incorrect address, "31 Stoughton, Dorchester," as shown by the first and second lines.

Master's Finding 15. The defendant copied the following names and information into its business directory, making a part of its 1904 City Directory of Boston, from complainant's copyrighted directory:

(1)

Business heading in both directories, "Architects."

C. D. (1) 1949. Briscoe Maurice B. 120 Boylston

D. D. 1604. Briscoe Maurice B. 120 Boylston

D. D. 1604. Briscoe Maurice B. 110 Boylston.

This name is blue-dotted in checkbook 1, "Business," and the correct spelling of the name and the correct business location were obtained by defendant, as shown in the third line above and entered, but the defendant copied into its directory the incorrect spelling and the incorrect location from complainant's copyrighted directory, as shown in the first and second lines.

(2)

Business headings, "Boot & Shoe Dealers" in complainant's and "Shoemakers" in defendant's directory.

C. D. (2) 1966. Masaree Arthur, 97 W. Concord

D. D. 1776. Masaree Arthur, 97 W. Concord

" 993 (General Directory). Macaree Arthur, cobbler, 99 W. Concord, res. 43 Langdon, Rox.

This name is not front-checked in checkbook 2, "Business," indicating that it was not obtained on original canvass. The correct spelling of the name and the correct business location were obtained by defendant, as shown by the third line above, but the defendant copied into its directory the incorrect spelling and the incorrect location from complainant's copyrighted directory, as shown in the first and second lines.

(3)

Business heading in both directories, "Grocers."

C. D. (6) 2046. Kovitzky Simon, 12 Morton

D. D. 1672. Kovitzky Simon, 12 Morton

" 912s (General Directory). Koritzky Simon, crockery and coal agent, 12 Morton, res. do.

The defendant obtained the correct spelling of this name, and inserted it in its general directory, as appears by the third line above, but copied into its business directory the incorrect spelling, as shown by the first and second lines.

(4)

Business heading in both directories, "Leather Dealers."

C. D. (8) 2086. Magoun Leather Co. 59 High

D. D. 1708. Magoun Leather Co. 59 High

This company moved from 59 High street before defendant's original canvass. The name is blue-dotted in checkbook 33 from complainant's general directory, is not front-checked in checkbook 8 from complainant's business directory, and does not appear in defendant's general directory. This name and location were copied by the defendant into its business directory from complainant's copyrighted directory.

(5)

Business heading in both directories, "Real Estate Agents."

C. D. (11) 2151. Jewell Albert L. 209 Wash. rm. 21

D. D. 1762. Jewell A. L. 209 Wash. rm. 21

" 861 (General Directory). Jewell Albert L. real estate, 19 Congress, rm. 95, tel. res. at Brookline

The defendant obtained the correct business location of this man and inserted it in its general directory as appears by the third line above, but copied

into its business directory the incorrect location from complainant's copyrighted directory, as shown by the first and second lines.

(6)

Business heading in both directories, "Restaurants."

C. D. (11) 2110*. Patten F. E. Mrs. 2280 Dorch av.

D. D. 1766. Patten F. E. Mrs. 2280 Dorchester av. Dor.

" 1285 (General Directory). Patten F. E. lunch room, 2270
Dorchester av. Dor. res. 2260 do.

This name is not front-checked in checkbook 11, "Business." It is blue-dotted in checkbook 44, where the correct location is given. The defendant obtained the correct location, and inserted it in its general directory, as appears by the third line above, but copied the incorrect location into its business directory from complainant's copyrighted directory, as shown by the first and second lines.

(7)

Business heading in both directories, "Teachers, Elocution."

C. D. (12) 2139. Warren Edward, 176 Tremont

D. D. 1795. Warren Edward, 176 Tremont

This man moved from 176 Tremont before defendant's original canvass. The name is blue-dotted in checkbook 60 from complainant's general directory, is not front-checked in checkbook 12 from complainant's business directory, and does not appear in defendant's general directory. The defendant copied this name and location into its business directory from complainant's copyrighted directory.

(8)

Business heading in both directories, "Teachers, Music."

C. D. (12) 1240*. Byrnes Alva, 162 Boylston

D. D. 1796. Byrnes Alva, 162 Boylston

" 393 (General Directory). Byrnes Alma, music teacher, res.
Union ter. J. P.

This name is front-checked in checkbook 6 from complainant's general directory, and appears in complainant's and in defendant's general directory with the correct spelling, "Alma." It is also front-checked in checkbook 12, taken from complainant's business directory, where it appears with the incorrect spelling, "Alva." The defendant obtained the correct spelling, "Alma," either from an original source or from complainant's general directory, and inserted it in its general directory, as shown by the third line above, but copied the incorrect spelling, "Alva," into its business directory, from complainant's copyrighted directory, as shown by the first and second lines.

Master's Finding 16. Many instances of similarity in the forms of entry of special names and information in the two directories are indications of a general system of copying by the defendant into its directory from complainant's copyrighted directory, of which instances the following are illustrations:

(1)

C. D. (3) 170. Belknap George E. chairman Nautical Training School
Commission, 110 State House, h. at Brookline

D. D. 292. Belknap George, chairman, Nautical Training School
Commission, 110 State House, res. at Brookline

(2)

C. D. (4) 228. Bradlee Benjamin H. deputy clerk, U. S. circuit court,
112 P. O. bldg. h. at Newton Centre

D. D. 339. Bradlee Benjamin H. dep. clerk, U. S. circuit court, 112
P. O. bldg. res. at Newton Centre

(3)

C. D. (4) 228. Bradlee Roger W. clerk, 40 Water, rm. 15, bds. Blue
Hill av. cor. Austin, Mat.

D. D. 339. Bradlee Roger W. clerk, 40 Water, rm. 15, res. Blue Hill
av. cor. Austin, Mat.

(4)

C. D. (45) 1442. Pennock A. N. clockmaker, 147 Tremont, h. 250 Mass. av.

D. D. 1295. Pennock A. N. clockmaker, 147 Tremont, res. 250 Mass.
av.

- (5)
- C. D. (45) 1442. Pennock F. G. foreman, 394 Atlantic av.
 D. D. 1295. Pennock F. G. foreman, 394 Atlantic av.
- (6)
- C. D. (45) 1442. Pennock Artemas S. pres. 442 Tremont bldg. h. at S. Braintree
 D. D. 1295. Pennock Artemas S. pres. 442 Tremont bldg. res. at S. Braintree
- (7)
- C. D. (59) 1798. Trowbridge Alexander H. clerk, U. S. circuit court, 112 P. O. bldg. h. at Brookline
 D. D. 27**. Trowbridge Alexander H. clerk, U. S. Circuit Court, 112 P. O. bldg. res. at Bro.
- (8)
- C. D. (59) 1798. Trowbridge Herbert W. clerk, Custom House and accountant, 82 Devonshire, rm. 28, h. at Stoughton
 D. D. 27**. Trowbridge Herbert W. clerk, Custom House, and accountant, 82 Devonshire, rm. 28, res. at Stoughton

Conclusions of Law.

First. The complainant is entitled to an injunction against the defendant from using or selling or offering for sale any copy of its 1904 City Directory of Boston so long as it contains—

(1) In its list of office buildings, halls, etc., on page 173, the name and location, "McKinley Hall, 24 W. Concord St.;"

(2) In its general directory the names and information connected therewith set out in master's findings 7, 8, 9, 10, 11, and 14;

(3) In its general directory the names and the information referred to in master's finding 9 as not front-checked in the checkbooks, and so not obtained by original canvass, and not blue-dotted, and so not obtained from original sources, upon questions drawn, but which are not included in Master's Schedule C; and

(4) In its business directory the fictitious names and locations, "Rogers Robert L. 312 Maverick," on page 1969, and "Jones G. W. 1650 Dorchester av.," on page 2151, and the sixteen (16) names and information in the form described in master's findings 15 and 15a.

Second. The complainant is entitled to a decree for an accounting for profits derived by the defendant from, and by reason of, its incorporating in its 1904 City Directory of Boston the names and information specified in the above first conclusion of law, in paragraphs 1, 2, 3, and 4, and from the manufacture and sale of said directory, in so far as such profits are attributable to such incorporating therein of said names and information.

Respectfully submitted,

John G. Stetson, Master.

[Memorandum. Schedules A, B, C, D, and E, attached to the master's report on file in the clerk's office, are omitted here.]

August 26, 1904. The foregoing, except as corrected in accordance with Master's Notes 35, 38, 41, and 44, was submitted to counsel for both parties (Mr. Browne and Mr. Hunt) as a first draft report to be retained in the master's office till Thursday, September 15, 1904. Counsel for both parties filed objections to said first draft report, entitled as follows: "Respondent's Objections to Master's Report," filed August 30, 1904; "Respondent's Further Objections to Master's Report," filed September 2, 1904; and "Complainant's Action on Master's Draft Report," filed September 15, 1904. I have inserted in these papers master's notes 1 to 48, inclusive, showing my action thereon, and explaining such action in some particulars. Except so far as these notes modify my report, I overrule the objections of both parties. These objections, with master's notes inserted, are as follows:—

Respondent's Objections to Master's Report.

[Filed with the Master August 30, 1904.]

(1) The respondent objects to so much of master's finding 6 as finds that agents and employes of respondent failed to make the verification therein referred to.

(2) The respondent objects to master's finding 7 in so far as it finds that an actual verification from original sources of information was impossible or was not made.

(3) The respondent objects to so much of master's finding 8 as finds that seven (7) of the persons therein mentioned had moved before the respondent commenced its canvass.

(4) The respondent objects to master's finding 9.

(5) The respondent objects to master's finding 10, and particularly to the part thereof which finds that an actual verification was impossible, and to that part which finds that the persons whose names are therein mentioned had moved prior to July 12, 1903, or July 1, 1903, or the time when attempted verifications were made.

(6) The respondent objects to master's finding 11 that the names of persons and information connected therewith are inserted in two forms.

(7) The respondent objects to so much of master's finding 14 as finds that the correct residence of the person there mentioned is 31 Sumner street, Dorchester.

(8) The respondent objects to so much of master's finding 15 (1) as finds that the two names there mentioned are intended for the same person.

(9) The respondent objects to so much of master's finding 15 (2) as finds that the two names therein mentioned are intended to refer to the same person.

(10) The respondent objects to so much of the master's finding 15 (4) as finds the time of removal.

(11) The respondent objects to so much of master's finding 15 (5) as finds that the three entries there quoted are intended to refer to the same person.

(12) The respondent objects to so much of master's finding 15 (7) as finds that the person therein mentioned had moved before the respondent's canvass.

(13) The respondent objects to so much of master's finding 15 (8) as finds that the two names there mentioned intended to refer to the same person.

(14) The respondent objects to master's finding 16.

(15) The respondent objects to the master's first conclusion of law.

(16) The respondent objects to the master's second conclusion of law.

(17) The respondent objects to the ruling of the master admitting in evidence hearsay statements as to what was or was not correct information.

(18) The respondent objects to the rulings of the master admitting in evidence hearsay statements as to dates of removal.

(19) The respondent objects to the rulings of the master admitting in evidence hearsay statements as to the fact of removal.

(20) The respondent objects to the rulings of the master declining to strike out hearsay statements as to what was or was not correct information as to the date of removal, and as to the fact of removal after they had been admitted.

(21) The respondent objects to the refusal of the master to make the findings requested by it, hereto attached.

(22) The respondent objects to the failure of the master to make the rulings of law requested by it, and hereto attached.

(23) The respondent makes again and insists upon the objections taken by him in the course of the trial as shown by the record.

[Master's Note 1. Upon consideration of the above twenty-three (23) objections, I make no changes in my draft report; but I consider the findings requested in paragraph 21, and the rulings of law requested in paragraph 22, and make notes therein showing, and to some extent explaining, my action thereon.]

By its Solicitors,

Gaston, Snow & Saltonstall.

Respondent's Request for Findings.

[Attached to Respondent's Objections to Master's Report.]

The respondent requests the following findings of facts:

* * * * *

Fourth. There has been no copying of the complainant's book by the respondent, except in so far as the method of drawing questions from the com-

plainant's book adopted by the respondent may amount, as a matter of law, to copying.

[Master's Note 2. I am unable to make this finding in view of the facts shown in master's findings 7, 8, 9, 10, 11, 12, 13, 14, 15, 15a and 16.]

Fifth. The respondent believed in good faith that it had the right to make such use of the complainant's book as it has made, and had been so advised by counsel.

[Master's Note 3. The defendant is a corporation, and as such could act only through its officers, agents, and employes, and could have no belief. It must be judged by the acts of its officers, agents, and employes in its behalf. Some of its agents believed that it could lawfully use complainant's copyrighted directory to front-check such names as it had obtained information upon by its original canvass; to blue-dot such names not front-checked as it desired information upon; to draw questions on such names, which consisted in copying such names, and the information connected therewith, from complainant's copyrighted book on question slips; to ascertain from complainant's copyrighted book original sources of information; and to go to such original sources of information and verify, or correct if incorrect, the information contained on the question slips; and that it could lawfully incorporate in its directory the information so verified or corrected. If the defendant had made such use only of complainant's copyrighted directory, and had incorporated in its directory only such information as it so verified or corrected, I could not have made master's findings 7 to 16, inclusive, and 15a. In some way, however, and it is not important to determine in what way, the defendant did the copying set forth in those findings.]

Sixth. The respondent has actually expended in compiling, printing, and binding its directory about forty thousand (40,000) dollars.

[Master's Note 4. I find as above requested.]

Seventh. The issue of an injunction such as is asked for would mean the total destruction of the respondent's investment in its directory.

[Master's Note 5. I cannot say as to this. Such an injunction as I find the complainant is entitled to by my first conclusion of law, on page 12, would prevent the further use or sale of defendant's 1904 City Directory of Boston so long as it contained the matters specified in said first conclusion of law.]

Eighth. There were at the time of the publication of the respondent's book, and are now, only 180 copies of the complainant's copyrighted book remaining for sale, and there is no sale for these. (Mr. Murdock's evidence, pages 398, 399).

[Master's Note 6. I find as requested.]

Ninth. The respondent made a bona fide canvass of the city of Boston in the course of compiling its book, employing for that purpose large numbers of men, and this canvass extended over a period of between four and six months.

[Master's Note 7. I find as requested. See master's finding 5, page 4.]

Tenth. The general directory of the respondent's book contains some 50,000 more names than the general directory of the complainant's book.

[Master's Note 8. Roughly speaking, yes.]

Eleventh. The street directory of the respondent's book contains several hundred more names than the street directory of the complainant's book, and also much additional information with reference to the streets. The complainant makes no claim of infringement in the street directory.

[Master's Note 9. Roughly speaking, yes.]

Twelfth. The respondent's general directory states whenever a person mentioned in it has a telephone, which is information not given by the complainant's directory.

[Master's Note 10. Roughly speaking, yes.]

Thirteenth. The business directory of the respondent's book is to a large extent arranged under different headings from that of the complainant's book.

[Master's Note 11. Roughly speaking, yes.]

Fourteenth. The number of names in the complainant's book, from which questions were drawn by the respondent, is about twelve per cent. of the entire number of names therein contained (Mr. Hyde's evidence, page 350—questions drawn on seventy-five per cent. of the blue-dotted names).

[Master's Note 12. Perhaps so. I have not made a close estimate of the percentage, and it is not material that I should do so.]

Fifteenth. Ninety per cent. of the errors contained in the complainant's book in connection with names from which questions were drawn have been corrected by the respondent.

[Master's Note 13. I cannot say as to this.]

Sixteenth. I find that, in those cases in which the respondent went to the complainant's book for information to direct it to original sources of information, it actually made an independent investigation of the original sources of information in substantially all cases [Master's Note 14. I cannot find this, considering the whole evidence before me. See master's findings 7, 10, and 14], and that in the remaining cases, if any, where no such investigation was made, this occurred by reason of the carelessness or fault of the individual canvassers [Master's Note 15. The individual canvassers were the employés of the defendant, and if, through their carelessness or fault, it transpired that the defendant inserted in its directory names and information copied from complainant's copyrighted directory, the defendant is responsible for such copying], and in disobedience to the instructions given by the respondent to its canvassers [Master's Note 16. Some of the defendant's agents and employés gave instructions to defendant's canvassers, and it, from disobedience of the instructions so given, it transpired that the defendant inserted in its directory names and information copied from complainant's copyrighted directory, the defendant is responsible for such copying.]

Seventeenth. I find that the respondent constantly and emphatically prohibited all of its employés from making any use of the complainant's book except for the purpose of drawing questions from it.

[Master's Note 17. Some of the defendant's agents frequently and emphatically prohibited others of defendant's employés from making any use of complainant's copyrighted directory except for the purpose of drawing questions from it.]

Eighteenth. The respondent has produced at the hearing the copy of the complainant's directory, which indicates the exact number of names checked and blue-dotted. It has produced large quantities of the original copy of its own book, and offered to produce the whole of such copy, which was not actually produced only because of its great bulk. It has also produced the original circulars, and some of the original schedules used by it in obtaining original information.

[Master's Note 18. I find as above requested.]

Nineteenth. The respondent put upon the stand as witnesses eight or nine of the men employed by it as canvassers, and six of the women employed by it in office work, two of whom had acted as superintendents. It offered to produce any other canvassers and any other women employed by it whom counsel for the complainant might call for, and a stipulation signed by both counsel has been filed, that the number of canvassers and that the number of women employed is so great as to make it impracticable and inconvenient to call them all as witnesses, and that no inference should be drawn against the respondent by reason of its failure to call as witnesses any others.

[Master's Note 19. I find as above requested.]

Twentieth. The complainant's copyrighted book contains ten fictitious names, of which four are in the general directory. (Mr. Murdock, page 49.) There is no evidence that seven of these ten appear in the respondent's book at all.

[Master's Note 20. I find as requested.]

Twenty-First. There is no evidence that any fictitious name appears in the respondent's general directory or in its street directory.

[Master's Note 21. I find as requested.]

Twenty-Second. The three alleged fictitious names which appear in the respondent's business directory and list of halls appear there because questions were drawn on them from the complainant's book which were not correctly investigated.

[Master's Note 22. Three alleged fictitious names appear in respondent's business directory and list of halls, and these names and information connected therewith were not and could not be verified. See master's findings 12 and 13.]

Twenty-Third. I find that the complainant can suffer no legal damage hereafter from the further sale of the respondent's book.

[Master's Note 23. I cannot find as above requested. It is my opinion that the fact is otherwise. Such damages, however, if any, may be recovered in a civil action brought under Rev. St. § 4964, as amended March 3, 1891, c. 565, § 7, 26 Stat. 1109, U. S. Comp. St. 1901, p. 3413. They cannot be recovered in the present case by bill in equity for an injunction, under which profits accruing to the infringer may be recovered, but not damages in addition thereto, as upon a bill in equity for an injunction for infringement of letters patent.]

Twenty-Fourth. The new directory of the complainant's for the year 1904 was published by them early in the month of July, 1904, prior to the conclusion of the hearings before me in this case.

[Master's Note 24. I find as requested.]

Respondent's Requests for Rulings.

[Attached to Respondent's Objections to Master's Report.]

In the above-entitled cause the respondent requests the master to rule as follows:

(1) A compiler of a general directory has the right to use a prior general directory both to verify the results of his own work, and to show him and direct him to the persons upon whom it may be worth his while to call. Sampson & Murdock Co. v. Seaver-Radford Co. (C. C.) 129 Fed. 761; Dun v. International Mercantile Agency (C. C.) 127 Fed. 173; Colliery Engineering Co. v. Ewald (C. C.) 126 Fed. 843; Edw. Thompson Co. v. American Lawbook Co., 122 Fed. 922, 62 L. R. A. 607, 59 C. C. A. 148; Moffatt v. Gill, 86 Law Times Rep. 405.

[Master's Note 25. I rule as above requested.]

(2) One who is compiling a general directory of a city has the right, after making his own canvass, to take a part of the names and addresses contained in another general directory, go to the original sources of information, ascertain how far the existing facts concur with the statements of the first directory, and then to print and publish the result as his own; abandoning what is not found, and changing what his investigation shows should be changed, and printing without change what he has by means of his own investigation found to be correct. Sampson & Murdock Co. v. Seaver-Radford Co. (C. C.) 129 Fed. 761; Dun v. International Mercantile Agency (C. C.) 127 Fed. 173; Colliery Engineering Co. v. Ewald (C. C.) 126 Fed. 843; Edw. Thompson Co. v. American Lawbook Co., 122 Fed. 922, 62 L. R. A. 607, 59 C. C. A. 148; Moffatt v. Gill, 86 Law Times Rep. 404.

[Master's Note 26. I rule as requested; but the compiler must go to the original sources of information, must ascertain how far the existing facts concur with the statements of the first directory, and must print only what by means of his own investigation he has found to be correct.]

(3) The right to do as above stated is not lost by reason of the fact that a person, in going to the sources of information, takes with him memoranda of names and addresses copied from the first directory, changing them when his investigation shows they should be changed to correspond with the facts, and checking them as correct when they prove to be correct.

[Master's Note 27. I rule as above requested.]

(4) The utmost legal damage which the plaintiff in this case can sustain by reason of the publication of an infringing book cannot, in view of the fact that there can be no further edition of its copyrighted book, exceed the entire value of all copies remaining in its hands for sale.

[Master's Note 28. No damages can be recovered in this case, which is upon a bill in equity for an injunction for an infringement of a copyright, under which profits accruing to the infringer may be recovered, but not damages in addition thereto, as upon a bill in equity for an infringement of letters patent. See master's note 23.]

(5) There is no evidence to warrant a finding of error or of the date of removal in any case where the only evidence comes from witnesses who admit that they have no knowledge upon the subject except such as is derived from hearsay.

[Master's Note 29. I rule as above requested.]

Respondent's Further Objections to Master's Report.

[Filed with the Master September 2, 1904.]

And now comes the respondent in the above-entitled cause, and prior to September 15th, the date set by the master, files with the master the following further objections to his report:

First. That the master has failed to make any finding as to the amount of damage suffered by the complainant through the alleged infringement.

[Master's Note 30. No question of damages is involved in the present reference. This is a reference preliminary to an interlocutory decree which will be final so far as it concerns an injunction. An order for an accounting for profits is usually incorporated in such a decree. If the defendant has infringed, as found by me in master's findings 7, 8, 9, 10, 11, 12, 13, 14, 15, and 15a, in which are specified 159 cases of copying by the defendant from complainant's copyrighted directory namely:

| | | | |
|------------|----|-------------|-----------|
| In Finding | 7, | Schedule A, | 29 cases, |
| " | " | 8, | " B, 13 " |
| " | " | 9, | " C, 15 " |
| " | " | 10, | " D, 46 " |
| " | " | 11, | " E, 36 " |
| " | " | 12, | 1 case, |
| " | " | 13, | 2 cases, |
| " | " | 14, | 1 case, |
| " | " | 15, | 8 cases, |
| " | " | 15A, | 8 " |

—and has also infringed by copying, as found by me in master's finding 9, in a large number of cases not specifically specified, it logically follows that the defendant should be enjoined as stated by me in my first conclusion of law, on page 12 of this report. The profits to be recovered may be determined on a reference to be made a part of or to follow the decree for injunction. It is not my duty to determine these profits on this reference. The damages, if any, resulting from the infringement, may be determined in a civil action under Rev. St. § 4964, as amended March 3, 1891. See master's notes 23 and 28.]

Second. That the master has failed to make any finding as to whether any damage alleged to be suffered by the complainant is either serious or irreparable.

[Master's Note 31. See master's note 30.]

Third. That the master has failed to make any finding as to whether the injury done to the respondent by an injunction would be disproportionate to the benefit derived by the complainant.

[Master's Note 32. See master's note 30.]

Fourth. That the master has failed to make any finding as to the number of copies of the complainant's copyrighted book which remained in existence or could be sold at the time of the alleged infringement or at the time of the hearing.

[Master's Note 33. Such finding would not be pertinent to any question involved in this reference. See master's notes 23, 28, and 30.]

Fifth. That the master has failed to make any finding as to the good faith of the respondent corporation or its officers.

[Master's Note 34. The defendant corporation must be judged by what it has done through its officers, agents, and employes, which, so far as the alleged infringement is concerned, is shown by master's findings 7, 8, 9, 10, 11, 12, 13, 14, 15, and 15a. I have not intended, and do not now intend in this report, to pass upon the good faith of any one. It is not necessary to do so upon this reference.]

By its Solicitors,

Gaston, Snow & Saltonstall.

Complainant's Action on Master's Draft Report.

[Filed with the Master September 15, 1904.]

First. It is submitted that on page 1, in third line of the paragraph beginning "Front Checks," the word "their" should be changed to "its."

[Master's Note 35. I adopt Mr. Browne's suggestion, and have changed my report accordingly.]

Second. That on page 2, about the middle of the page, the words "mutually agreed upon" should be substituted for the words "furnished by Mr. Browne."

[Master's Note 36. The record reads: "It is agreed that the evidence in this case may be taken stenographically." I understand that the stenographers were furnished by Mr. Browne, but as to this I may be in error. There may have been an agreement of which I was not advised.]

Third. It is submitted that on page 4, in the paragraph headed "Master's Finding 7," the words "it is impossible that" should be inserted before the words "an actual verification" in the seventh line of said paragraph, and that the word "made" should be substituted for the word "impossible," in the eighth line thereof.

[Master's Note 37. My statement as it stands means substantially the same as it would if amended as suggested by Mr. Browne.]

On page 5, line 6, the word "eleven" should be substituted for the words "the first seven."

[Master's Note 38. On re-examination of my draft report, I discover that seven (but not the first seven) of the persons represented by the names on Master's Schedule B moved from the residences or places of business given in both directories before the defendant commenced its original canvass, namely: (1) Charles B. Gilman; (2) Caribel Gilman; (4) Grace M. Gilman; (8) Ada Wells Gilman; (11) Edgar F. Gilpatric; (12) Samuel S. Gilpatrick; and (13) Mrs. T. B. Gilpatrick. I accordingly amend master's finding 8, page 5, line 6, by striking out the words "the first," and I confirm said finding as so amended. My error arose from rearranging the names alphabetically after I had drafted the finding.]

Fourth. At the end of the paragraph headed "Master's Finding 9" the following should be inserted: "In the complainant's general directory, containing 1,725 pages, there would be found 2,587 such transfers in all, if the same proportion holds throughout."

[Master's Note 39. What Mr. Browne suggests should be inserted at the end of master's finding 9 as an obvious inference from the last paragraph of that finding. It is not necessary for me to amend this finding.]

Fifth. In the paragraph beginning "Master's Finding 10," in the seventh line thereof, after "but," insert "it is impossible that." In the eighth line of said paragraph substitute "made" for "impossible."

[Master's Note 40. My statement as it stands means substantially the same as it would if amended as suggested by Mr. Browne.]

Sixth. It is submitted that in master's finding 11 there should be added to the thirty-five instances of double insertion contained in Schedule E the following instances, and that the other findings under this head should be corrected numerically accordingly:

- (1) "Allen, Robert C.," should be "Allan," page 18.
- (2) "Anderson, Charles A.," should be "William C.," page 59.
- (3) "Benthall, Fred J.," should be "Bentholl," page 23.
- (4) "Coburn, William M., 133 Harvard av.," should be "William B., 13 Harvard av.," page 43.
- (5) "Demers, Joseph," should be "James," page 43.
- (6) "Eastman, Charles," should be "Charles E.," page 19.
- (7) "Hale, George A.," should be "George E.," page 19.
- (8) "Hirschman, Harry," should be "Hirshman," page 20.
- (9) "Lightford, Harry L.," should be "Lightfoot, Harry W.," page 20.
- (10) "McGibbon, John J.," should be "John D.," page 64.
- (11) "Rigby, James J., 54 Dorchester," should be "54 Newport," page 45.
- (12) "Ross, William R.," should be "Jordan, William Roscoe," page 21.
- (13) "Saunders, Edward L., 8 Joy," should be "Edmund S., 10 Joy," page 21.
- (14) "Sheerin, Thomas, Rev.," should be "John, Rev.," page 45.
- (15) "Stevenson, Francis, 564 Washington," should be "Frederick," page 45.

[Master's Note 41. In making Master's Schedule E, I examined each of the instances specified by Mr. Browne, except No. 8, and decided not to include them in that schedule. I have re-examined these instances, and am satisfied that my decision was correct.

No. 8 might have been included in Master's Schedule E, as follows:

(36)

- C. D. (23) 883. Hirschman Harry, trimmer, 18 Summer, bds. 124 Union park
 D. D. 800. Hirschman Harry, trimmer, 18 Summer, res. 124 Union pk.
 " 800. Hirschman Harry, clothing trimmer, 18 Summer, res. 124 Union pk. st.

I now add this instance to Master's Schedule E, and amend master's finding 11 by substituting "thirty-six (36)" for "thirty-five (35)" in two places on page 6.]

Seventh. In the paragraph headed "Master's Finding 13," in the seventh line thereof, after the word "av.," insert the following sentence: "These were also traps intentionally set, and the defendant fell into them also."

[Master's Note 42. This sentence is easily read into master's finding 13 as it stands. It is not necessary to amend the finding.]

Eighth. On page 8, before "Master's Finding 15," insert a new paragraph as follows:

"Master's Finding 14a. The defendant transferred to all parts of its business directory from the complainant's copyrighted directory many names, and information connected therewith, which it did not obtain by its original canvass. As it is admitted, 'the defendant's business directory was checked up from original information in the same way as the general' (Hyde, page 265), but there was no blue-dotting. It has appeared that the number of names so transferred in checkbooks 2 and 3, taken as samples of the whole, was about forty per cent. of all the names appearing in the defendant's business directory."

[Master's Note 43. I decline to incorporate the above into my report as master's finding 14a. The defendant introduced evidence tending to prove that it made a use of complainant's business directory similar to that which it claimed to have made of complainant's general directory; that is to say, that it front-checked the names as to which it obtained information by its original canvass, and drew questions upon slips of paper on such names in small type as it did not front-check, and, using these question slips, went to original sources of information, verified the information contained on the question slips, or corrected it where it should be corrected, and transferred to its directory the information so verified or corrected. This evidence is uncontradicted except as to two (2) specific instances specified in master's finding 13, eight (8) specific instances specified in master's finding 15, and eight (8) specific instances specified in master's finding 15a, made upon consideration of Mr. Browne's suggestion which immediately follows this note.]

Ninth. On page 10, before the paragraph beginning "Master's Finding 16," insert, "Other cases of errors copied in the business directory are as follows:

- (1) D. D., page 1612, Barbers, Alario, Joseph, testimony, page 75.
- (2) D. D., page 1760, Real Estate, Beals & Newhall, testimony, page 75.
- (3) D. D., page 1649, Dress-makers, Burham, S. E., testimony, page 75.
- (4) D. D., page 1776, Shoe-makers, Dugas, John, page 74.
- (5) D. D., page 1778, Shoe Manufacturers, Farrior, Brown Shoe Company, page 76.
- (6) D. D., page 1610, Bakers, Langerfeld, John P., page 78.
- (7) D. D., page 1799, Teachers of Music, Moore, Grace T., page 78.
- (8) D. D., page 1623, Butter and Cheese, Mugford, R. E., page 74.
- (9) D. D., page 1777, Shoe-makers, Petro, Frederick, page 74.
- (10) D. D., page 1777, Shoe-makers, Riley, Patrick J., page 74.
- (11) D. D., page 1760, Real Estate Brokers, Adams Real Estate Trust Company, page 18.
- (12) D. D., page 1700, Lawyers, Chisholm, George C., page 19.
- (13) D. D., page 1649, Dress-makers, Churchill, Mrs. M. H., page 19.
- (14) D. D., page 1606, Artists, Enneking, John J., page 19.
- (15) D. D., page 1721, Milliners, Gibbs, Carrie E., page 19.
- (16) D. D., page 1787, Stock Brokers, Gile, Daniel D., page 43.
- (17) D. D., page 1702, Lawyers, Hay, Robert T., page 19.
- (18) D. D., page 1625, Carpenters, Henderson, W. T., page 43.
- (19) D. D., page 1671, Grocers, Johnson, Adolph O., page 47.

- (20) D. D., page 1672, Grocers, Laro V., page 20.
- (21) D. D., page 1650, Dress-makers, Leach, Lile, page 44.
- (22) D. D., page 1704, Lawyers, Merrell, George C., page 44.
- (23) D. D., page 1797, Teachers of Music, Shedd, Heman, page 45.
- (24) D. D., page 1601, Accountants, Watson, George, page 21.
- (25) D. D., page 1610, Bakers, Westcott, Jennie, page 68.

In all the instances last above mentioned, the defendant's General Directory either fails to show the name at all, or shows it with different information. In every case the information furnished in the defendant's Business Directory is an error copied from the complainant's Business.

[Master's Note 44. I have now examined the above instances, which were not called to my attention specifically in complainant's brief, nor at the argument before me, and in view thereof make the following finding:

Master's Finding 15a. Other cases of errors copied into the defendant's business directory, making a part of its 1904 City Directory of Boston, from complainant's copyrighted directory, are as follows:

(9) Mr. Browne's (10)

Business heading, "Boot and Shoe Makers" in complainant's and "Shoemakers" in defendant's directory.

- C. D. (2) 1967. Riley Patrick J. 145 Albany
- D. D. 1777. Riley Patrick J. 145 Albany
- " 1386. Riley Patrick J. Boots and shoes, 7 Oak, res 93 do.

(10) Mr. Browne's (12)

Business heading in both directories, "Lawyers."

- C. D. (8) 2078. Chisholm George C. 15 Court sq. rm. 2
- D. D. 1700. Chisholm George C. 15 Court sq. r. 2
- " 443. Chisholm George C. real estate, 15 Court Sq. rm. 2 res. at Sharon.

(11) Mr. Browne's (15)

Business heading in both directories, "Milliners."

- C. D. (9) 2103. Gibbs Carrie E. 110 Hotel Pelham
- D. D. 1721. Gibbs Carrie E. 110 Hotel Pelham
- " 43*. Gibbs Carrie A. Mrs. millinery, 110 Hotel Pelham, res do.

(12) Mr. Browne's (17)

Business heading in both directories, "Lawyers."

- C. D. (8) 2080. Hay Robert T. 53 State, rm. 712
- D. D. 1702. Hay Robert T. 53 State, rm. 712
- " 766. Hay Robert T. (Carret, Chase & Hay) lawyer, 53 State, rm. 713, res. 2 Quincy pl. Rox.

(13) Mr. Browne's (18)

Business heading in both directories, "Carpenters and Builders."

- C. D. (3) 1983. Henderson W. T. 35 Crescent ave. Dor.
- D. D. 1625. Henderson W. T. 35 Crescent ave. Dor.
- " 780. Henderson William T. carpenter, res. 53 Crescent ave. Dor.

(14) Mr. Browne's (19)

Business heading in both directories, "Grocers."

- C. D. (6) 2046. Johnson Adolph O. 498 Sumner E. B.
- D. D. 1671. Johnson Adolph O. 498 Sumner E. B.
- " 862. Johnson Adolph O. dry goods 322 Sumner, E. B. and grocer, 487 do. res. 498 do.

(15) Mr. Browne's (20)

Business heading in both directories, "Grocers."

- C. D. (6) 2046. Laro V. 469 Hanover
- D. D. 1672. Laro V. 469 Hanover
- " 928. Lauro Vincenzo, grocer, 469 Hanover, res. do.

(16) Mr. Browne's (25)

Business heading in both directories, "Bakers."

- C. D. (1) 1956. Westcott Jennie 85 Orleans
- D. D. 1610. Westcott Jennie 85 Orleans
- C. D. 1870. Westcott Jennie, baker, 95 Orleans, E. B. h. 222 Everett, do.

I decline to make a similar finding as to Mr. Browne's instances 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 16, 21, 22, 23, and 24, preferring not to find copying

where there is not corroborative proof thereof from an inspection of defendant's directory, except in the single instance of "Westcott Jennie," as to which the evidence of complainant's witness Alexander Hutchins (typewritten page 68) is plenary.]

Complainant's Requests for Rulings.

Upon the findings of fact made by the master, it is requested that he should find as conclusions of law, instead of the findings made by him, as follows:

First. From the fact that the defendant has copied the three trap names hereinbefore mentioned in the master's findings 12 and 13, and has copied numerous errors occurring throughout the complainant's directory, and has copied numerous names of persons occurring in the complainant's directory, but deceased or removed before the time of defendant's canvass, the complainant is entitled to an injunction against the defendant from using, selling, or offering for sale, or otherwise disposing of, or offering to dispose of, any copy of defendant's 1904 City Directory of Boston.

Note. This conclusion is based upon the assumption that whereas the defendant's witnesses have testified that, in every case where information was not obtained by original canvass, it was obtained by verification of matter copied from complainant's book, yet it appearing that in these isolated and widely separated instances such was not the fact, there is ground for finding that in no case was the matter copied from complainant's book verified, but that all matter so copied was printed as copied, without verification. If this be found, the matter so printed forming a large portion of the defendant's entire book, and not being readily distinguishable from the rest, the defendant, having wrongfully mixed the matter of another with his own, must suffer the consequences.

[Master's Note 45. I decline to report a conclusion of law in the form above suggested by Mr. Browne. I have found as facts substantially that the defendant copied into its directory from complainant's copyrighted directory the three trap names mentioned in master's findings 12 and 13, and has so copied the errors specified in master's findings 7, 8, 10, 11, 14, 15, and 15a, and the errors referred to in master's finding 9. I amend my first conclusion of law on page 12 by substituting for the words "Master's Finding 15," at the end of paragraph 4, the words "Master's Findings 15 and 15a," and, as thus amended, I confirm my said first conclusion of law.]

Second. If the complainant is not entitled to an injunction as aforesaid, then that it is entitled to an injunction against the defendant from using or selling, or offering for sale, or otherwise disposing of, or offering to dispose of, any copy of its 1904 City Directory of Boston, so long as it contains the matter set forth in paragraphs 1, 2, 3, and 4, on page 12 of the master's report.

[Master's Note 46. Yes; that was the intent of my first conclusion of law on page 12, and I assent that the words "or otherwise disposing of, or offering to dispose of," may be inserted in the second line of my said first conclusion of law, after the words "or offering for sale."]

Third. If the first conclusion of law above set forth is correct, the complainant is entitled to a decree for an accounting of profits derived by defendant from and by reason of its manufacture, use, sale, or delivery of its 1904 City Directory of Boston.

[Master's Note 47. Yes; but in master's note 45 I have declined to report a conclusion of law in the form set out in Mr. Browne's above paragraph first.]

Fourth. If the second conclusion of law above set forth is sustained, the complainant is entitled to a decree as set forth in the clause marked "Second" at the end of the master's present findings.

[Master's Note 48. Yes; the complainant is entitled to such a decree.]

Respectfully submitted,

Alex. P. Browne,
Solicitor and of Counsel for Complainant.

Respectfully submitted,

John G. Stetson, Master.

September 30, 1904. The foregoing was submitted to counsel for both parties (Mr. Browne and Mr. Hunt) as a second draft report, to be retained in the master's office till Wednesday, October 5, 1904.

October 3, 1904. Mr. Hunt sent to me a letter from which I quote the following: "I think that, to protect fully the rights of my clients, I must ask you to report all the evidence in *Sampson & Murdock Co. v. Seaver-Radford Co.*" Upon this request by Mr. Hunt in behalf of the defendant, I report all the evidence before me, as required by the order of reference of May 17, 1904, and I annex a schedule of this evidence to this report.

October 15, 1904. No further objections being taken by either party, and no further requests being made by either party, I make this my final report.

Respectfully submitted,

John G. Stetson, Master.

To the above report the complainant filed the following exceptions:

(1) It excepts to the ruling of the master, in master's note 25, that a compiler of a general directory has the right to use a prior general directory both to verify the results of his own work, and to show him and direct him to the persons upon whom it may be worth his while to call.

(2) It excepts to the ruling of the master, in master's note 26, that "one who is compiling a general directory of a city has the right, after making his own canvass, to take a part of the names and addresses contained in another general directory, go to the original sources of information, ascertain how far the existing facts concur with the statements of the first directory, and then to print and publish the result as his own; abandoning what is not found, and changing what his investigation shows should be changed, and printing without change what he has, by means of his own investigation, found to be correct."

(3) It excepts to the ruling of the master, in master's note 27, that "the right to do as above stated is not lost by reason of the fact that a person, in going to the sources of information, takes with him memoranda of names and addresses copied from the first directory, changing them, when his investigation shows they should be changed, to correspond with the facts, and checking them as correct when they prove to be correct."

(4) It excepts to the failure of the master to find as a conclusion of law (see master's note 45) that from the fact that the defendant has copied the three trap names hereinbefore mentioned in the master's findings 12 and 13, and has copied numerous errors occurring throughout the complainant's directory, and has copied numerous names of persons occurring in the complainant's directory, but deceased or removed before the time of defendant's canvass, the complainant is entitled to an injunction against the defendant from using, selling, or offering for sale, or otherwise disposing of or offering to dispose of, any copy of defendant's 1904 City Directory of Boston.

The defendant also filed certain exceptions, but, upon hearing, argued only, first, an exception in reference to the right to drawing questions; and, second, an exception urging that the master ought to have made a finding that the plaintiff should affirmatively show damages before he is entitled to any injunction. Defendant's other exceptions were not pressed at the hearing, and need not be referred to.

Alex. P. Browne, for complainant.

Thomas Hunt, for defendant.

HALE, District Judge (after stating the case). This cause has already been before the court upon the question of preliminary injunction. 129 Fed. 761. After action had been taken on that question, the case came before us upon bill, answer and replication, and, under the practice of the court in such cases, was referred to John G. Stetson, as master, to hear the evidence, find the facts, and report to the court his findings of fact, his conclusions of law, and such portions of the evidence as either party might request, or as

he might deem useful for the court. The master has fully heard the parties, and has filed his report, which clearly presents the whole matter for our consideration. The leading and vital contention of the complainant is that the master made an error in ruling that "one who is compiling a general directory of a city has the right, after making his own canvass, to take a part of the names and addresses contained in another general directory, go to the original sources of information, ascertain how far the existing facts concur with the statements of the first directory, and then to print and publish the result as his own; abandoning what is not found, and changing what his investigation shows should be changed, and printing, without change, what he has, by means of his own investigation, found to be correct." In our former decision we found it necessary to refer to this subject, and to discuss it briefly. We stated the leading English authorities, and the cases presenting the conclusions of the federal courts of this country. We referred to the late cases: *The Thompson Co. v. American Lawbook Company*, 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607, and *Dun v. International Mercantile Agency (C. C.)* 127 Fed. 173. We then said:

"It seems to us that there is strong reason for holding that the publisher of a new directory has a right to take an old directory, and be guided by it to original sources of information, and that if, so guided, he goes to those sources of information and obtains facts, he may publish those facts, even though they consist of names and addresses which are identical with those published by the old directory. But upon this motion for a temporary injunction it is not necessary nor fitting for the court to pass upon this question."

As the case now comes before the court, it is necessary to pass upon the question. We see no reason for coming to a different conclusion from that suggested in our former opinion. The American cases which we have just cited contain the latest expression of the federal courts upon the subject, and must control our action. The learned counsel for the complainant has presented a very able argument, insisting that the court should not allow the compiler of a directory to verify his own work by a former directory; that he should not be permitted to go to the original sources pointed out by the former directory, and, after verifying the statement of the former directory, then to publish the names and addresses, if they are identical with those published in a former directory. But the action which we indicated in our former opinion amounts to something more than mere verification. For example, let us suppose that in July a publisher is obtaining information upon which he proposes to publish a directory. He takes an old directory which had been compiled the preceding January. In that directory it appears that John Smith was in January a lawyer at No. 1 Tremont street. With the information contained in the January directory, the compiler of the July directory goes to No. 1 Tremont street on July 1st, and finds that John Smith is a lawyer; that he has at that date an office at No. 1 Tremont street. The directory maker has a right to publish this information in his July directory. He cannot be precluded from so publishing it by the fact that the maker of the January directory has stated that the same facts existed in

the preceding January. The maker of the January directory may or may not have stated the truth as to John Smith at that time; but the compiler of the July directory may, in his directory, state the facts as they exist on July 1st relating to John Smith, whether those same facts existed, or not, the previous January, and whether they were stated, or not, in the January directory. The compiler of the July directory is not merely verifying and quoting. He is obtaining facts from original sources, using the old directory only to guide him to these sources. Facts so obtained he may publish in his compilation. He cannot be prevented from such publication by the fact that the same things were true in January, and were stated by a former compiler.

In reference to the exceptions raised by the defendant, we have already considered the subject of the first exception. In reference to the second exception, we sustain the findings of the master.

We overrule the exceptions of both parties to the report of the master, and confirm his findings of fact and conclusions of law.

The learned counsel for complainant requests that the court decree a general injunction, with liberty for the defendant to have the injunction removed when he shall have expunged certain offending matter. He bases this request upon the decree in *Social Register Association v. Murphy* (C. C.) 128 Fed. 116; but in that case the court found that, as to portions of the book at issue, certain material of the complainant and defendant were so blended that a separation was impracticable, and on this ground made the injunction general. We prefer to order a specific injunction in accordance with the details indicated in the findings of the master.

A decree may therefore be entered that there be:

First. An injunction against the defendant from using or selling or offering for sale any copy of its 1904 City Directory of Boston so long as it contains—

(1) In its list of office buildings, halls, etc., on page 173, the name and location, "McKinley Hall, 24 W. Concord St.";

(2) In its general directory the names and information contained therewith set out in master's findings 7, 8, 9, 10, 11, and 14;

(3) In its general directory the names and the information referred to in master's findings as not front-checked in the check books, and so not obtained by original canvass, and not blue-dotted, and so not obtained from original sources upon questions drawn, but which are not included in Master's Schedule C; and

(4) In its business directory the fictitious names and locations, "Rogers Robert L., 312 Maverick," on page 1969, and "Jones G. W. 1650 Dorchester ave.," on page 2151, and the sixteen names and information in the form described in master's findings 15 and 15a.

Second. That there be an accounting to the complainant for profits derived by the defendant from and by reason of its incorporating in its 1904 City Directory of Boston the names and information specified above in paragraphs 1, 2, 3 and 4, and from the manufacture and sale of said directory, in so far as such profits are attributable to such incorporating therein of said names and information.

THE TEXAS.

(District Court, S. D. New York. January 20, 1905.)

SHIPPING—REGULATION OF STEAM PASSENGER VESSELS—VIOLATION OF STATUTE PROHIBITING CARRIAGE OF GASOLINE.

Rev. St. § 4472, prohibits passenger steamers from carrying as freight certain articles, including petroleum products or other like explosive fluids, except in certain cases and under certain restrictions. By Act Feb. 20, 1901, c. 386, 31 Stat. 799 [U. S. Comp. St. 1901, p. 3050], the section was amended by adding the following provision: "Nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: Provided, however, that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel and the same be not relighted until after said vehicle shall have left the same. * * *" *Held*, that gasoline contained in the tank of an automobile being transported on a steam vessel was carried as freight, within the meaning of the statute; that an automobile in which the motive power was generated by passing an electric spark through a compressed mixture of gasoline and air in the cylinder, causing intermittent explosions, carried a fire while the vehicle was under motion from its own motive power; and that the carrying by a steam ferryboat of such a vehicle, which was run on and off the boat under its own power, was a violation of the statute.

In Admiralty. Libel for penalty for transportation by ferryboat of gasoline automobile without extinguishment of fire.

Henry L. Burnett, U. S. Atty. (Ernest E. Baldwin, Asst. U. S. Atty., of counsel), for libellant.

Wilcox & Green (Herbert Green and John C. Higdon, of counsel), for claimant.

ADAMS, District Judge. This action was brought by the United States to recover against the ferryboat Texas a penalty of \$500 for transporting an automobile across the East River on the 14th day of October, 1904, under section 4472 of the Revised Statutes of the United States as amended by Act Cong. Feb. 27, 1877, c. 69, 19 Stat. 252, and Act Feb. 20, 1901, c. 386, 31 Stat. 799 [U. S. Comp. St. 1901, p. 3050], and section 4499 of the same [U. S. Comp. St. 1901, p. 3060]. These sections provide:

"Sec. 4472 (as amended 1877, 1901). Dangerous articles not to be carried on passenger steamers; (gasoline, etc., in automobiles).

No loose hay, loose cotton, or loose hemp, camphene, nitro-glycerine, naphtha, benzine, benzole, coal-oil, crude or refined petroleum, or other like explosive burning fluids, or like dangerous articles, shall be carried as freight or used as stores on any steamer carrying passengers; nor shall baled cotton or hemp be carried on such steamers unless the bales are compactly pressed and thoroughly covered with bagging of similar fabric, and secured with good rope or iron bands; nor shall gunpowder be carried on any such vessel, except under special license; nor shall oil of vitriol, nitric or other chemical acids be carried on such steamers except on the decks or guards thereof, or in such other safe part of the vessel as shall be prescribed by the inspectors. Refined petroleum, which will not ignite at a temperature less than one hundred and ten degrees of Fahrenheit thermometer, may be carried on board such steamers upon routes where there is no other practicable mode of transporting it, and under such regulations as shall be prescribed by the board of supervising

inspectors with the approval of the Secretary of the Treasury; and oil or spirits of turpentine may be carried on such steamers when put up in good metallic vessels, or casks or barrels well and securely bound with iron and stowed in a secure part of the vessel; and friction matches may be carried on such steamers when securely packed in strong tight chests or boxes, the covers of which shall be well secured by locks, screws, or other reliable fastenings, and stowed in a safe part of the vessel at a secure distance from any fire or heat. All such other provisions shall be made on every steamer carrying passengers or freight, to guard against and extinguish fire, as shall be prescribed by the board of supervising inspectors, and approved by the Secretary of the Treasury. Nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: Provided, however, that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel, and the same be not relighted until after said vehicle shall have left the same: Provided, further, that any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles the tanks of which contain gasoline, naphtha, or other dangerous burning fluids."

"Sec. 4499. Penalty for failure to comply.

If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of five hundred dollars for each offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

The allegation of the libel is:

"Sixth: That on said day, to wit, the 14th day of October, 1904, at about 10:28 o'clock in the morning, said ferryboat, being on one of her regular trips on the East River between said ferry termini, and having passengers on board, carried as freight, across the East River, from the foot of East 23rd Street, Borough of Manhattan, to the foot of Broadway, in the Borough of Brooklyn, New York City, a quantity of gasoline, the same being an explosive burning fluid, which fluid was contained in a tank or other receptacle attached to and forming a part of a motor vehicle commonly known as an automobile, which vehicle was numbered 11,119; that said vehicle used the said gasoline as a source of motive power, and there was at said time, a fire in said vehicle which was not extinguished before said vehicle entered said vessel at said East 23rd Street and was relighted before said vehicle left said vessel at the foot of said Broadway."

The answer denies some of the material allegations of the libel in the following language:

"Sixth: Denies that the gasoline mentioned in the sixth article of the libel was carried by the ferryboat Texas as freight; also denies that there was a fire in the motor vehicle therein mentioned which was not extinguished before the vehicle entered the vessel on the occasion referred to in said article, denies that a fire was relighted in said vehicle before it left the vessel at the foot of Broadway, Brooklyn, and also denies that there was any fire whatsoever in said vehicle on said occasion; and admits the remaining allegations contained in the sixth article of the libel."

The answer further alleges:

"Ninth: Further answering, claimant alleges, upon information and belief, as a distinct and separate defense:

Section 4472 of the Revised Statutes, which incorporated an act of Congress of February 28, 1871, originally contained no reference whatsoever to automobiles or motor vehicles, but by an amendment which became a law February 20, 1901, the following was added thereto, which appears in said section of the Revised Statutes as set forth at length in article fourth of the libel:

'Nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: Provided, however, that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel, and that the same be not relighted until after said vehicle shall have left the same: Provided, further, that any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles the tanks of which contain gasoline, naphtha, or other dangerous burning fluids.'

At the time said amendment became a law automobiles or motor vehicles using gasoline as a source of motive power commonly contained a fire giving forth a continuous flame which was essential to the creation of the power used to propel such vehicles.

The motor vehicle or automobile numbered 11,119, referred to in the libel, was equipped with a securely closed metal tank containing not more than 10 gallons of gasoline which was used as a source of motive power for the propulsion of the vehicle. The tank was securely affixed to the rear of the vehicle. The method of producing the power required to propel said vehicle is, and was on said occasion, as follows:

The gasoline is conveyed from the said tank through a metal tube, about $\frac{1}{4}$ of an inch in diameter, into a metallic device called a carburetter. The flow of the gasoline through this tube is not free, but is checked and controlled by a needle valve. The carburetter consists of two chambers, in the upper of which is a float operating the said needle valve, and said chamber is capable of holding, and does hold, not more than a gill of gasoline. The gasoline is discharged from said chamber, a drop at a time, into the lower or mixing chamber of the carburetter. The mixing chamber is filled with warm air, and as the gasoline enters it becomes vaporized and forms an explosive mixture. By the operation of the piston which runs the vehicle, this mixture is drawn into the cylinder of the motor. The cylinder is made of forged steel surrounded by a water tight jacket in which water is kept cool by constant circulation. The said mixture is compressed in the cylinder by the return stroke of the piston, and at the point of greatest compression is exploded by the passage of a succession of electric sparks through it. Such explosions force the piston forward, and the piston transmits its motion through a crank shaft to the running gear, which is thereby operated. The electric sparks are produced by a small battery or dynamo, the current from which is instantly made and instantly broken.

On the occasion mentioned in the libel, and while the ferryboat lay in its slip at East 23rd Street, Manhattan, made fast to the ferrybridge, the vehicle entered the ferryboat, and traversed the length thereof in the horse gangway, under its own power, produced as hereinbefore described, and then, before the ferryboat started on her trip, the said electric current was instantly broken, and said sparking ceased. Said current remained broken, and said sparking suspended, throughout the trip of the ferryboat and until she was made fast to the bridge in her slip at the foot of Broadway, Brooklyn, at the termination of the trip, when said current was again made, and said sparking resumed, for the purpose of permitting the vehicle to leave the ferryboat under its own power."

The allegations of the answer were in substance, admitted to be true.

It was agreed that the type of car, which is the subject of controversy, is known as the Mors automobile, manufactured in France, and consists of four cylinders.

The scientific testimony of two witnesses was taken on the trial on behalf of the Government, but none on the part of the claimant, which apparently was satisfied with the Government's case in such respect. These witnesses were Frederick R. Hutton, Professor of Mechanical Engineering in Columbia University and David S. Jacobus, Professor

of Experimental Engineering at the Stevens Institute of Technology. Dr. Hutton testified, in substance, as follows:

That when electric sparks were passed through the compressed mixture of gasoline and air, a fire was created; that the result of such fire was continuous when the car was in motion, and only ceased when it was still; that every indication of combustion would appear from the ignition from the sparks, such as the heating of the cylinder and the necessity of cooling the same by the circulation of water, that the circulation of water was to avoid deformation or working of the cylinders; that the deposit of lamp black in the cylinders resulted from the burning of hydro-carbon vapor, and the lamp black was also deposited upon the spark plugs; that there was frequent combustion in the muffler, an enlargement of the cross section of the exhaust pipe between the head of the cylinder of the motor and its outlet, which was designed to reduce the noise of the explosions, when for any reason there might be a failure of ignition in the cylinder and where the flame could be plainly seen; that leaking gasoline could readily be ignited by a premature or consequent explosion in the muffler, where the flame might pass out; that but for the presence of the cooling water jacket, the cylinder would become red hot at night time and black hot in the day light; that technically a definition of fire is that it is a source of heat resulting from a chemical union of combustible material with oxygen at such a temperature that any solid material in the combination would create a glow sufficient to emit light; that the operation in the cylinder of the combustion of gas is fire; that gasoline, a product of petroleum, is an explosive burning fluid when combined with air; that the explosions and effect are entirely enclosed and confined excepting so far as the valves in the head of the cylinder open a communication to the outer air; that if there should be anything explosive in the muffler or exhaust pipe the fire would be communicated outwards; that it happens by no means unfrequently that the mixture of hydro-carbon air—gasoline and air—which is drawn into the compressing or motor cylinder in the first stroke, is not fired in the compression, either by the failure of the spark to pass, or by such properties of the mixture that the flame is not propagated through it on the passage of the spark; that the cylinder contents, then, instead of being an incombustible mixture of exhausted gases, carbonic acid and other gases, is passed into the exhaust pipe as a mixture of explosive vapor or air; that if the flame can pass back through the opening of the exhaust valve into the exhaust pipe where the mixture lies, it will be set afire by the flame in the muffler, or in the exhaust pipe, or in any part of the exhaust connection, making a loud report and if the flame is sufficient the product of combustion may expel itself through the final outlet of the muffler or exhaust pipe into the open air; that it would probably not burst the muffler, because they are usually strong enough to withstand this pressure, although the bursting of mufflers is not unknown; that in the hands of competent operators there is not much difference between gas and steam machines; that when the machine is at rest, the gasoline explosions cease absolutely and normally everything is closed when the explosion takes place; that in a four cylinder car there would be an explosion at every turn of the crank shaft; that when the car is mov-

ing along at even a moderate rate of speed, the time between the explosions in the respective cylinders would be very short; that the hot tube machines, steam cars, giving a steady continuous flame, are in very successful operation.

Dr. Jacobus testified, in substance, as follows:

That he caused to be made a drawing illustrating the kind of engine on the car in this case; that he was present and heard the testimony of Dr. Hutton; that assuming the facts to be true, the operation of passing the electric spark through the explosive mixture would produce a fire; that assuming, for some reason or other, in the opening of the valve when the gas charge exploded, a part of the flame or fire or combustion should come in contact with the mixture in the pipe or muffler, it would then explode; that if the charge was of sufficient strength, it might be ejected as a flame or fire from the end of the muffler and be capable of igniting gasoline or any other product of petroleum or any other body that was inflammable; that he knew the sparks to fail to ignite the gas and danger to arise from the failure; that he had never seen it happen right at the time of cranking the machine but had seen a violent explosion in the muffler; that in starting up a muffler of this class you have to get a compression by hand, the charge has to be taken in and the compression given by your own power and then after the gas is compressed it is ignited by the electric spark; that sometimes too much gasoline gets in with the air, and it will not take fire when the spark goes through it; that he has seen flames shot out of the exhaust pipe on account of the fact that the combustion has not been quite completed before the end of the stroke; that he has seen flames shooting out of the exhaust pipe of a motor of this class; that he considers there is a fire in the cylinder but would not describe it as a continuous fire; that it is intermittent in the ordinary sense of the term; that if a motor of this class were running with a peep hole in it and you asked a popular man whether there was a fire inside the motor, he would look in and see the flame and say there was; that his (the witness') definition of a fire is the heat produced through the combustion of the fuel with oxygen where the temperature is raised so that solid particles brought to that temperature will be luminous; that the chemistry of combustion is very complicated, because we have the disassociation there of the hydrogen from the carbon, and the general theory of a flame, which gives light, is that the particles of carbon which are solid give a glow of light; that with incomplete combustion you get the carbon which is deposited on the walls of the cylinder and the exhaust pipe which is visible to the eye if the cylinder be opened; that the residuum of the combustion in the chamber is of sufficient quantity so that the spark plug has to be taken out and cleaned now and then; that it is deposited on the head of the spark plug and parts that project into the cylinder, so that it can be rubbed off with the finger and the engines have also to be cleaned for the same reason; that the terms flame and fire are not necessarily synonymous, you can have carbon all aglow with no flame to it; that when in technical parlance you use the word fire you do not necessarily mean flame; that the fire in the muffler which might result from insufficient process in the cylinder is the same sort of an explosion or really combustion that you get in the cylinder.

Dr. Hutton on being recalled, said that there could be fire without flame; that there could be flame without glow as the result of chemical action or union; that flame and fire are not synonymous terms; that you may very easily have a fire without a flame. We are familiar with that in the charcoal fire or in the anthracite fire, where after the first volatile products of the coal have been removed, there is no flame; that on the other hand he thought, there is always fire where there is a flame; that the products of combustion, if the process is normal, should be invisible; that if the process is slightly off normal they become visible.

The libellant contends that but two questions remain for determination: (1) Whether gasoline as carried by the car in this case was freight, and (2) whether in the method of operation, there was a fire as such, which had not been extinguished when the car went on the ferryboat and was relighted before it went ashore.

1. It is urged that if there could have been much doubt as to whether fluid of the character indicated carried on a vehicle in the manner set forth was freight, such uncertainty was removed by the amendment which was passed February 20, 1901, incorporated at the end of section 4472, quoted above, as follows:

"Nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: Provided, however, that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel, and that the same be not relighted until after said vehicle shall have left the same: Provided, further, that any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles the tanks of which contain gasoline, naphtha, or other dangerous burning fluids."

The contention is that the word "freight" in the act is used in the ordinary sense to indicate the cargo, or any part of it, or anything carried for pay, as this car concededly was, and it is a necessary corollary that all of the machine, and everything belonging to it, partook of the same character.

The history of the legislation, now sought to be enforced, is referred to, by which it appears that the amendment of 1901, was the result of an application to Congress for some relief in favor of automobiles. This was granted upon the condition that there should be no fire in the automobiles, desiring to carry the explosive burning fluid, while being carried on steam vessels.

2. On the question of fire, it is urged that the testimony of the witnesses is decisive upon the point; that the conditions existing on the vehicle were not compatible with any other theory than that there was a fire on the car when it entered and left the ferryboat.

The claimant contends:

1. That the gasoline which was being carried on the car, not more than 10 gallons in quantity, was contained in a securely closed metal tank; that it was not freight but was a mere adjunct and incident to the vehicle, which was itself the freight within the meaning of the statute. It is urged that if it is freight, then a car with lamps carrying kerosene or any other explosive burning fluid is within its prohibition, as so

would be a bicycle, on which there was a lantern, containing kerosene, or a man carrying home a can of kerosene, or a woman who, on returning from shopping, carries home a bundle of cotton batting, or a teamster, whose horse's nose bag contains hay, or matches in the basket of a peddler, or such cases which could be multiplied ad infinitum, all of which, it is said, would be absurd. It is also urged that the construction contended for by the Government would seriously cripple the rapidly growing practice of using automobiles as trucks.

2. That there was no fire in the automobile within the meaning of the statute, nor did the vehicle go aboard the ferryboat without extinguishing a fire, or without relighting a fire before leaving.

The theory advanced is, that there were two well known types of motor vehicles in use at the time of the enactment of the amendment of 1901, one known as the steam power machine, which used a continuous flame, and the other the one now under consideration, which only had an intermittent fire, depending upon a flame created by electric sparks, which admittedly did not constitute a flame. The Government's attorney said during the trial in this connection: "We have abandoned the idea of a spark being a flame." This admission followed a statement by Dr. Hutton that the electric sparks should not be described as a fire. In this connection, it is contended that the language of the act, especially the use of the words "all fire, if any" and "re-lighted" clearly contemplates the two types of automobiles, one with a fire in the ordinary and popular sense, fed by gasoline and giving forth a continuous flame, and the other, like the one in question, having no such fire; that it is only by a stretch of language that the intermittent electric flashes can be described as a "fire," which must be extinguished before entering and not relighted until after leaving the boat; that the mere circumstance of there being an insignificant residuum of carbon in the cylinder does not make these flashes a fire.

The claimant also refers to the history of the legislation which resulted in the amendment of 1901, and has furnished the court with copies of the reports of the Committees in the Senate and House of Representatives, when it was under consideration. These reports were as follows:

56th Congress,
2d Session,

Calendar No. 1,889.
SENATE.
AMENDING SECTION 4472, REVISED STATUTES.

Report
No. 1912.

January 17, 1901.—Ordered to be printed.

Mr. Gallinger, from the Committee on Commerce, submitted the following
REPORT.

(To accompany S. 5427.)

The Committee on Commerce, to whom was referred the bill (S. 5427) to amend section 4472 of the Revised Statutes of the United States so as to permit steamboats to carry automobiles using gasoline as a method of propulsion, having duly considered the same, report it with an amendment, and as thus amended recommend that the bill pass.

The bill was referred to the Treasury Department for suggestions, and returned by the Secretary of the Treasury, who calls attention to the letter of the Supervising Inspector-General, which is appended and made a part of this report.

Treasury Department,
Steamboat-Inspection Service,
Office of the Supervising Inspector-General,
Washington, January 10, 1901.

Sir: I have the honor to acknowledge the receipt, by reference to this office for report, of a communication from the Committee on Commerce, United States Senate, inclosing Senate bill No. 5427, Fifty-sixth Congress, second session, "To amend section fifty-four hundred and seventy-two of the Revised Statutes of the United States so as to permit steamboats to carry automobiles using gasoline as a mode of propulsion."

I have the honor to report thereon that the apparent necessity for the proposed legislation arises from the fact that, under the construction of the Treasury Department of the provisions of section 4472, Revised Statutes, the carriage of "Camphene, * * * naphtha, benzine, benzole, coal oil, crude or refined petroleum, or other like explosive burning fluids," is in terms positively prohibited on passenger steamers, and that therefore automobiles with storage tanks filled with the prohibited articles named could not be carried on such passenger steamers.

The decision of the Department referred to is given in full, as follows:

Treasury Department, July 30, 1900.

Sir: The Department is in receipt of your letter of the 27th instant, calling attention to a recent ruling of the Supervising Inspector-General of Steamboats, upon the application of the Jamestown and Newport Ferry Company, under section 4472 of the Revised Statutes, which ruling, you say, "unless modified, threatens to work great hardship to a large number of persons in this city and throughout the United States."

In reply, you are informed that, upon examination of the ruling you refer to, which is found contained in the statement indorsed upon the application of the superintendent of the Jamestown and Newport Ferry Company to the local inspectors at Providence, and by those officers referred through the proper official channel to the Supervising Inspector-General, asking if it would be illegal to carry on their ferry referred to gasoline automobiles, which application was returned through the same channel, indorsed as follows, namely, "Section 4472, Revised Statutes, absolutely prohibits the carriage of naphtha, benzine, etc., under any circumstances, either as freight or stores, on passenger steamers, which includes ferry steamers and, therefore, would prohibit gasoline automobiles when their tanks are supplied with gasoline," the Department, having carefully examined the statute referred to in the indorsement quoted, can construe it in no other manner than has the Supervising Inspector-General. Nor is there any authority in this Department to modify said statute in the manner suggested by you, namely, that a requirement or rule be made "that any vehicle employing gasoline as a motive power should carry the same in a strong metal tank, securely closed, removed from any possible contact, and also plainly marked as containing inflammable substance, and that all carriages using the hydrocarbon system, upon entering ferries or vessels, should bring the motor to a full stop; and all steam vehicles, besides providing the same safeguards, should close the fuel tank and extinguish all fire."

In conclusion, you are informed that Congress alone has the power to modify section 4472, Revised Statutes, and it is respectfully suggested that application be made to it, when it meets in December next, for the relief sought for.

Respectfully,

H. A. Taylor, Assistant Secretary.

Mr. George W. Chamberlin,
President Automobile Club of America, New York, N. Y.

The provision of the bill under consideration, that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel, and that the same be not relighted until after said vehicle shall have left the same, seems to this office to remove the greatest danger attached to the carriage of naphtha or other dangerous burning fluids in the tanks of auto-

mobiles, and the fact that the quantity carried is very small removes any objections to the passage of the bill under consideration.

This office, however, in view of the possible fact that there may be owners of steamboats who, through their own fears, might object to carrying naphtha or other like dangerous fluid, even in small quantities, on the steamers owned by them, but would be obliged, nevertheless, under the law relating to common carriers, if this bill should become a law in its present form, to comply therewith, thinks it would be well that such owners should be protected by having the right to refuse, without liability therefor, to carry automobiles with tanks filled with naphtha or like dangerous oil.

It is therefore recommended that the bill be amended by adding thereto, after line 13, the words as follows: And it is further provided. That any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles the tanks of which are supplied with gasoline, naphtha, or other dangerous burning fluids.

If it should be found that there are no owners of steam vessels who object to carrying automobiles with tanks filled with gasoline, naphtha, or other dangerous burning fluids, this amendment would do no harm; if, however, there are such owners, this office thinks they are entitled to such consideration as the suggested amendment would afford them.

Very respectfully,

The Secretary of the Treasury,
Washington, D. C.

Jas. A. Dumont,
Supervising Inspector-General.

56th Congress,
2d Session.

HOUSE OF REPRESENTATIVES.

Report
No. 2565.

PERMITTING STEAMBOATS TO CARRY AUTOMOBILES USING GASOLINE.

January 30, 1901.—Referred to the House Calendar and ordered to be printed.

Mr. Sherman, from the Committee on Interstate and Foreign Commerce, submitting the following

REPORT

(To accompany H. R. 13633.)

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 13633) to amend section 4472 of the Revised Statutes, etc., beg leave to submit the following report, and recommend that said bill do pass, with an amendment.

The Senate Committee has made a report upon a bill (S. 5427) identical with this which covers the case, and this committee incorporates the Senate report as a part of its report, as follows:

The bill was referred to the Treasury Department for suggestions, and returned by the Secretary of the Treasury, who calls attention to the letter of the Supervising Inspector-General, which is appended and made a part of this report.

(Here follows the letter of the Supervising Inspector-General of January 10, 1901, quoted in the Senate Committee Report.)

The committee therefore recommends the passage of the bill with the following amendment:

"Provided further, that any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles the tanks of which contain gasoline, naphtha, or other dangerous burning fluids.

It is stipulated between the parties that the burner in the steam machine which uses gasoline as a fuel has a diameter varying from 14 to 20 inches, according to the size of the vehicle and that the steady flames arising therefrom are from 1 to 1½ inches in height. It is argued by the claimant that this is the kind of an automobile which it was intended to exclude from passenger steamers and not the one using the electric sparks.

After an examination of the testimony and the briefs, I conclude:

1. There does not seem to be any doubt that the contents of the tank which formed a part of the vehicle was freight within the meaning of the statute. The amendment of February 20, 1901, to Rev. St. § 4472, provided for the transportation of vehicles carrying the prohibited dangerous articles under certain restrictions. No doubt the vehicles themselves were freight but it does not follow that their contents were not freight also. This contention does not apparently require much consideration.

2. The question whether there was a fire on the car when it went aboard and left the boat, is not so clear. It is a serious matter to determine, especially in view of the importance automobiling has assumed in recent years, whether there was an infraction of the statute such as would authorize the imposition of the penalty imposed, with all its attendant consequences. It appears by the testimony that there was no real danger to the gasoline in the tank from the sparks. There is no suggestion of danger of fire thereto through the machinery to the tank but only of a possible outward explosion, which seemingly would not immediately affect the contents of the tank although it might ultimately do so, with its attendant danger, should anything be set on fire from which a general conflagration followed. It is possible that it was in order to provide against such a contingency that the amendment contained the requirement with reference to the absolute extinguishment of fire while the car was on the boat. But whatever the intention of Congress may have been in this particular, it is really unimportant in the determination of the question here; that is, whether there was a violation of the law. It is apparent that the act of 1901 required the car to enter and leave the boat by some other method than the use of its own power and it must be presumed that Congress so intended, however inconvenient it might prove, otherwise the requirement would not have been inserted. The element of danger should not receive very much consideration from the court because the law making power has indicated unmistakably that the carriage of gasoline by passenger steamers in automobiles, required an absolute extinguishment of fire on the vehicle.

The testimony of the experts here makes it clear that when a motor of this class is under motion from its own motive power it carries a fire. Congress has made no distinction between this and the steam class of machines, the only other kind much discussed, which operates under a different method. There is much in the testimony to show a difference in favor of the gasoline machine, as far as danger of explosion is concerned from ignition of the motive liquid, because the steam machine carried constant fire and the other uses only a succession of sparks, not constituting a flame, to produce a fire. It is obvious, however,

that neither class of machines can produce motive power without heat, which, in these cases, is the result of fire, the prohibited thing.

The suggestions of counsel concerning the various possible slight infractions of the law do not bear upon the question here. It is not necessary to determine now whether they would be regarded as of a serious character or treated as *de minimis*. When necessary, questions arising out of such cases can be determined. It is sufficient for the present to apply the law to the case under consideration.

It will be observed that the act of 1901, leaves it optional with passenger steam vessels to carry vehicles containing the prohibited fluid, so that no liability results from a refusal to transport machines of the kind in question.

Decree for the libellants for \$500.

In re PEASE CAR & LOCOMOTIVE WORKS.

(District Court, N. D. Illinois. February 23, 1905.)

1. BANKRUPTCY—DELIVERY OF PROPERTY SOLD—LAW GOVERNING.

In a controversy between a purchaser of property from a bankrupt and the trustee in bankruptcy as to the sufficiency of the delivery prior to the bankruptcy to vest the purchaser with title, the issue is governed by the law of the state where the property was situated, and where it was to be repaired and delivered to the purchaser.

2. SALE—SUFFICIENCY OF DELIVERY—PROPERTY REMAINING IN POSSESSION OF SELLER.

A manufacturing corporation a short time before its bankruptcy contracted to sell two locomotive engines which were to be repaired and put in good condition by bankrupt, inspected by an agent of the purchaser, and then delivered to a railroad company for shipment. The repairs were completed, the name of the purchaser painted by its direction on each side of the engines, they were inspected and accepted by the agent and paid for by the purchaser in accordance with the contract, but shipment was delayed on account of high water and they had not been actually delivered to the railroad company at the time of the institution of the bankruptcy proceedings and were taken possession of by the receivers appointed therein. *Held*, that under the law of Illinois there had been a sufficient delivery to pass title to the purchaser.

In Bankruptcy. On exceptions to report of special master upon the petition of the Sabine Tram Company praying for delivery of property.

Moses, Rosenthal & Kennedy, for Edwin C. Day and Henry L. Wilson, receivers in bankruptcy, and for trustee in bankruptcy.

Roscoe L. Roberts, for petitioner Sabine Tram Company.

SANBORN, District Judge. Exceptions to report of special master, upon the petition of the Sabine Tram Company, praying for delivery of property.

The facts upon which the petition and report of the special master are based have been agreed upon between the parties, and are as follows: On January 19, 1903, a contract was entered into in Texas between petitioner and bankrupt for the sale and purchase of one Dickson Mogul locomotive, price \$3,400, f. o. b. Hegewisch,

Pease Car & Locomotive Works; terms, one-fourth cash, and balance evidenced by 24 notes for \$113 each, falling due each month thereafter; it being further agreed that Johnson, Caswell & Co. were to inspect the engines for Sabine Tram Company as its agent, and the engines were inspected by Johnson, Caswell & Co., and pronounced as complete, according to contract by them. The 10-wheel locomotive was purchased February 19, 1903, for \$4,500, under the same terms as the Mogul—one-fourth cash, and 24 notes for \$149.58 each, falling due each month. The agreements evidencing said sale appear in letters attached to the petition, and are to be construed as part of this stipulation. The Sabine Tram Company completed its part of the contract by paying the Pease Car & Locomotive Works \$850 on February 18th and delivering its 24 notes for \$113 each, and by paying \$1,125 cash on February 27th and delivering its 24 notes for \$149.58 to the Pease Car & Locomotive Works on March 14th. These notes were immediately sold to the First National Bank of Hammond, Ind., and the Sabine Tram Company notified to pay the notes there, which the Sabine Tram Company have continued to do, having paid to date three notes for \$113 and three notes for \$149.58. These engines were not ready for delivery at the time they were bought, certain repairs thereon being necessary in order to make the engines suitable for shipment, but said engines were ready for shipment about March 1st, and the Sabine Tram Company were advised thereof about said time. The Pease Car & Locomotive Works were given 60 days under the contract in which to put these engines in first-class secondhand condition. The Mogul engine was paid for in full February 18th, before it was inspected; the 10-wheel engine was paid for in full March 14th. Both engines were to be shipped together, but on account of high water in Texas it was impossible for the Sabine Tram Company to give shipping directions until April 7th—see their letter of that date. These engines were tested by Johnson, Caswell & Co. while same were in the yards of the Pease Car & Locomotive Works at Hegewisch, and tested by them by having them fired up and running them under a full pressure of steam. The name "Sabine Tram Company" was painted upon both of these engines on either side thereof, and upon the tenders, by the Pease Car & Locomotive Works, under the orders and directions of the Sabine Tram Company. It is further stipulated and agreed by the parties that during the period of time after the sale of said engines by said bankrupt to said petitioner, and before the 2d day of April, debts were created by said bankrupt to divers creditors, who have proven and secured the allowance of such claims against said estate in bankruptcy. Receivers were in charge of the plant at Hegewisch on April 2d; on May 12th, receivers notified the Sabine Tram Company that further repairs would have to be made on engines before they could be shipped, and made price for repairs; on May 23d, the Sabine Tram Company, by letter to receivers, authorized them to go ahead and make the repairs; on June 3d, the Sabine Tram Company is notified by receivers that repairs have been made, and their bill therefor is \$248.50; receivers will obtain necessary order of court releasing the engines for \$50 addi-

tional. The receivers afterwards advised the Sabine Tram Company that the company would have to make application for the delivery of the engines through its own counsel.

Whether the petitioner is entitled to delivery of the locomotives is one of Illinois law, the place where the work was to be done and the delivery made. *G. A. Gray Co. v. Taylor Bros. Iron Works*, 66 Fed. 686, 14 C. C. A. 56. The contention of the trustee, briefly stated, is that because there was no actual delivery of the two locomotives purchased by the petitioner from the bankrupt accompanying the sale of such locomotives by the bankrupt to the petitioner, and because the possession of said locomotives remained continuously from the time of said purchase until and after the appointment of the receivers herein, and that said locomotives were taken possession of by said receiver as part of the property of the bankrupt estate, said sale is void as against such trustee, who stands in the same position as an execution or attaching creditor. The rule of the law in Illinois is well settled that the retention of possession by a vendor of chattels is not merely prima facie evidence of fraud sufficient to avoid the sale when attacked by an execution or petitioning creditor who has acquired a lien upon said property, but that such retention of possession carries with it a conclusive and irrebutable presumption of fraud. See the numerous Illinois cases cited in 14 Am. & Eng. Encyc. of Law, 358.

It is further contended on the part of the trustee that the painting of the name upon the locomotives was only done pursuant to specification, and is not of itself indicative of a present intention to cause delivery. It was merely indicative of the fact that the Pease Car & Locomotive Works was complying with its contract with the petitioner, and that if the engines were satisfactory, and in accordance with specifications, and had been properly inspected, there would be at some future time delivery of the property. In other words, to use the language of one of the decisions (*Burchinell v. Weinberger* [Colo.] 34 Pac. 911), the painting of such name was merely indicative of the present intention of delivery in the future.

A short review of the Illinois cases will be sufficient to show what rule should be applied to the facts. In *Ticknor v. McClelland*, 84 Ill. 471, the property sold was standing corn, three stacks of hay, hogs, shoats, plows, planters, etc. The court held that as to the corn and stacks of hay the delivery of possession was sufficient, but not as to the other property. There was no physical change of possession. All the vendee did was to examine the farming implements, horses, and the hay. No money was paid, and no bill of sale drawn until the next day. The corn and hay being ponderous and incapable of immediate delivery, it was held that the mere looking it over was a sufficient act on the part of the vendee to constitute a delivery against a creditor. In *Thompson v. Wilhite*, 81 Ill. 356, the property was growing wheat and corn, an undivided half of a reaper, and a number of hogs. No actual possession was taken of any of the property, but it was held that there was a sufficient delivery as to the wheat, corn, and undivided half of the reaper, but not as to the hogs. In *Burnell v. Robertson*, 5 Gilman, 282, certain stage horses, their har-

ness, etc., and a large quantity of other property upon different stage routes in Illinois, Iowa, and Wisconsin, were sold. The vendees immediately proceeded as fast as possible to take possession of the property conveyed. Before they had taken possession of the particular property in suit, it was seized by officers under an attachment. It was held that the sale was void as to creditors, because there was no sufficient delivery of possession. In *Hewett v. Griswold*, 43 Ill. App. 43, the court say:

"When an actual change of possession is not practicable, the acts that will constitute a sufficient delivery as to creditors vary in the different classes of cases, and depend upon the character of the property sold and the circumstances of each particular case."

In *Barker v. Livingston Co. Nat. Bank*, 30 Ill. App. 591, 603, the vendor instructed his custodian to nail a sign on a crib of corn sold, stating that it was the property of the vendee. This was done. Held a sufficient delivery. The court say that the removal of the corn was utterly impracticable, and would have involved the purchaser in large expense. In *Vaughn v. Owens*, 21 Ill. App. 249, growing corn was sold, and was to be gathered by the vendor, measured, and cribbed by him on his premises. It was objected that there was no delivery, because, when the corn was gathered after maturity, the vendee lost his right by permitting it to remain in the apparent possession of the vendor. The court held that the act of cribbing by the vendor for the vendee was sufficient delivery. In *Vanscoy v. Bigelow*, 28 Ill. App. 301, the coal office, coal shed, and one four-ton Howe scale were sold. The keys were delivered to the vendee, who within an hour afterwards delivered the key back to the vendor, who retained possession for the vendee. It was held that the possession taken was all that the law required, considering the nature of the property. In *Lowe v. Matson*, 140 Ill. 108, 29 N. E. 1036, an insolvent debtor made a voluntary assignment of a lumber yard. The assignment was made at 10 o'clock in the forenoon. About 50 minutes later the assignee informed the bookkeeper of the assignor in charge of the lumber office, by telephone, and ordered him to sell no more lumber, but to take charge of the yard for him, and at once prepare a statement of the assignor's creditors. The bookkeeper thereupon stopped the delivery of lumber then being made, and proceeded to make a list of creditors. About an hour later two executions against the assignor were levied upon the lumber yard. Still later, and about 2 o'clock in the afternoon, the assignment was filed with the county clerk of the proper county. It was contended that there was no delivery prior to the levy of the executions. The court, however, held that the transfer being founded on a good consideration, with no intention in fact to defraud creditors, the ordinary rule that a failure to deliver possession carries with it a conclusive and irrebuttable presumption of fraud did not apply, because the transfer was sufficiently a matter of publicity or notoriety. It will be seen that there was no publicity or notoriety until the recording of the assignment after the levy.

In other states the authorities are quite conflicting as to what constitutes a sufficient delivery to rebut the presumption of fraud.

In *Pope v. Cleney*, 68 Iowa, 563, 27 N. W. 754, a large quantity of corn in a crib was sold, and the vendee nailed up certain holes in the crib. This was held to be a sufficient act on his part to show a change of possession. In *Barney v. Brown*, 2 Vt. 374, 19 Am. Dec. 720, certain sheep pointed out by the vendee in the vendor's flock were sold, and the vendee directed the vendor's servant to make a red mark on each sheep so selected. The sheep were then allowed to run as before with the vendor's flock, and the whole flock was levied on by a creditor of the vendor. Held a sufficient change of possession. In *Haynes v. Hunsicker*, 26 Pa. 58, a quantity of lumber piled in a millyard was sold, and the pile was conspicuously marked with the vendee's name. This was held to be a sufficient change of possession, as the roads were so bad that the vendee could not haul the lumber. In *Chase v. Garrett* (Pa.) 1 Atl. 912, it is said that a change of possession is essential only when the character of the property and the situation of the parties render such a change reasonable. In *Thompson Manufacturing Co. v. Smith*, 67 N. H. 409, 29 Atl. 405, 68 Am. St. Rep. 679, the vendee examined and accepted an engine, and took away with him such parts as were liable to be lost or stolen. Held a sufficient change of possession. In *Hawkins v. K. C. Hydraulic, etc., Co.*, 63 Mo. App. 64, the purchaser of brick had notice of his ownership placed on the piles. The notices remained there for two months, but had disappeared at the time of a levy thereon as the property of the vendor. Held a sufficient change of possession.

I think the facts in this case show a sufficient delivery of possession. While the engines were not strictly ponderous articles, yet they would ordinarily be delivered only upon a railroad track. The reason why they were not thus delivered was that high water in Texas, where the vendee was, prevented the giving of shipping directions. It is true that they might have been delivered to a railroad company for shipment, and their actual shipment delayed; but this would have subjected them to demurrage charges. It is also true that a custodian might have been placed by the vendee in charge of the engines in the yard of the vendor; but this is likewise true of the stacks of hay in the case of *Ticknor v. McClelland*, *supra*. The hay was no more ponderous in its character than the engines, and was equally capable of immediate delivery. The engines were fully paid for, and the name of the vendee painted on each side of both engines. The transaction was entirely in good faith, and no creditor of the vendor was in any way injured. I think that the painting of the vendee's name on the engines made the sale sufficiently notorious.

Under the rule in Illinois, as applied by the Court of Appeals of this circuit in *Dooley v. Pease*, 88 Fed. 446, 31 C. C. A. 582, I think there was a sufficient delivery, and that the exceptions to the master's report should be overruled.

TILFORD v. ATLANTIC MATCH CO.

(Circuit Court, D. New Jersey. February 18, 1905.)

1. CORPORATIONS—PERSONAL PROPERTY—OWNERSHIP.

The N. Match Company, a mere stockholding corporation without any plant, acquired all the capital stock of the A. Match Company, with the exception of five shares. E., who was vice president and general manager of both companies, accepted a proposition to furnish the A. Company with a certain boiler, title to remain in the seller until paid for, the acceptance being signed by the N. Company by E., vice president, and directed the seller to place the name of the N. Company on the front of the boiler and ship to the A. Company. No payments were made by the N. Company, two payments being made by the A. Company, and the final payment was made from the proceeds of a sale of the boiler after both companies had been placed in the hands of receivers. *Held*, that the N. Company never acquired any interest in the boiler, and that its receiver was not entitled to the balance of the fund derived from its sale.

2. SAME—MORTGAGES—PRIORITY.

Where a corporation purchased a boiler under a contract reserving the title in the seller until paid for, and only two-thirds of the price had been paid at the time a receiver was appointed for the corporation, the boiler was not covered by a mortgage previously given by the corporation to secure bonds covering all property of the corporation, real and personal, which it then owned or might thereafter at any time acquire.

3. SAME—CONDITIONAL SALES—SUBSEQUENT PURCHASER—MORTGAGEE.

A holder of bonds of a corporation, secured by a trust mortgage executed prior to the corporation's purchase of a boiler under a conditional contract of sale reserving title in the seller until the price was paid, was neither a subsequent purchaser nor mortgagee of the corporation as to such boiler, within a New Jersey statute making conditional contracts of sale not recorded as provided for therein void as to judgment creditors and subsequent purchasers and mortgagees in good faith.

In Equity. In matter of claims against fund in court.

Edwin G. Adams, for receiver of National Match Company.

Thomas B. Harned, for Champion Construction Company.

Lindabury, Depue & Faulks, for receivers of Atlantic Match Company.

LANNING, District Judge. This matter comes before the court upon an application to determine the validity of the respective claims of the receiver of the National Match Company, of the Champion Construction Company, and of the receivers of the Atlantic Match Company to the sum of \$869, being part of the proceeds of the sale of the boiler hereinafter mentioned. The facts are as follows: On August 15, 1900, the Atlantic Match Company, a corporation of New Jersey, executed to the Real Estate, Loan & Trust Company of Camden, N. J., as trustee, a mortgage to secure \$1,000,000 of its bonds. The mortgage covered all real and personal property owned by the company at the date of its execution, and all real and personal property that it might thereafter at any time acquire. It was duly recorded on October 2, 1900, both as a real estate mortgage and as a chattel mortgage. In August, 1901, the National Match Company, also a corporation of New Jersey, acquired all of the capital stock of the Atlantic Match Company,

except five shares standing in the names of the latter company's directors. The Atlantic Match Company had a plant and factory in operation, but the National Match Company never owned any plant or factory. On October 8, 1901, the Stirling Company submitted to the Atlantic Match Company a written proposal as follows:

"Phila., Pa., Oct. 8, 1901.

"For and in consideration of the hereinafter named amount we propose to furnish to Atlantic Match Company, Philadelphia, Pa., 250 horse power water tube boiler (here follow specifications) to be delivered f. o. b. cars Camden, New Jersey, for the sum of \$2793, one-third to be paid when contract is accepted, one-third on delivery of certain documents, balance when boiler is erected ready for brick-work, final payment to be guaranteed as understood when contract is completed.

"This proposal will be void if not accepted within thirty days. All previous communications between the parties hereto either verbal or in writing are hereby abrogated and this proposal shall constitute a contract. Any modifications in this proposal must be in writing and attached hereto. We assume no liability for damages on account of delays. The title and right of possession to the material we furnish remains in the Stirling Company until the same has been fully paid for in cash.

"The Stirling Company,
"By James Meily,
"Fisher."

On November 11, 1901, the president of the Atlantic Match Company was also president of the National Match Company, and certain other persons, being directors of the Atlantic Match Company, were also directors of the National Match Company, and F. C. Eaton was then the vice president and general manager of both companies. On that day—November 11, 1901—F. C. Eaton indorsed on the above proposal the following acceptance:

"Nov. 11, 1901.

"The Stirling Company, Chicago, Ill.—Gentlemen: We hereby accept the foregoing proposition. Name required on front, National Match Co. Description of fuel to be used, Soft Coal and Wood Shavings. Date to be delivered, Dec. 1st, 1901. Shipments to be consigned to Atlantic Match Co., Camden, New Jersey.

"Yours truly,

National Match Co.
"By F. C. Eaton, Vice-Prest."

Between November 11, 1901, and July 7, 1902, the exact date not appearing, the Stirling Company delivered upon the premises of the Atlantic Match Company a boiler of the character mentioned in the proposal, and between the same dates the Atlantic Match Company made two payments of \$931 each on account of the boiler. The boiler was purchased for the purpose of being permanently installed in the plant of the Atlantic Match Company in lieu of an old and inadequate boiler then in use. On December 31, 1901, the Atlantic Match Company executed and delivered to Thomas W. Synnott its promissory notes to the amount of \$91,150, and, as collateral security for the payment thereof, issued and delivered to Synnott 250 of its above-mentioned mortgage bonds, which bonds were the only ones ever issued by the company. These notes, which fell due in six months after their date, were not paid, and subsequent to their maturity Synnott sold them to the Champion Construction Company, which company then came into possession of both the notes and the bonds collateral thereto. On July 7, 1902, the Atlantic Match Company, under an order of this court,

was put into the hands of receivers. Besides its indebtedness on the notes above mentioned, at the time of the appointment of the receivers it was indebted to general creditors in a sum exceeding \$60,000. On September 7, 1902, the National Match Company, under an order of this court, was put into the hands of a receiver. In November, 1902, the Stirling Company demanded payment of the third installment of the purchase price of the above-mentioned boiler, and threatened, if such payment were not made, to take possession of the boiler and forfeit the payments previously made to it. The boiler had never been set up or put into use by the Atlantic Match Company. When the Stirling Company threatened to take possession of it, the receiver of the National Match Company claimed it as the property of that company, the Champion Construction Company claimed that it was subject to the lien of the above-mentioned trust mortgage, and the receivers of the Atlantic Match Company claimed that it was the property of that company. In consequence of these conflicting claims, it was agreed on December 6, 1902, that the boiler should be sold for the sum of \$1,800, that out of the proceeds of the sale there should be paid to the Stirling Company the sum of \$931 in satisfaction of the third installment of the purchase price due to that Company, and that the right to the balance of \$869 should be determined by this court upon the facts above stated.

The claim of the receiver of the National Match Company is clearly unsupported by the facts of the case. Notwithstanding the acceptance of the proposal of the Stirling Company was signed by F. C. Eaton as vice president of the National Match Company, and the name required to be placed on the front of the boiler was "National Match Co.," the National Match Company not only required the boiler to be consigned to the Atlantic Match Company, but permitted, if it did not require, the Atlantic Match Company to make two payments of \$931 each on account of the purchase price. The plant at which the boiler was delivered was the plant of the Atlantic Match Company, and was operated by that company. The National Match Company had no plant. It simply held the capital stock of the Atlantic Match Company. Even the final payment upon the boiler was not made out of the treasury of the National Match Company, but out of the proceeds of the sale of the boiler. The National Match Company never acquired any legal or any equitable right to or interest in the boiler, and the claim of its receiver to the fund in question must be adjudged invalid.

Nor is the claim of the Champion Construction Company deemed valid. The lien of the mortgage given by the Atlantic Match Company undoubtedly extended to and covered all property the title to which was acquired by that company after the execution and record of the mortgage, whether the title so acquired was a legal or an equitable one. *Toledo, etc., Railroad Company v. Hamilton*, 134 U. S. 305, 10 Sup. Ct. 546, 33 L. Ed. 905; *Central Trust Company v. Kneeland*, 138 U. S. 419, 11 Sup. Ct. 357, 34 L. Ed. 1014. But did the Atlantic Match Company acquire any title, legal or equitable, to the boiler? The proposal of the Stirling Company and the acceptance of the proposal constituted a conditional sale. By the condition therein set forth the vendor reserved to itself the title to the boiler until the same should

have been fully paid for in cash. It is clear that under such a contract the Atlantic Match Company acquired no legal title previous to the date of the appointment of the receivers for that company, for at that time it had paid but two-thirds of the purchase money. For the same reason, it had then acquired no equitable title thereto. The investment of the Atlantic Match Company with the title, either legal or equitable, was made to depend upon full payment of the purchase price. The situation was not changed after the appointment of the receivers. Up to the time of the sale of the boiler the title thereto was vested absolutely in the Stirling Company. In *Knowles Loom Works v. Ryle*, 97 Fed. 730, 38 C. C. A. 494, a Pennsylvania case, it was held that the lien of a mortgage containing an after-acquired property clause did extend to, and cover property sold to the mortgagor upon a conditional sale after the date of the mortgage. But that case followed the rule established by a long series of opinions in the state courts of Pennsylvania that all conditional contracts of sale, where possession passes to the vendee and title is reserved in the vendor, are fraudulent and void as to creditors of the vendee and innocent purchasers. See, also, *Ryle v. Knowles Loom Works*, 87 Fed. 976, 31 C. C. A. 340. In New Jersey the Pennsylvania rule does not obtain. Here conditional contracts of sale are valid. *Cole v. Berry*, 42 N. J. Law, 308, 36 Am. Rep. 511. The statute of New Jersey, passed since the decision in *Cole v. Berry*, makes conditional contracts of sale that are not recorded as provided for in that act void only as to judgment creditors and subsequent purchasers and mortgagees in good faith. In the case in hand, the holder of the trust mortgage given by the Atlantic Match Company is neither a judgment creditor of that company nor a subsequent purchaser or mortgagee. The conclusion reached is that the Atlantic Match Company never acquired any interest in the boiler to which the lien of the mortgage could attach. The case of *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, is not a contrary authority. In that case certain cars were sold to a railroad company upon a conditional contract of sale, the condition being that the cars should remain the property of the vendor until paid for. In considering the right of the mortgagee, the court, at page 251, 99 U. S., 25 L. Ed. 339, said:

"They [the mortgagees] are in no sense purchasers of the cars. The mortgage attaches to the cars, if it attaches at all, because they are after-acquired property of the company; but as to that class of property it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired: no more, no less."

To the same effect is *Myer v. Car Co.*, 102 U. S. 1, 26 L. Ed. 59. In *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285, the leading case in the federal courts on the subject of conditional sales, Mr. Justice Bradley set forth principles which, it seems to me, are inconsistent with the idea that a conditional vendee of personal property, whose title has been reserved in the vendor until payment made, can, by any act of his, subject that property to any lien so long as the conditions of the sale have not been complied with by the conditional vendee or waived by the vendor. The contract before me was not an absolute sale. It was an agreement to sell upon a condition to be performed.

The Atlantic Match Company never performed the condition. It therefore acquired no title, legal or equitable. It simply held possession of the boiler, and even that possession was wholly by permission of the Stirling Company, who, by its contract, had reserved to itself not merely the title, but the right of possession. Whether, if the Stirling Company had taken possession of the boiler after receipt of two-thirds of the purchase price on the ground of the default of the Atlantic Match Company in the payment of the residue of the purchase price, the Atlantic Match Company could have required the refunding of any part of the purchase price paid, in accordance with the equitable principle stated in 1 Benjamin on Sales, § 433, is a question not before me.

The conclusion reached is that the claims of the receiver of the National Match Company and of the Champion Construction Company are invalid, and that the fund consequently belongs to the receivers of the Atlantic Match Company.

SMITH v. ROBERT R. SIZER & CO.

(District Court, S. D. New York. January 31, 1905.)

SHIPPING—DEMURRAGE ON LUMBER CARGO—RULES OF NEW YORK MARITIME ASSOCIATION.

A charter party for the carriage of a cargo of lumber from a southern port to New York, providing that the lay days for discharging should be "as customary," held not to make rule 7 of the New York Maritime Association rules applicable in the computation of demurrage, in the absence of any reference thereto, and especially in view of the uncertainty as to the meaning of the term "board measure" as employed in the rule.

[Ed. Note.—Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

In Admiralty. Suit for balance of freight and demurrage.

Hyland & Zabriskie, for libellant.

Eustace Conway, for respondent.

ADAMS, District Judge. This action was brought by Caleb R. Smith, as master of the schooner *May & Anna Beswick*, to recover from the corporation of Robert R. Sizer & Company, the sum of \$333.44, for an alleged balance of freight and demurrage due on a cargo of lumber, transported from Newberne, North Carolina, to the City of New York. The vessel was loaded at Newberne and sailed thence on or about the 22d day of June, 1904, and was discharged in New York, July 14th by 2:30 o'clock P. M.

The charter party, dated at New York, the 23d day of May, 1904, provided for the voyage described and further, as follows:

"The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo of Kiln Dried rough and/or dressed N. C. Pine Boards under and on deck, and to pay to said party of the first part, or agent, for the use of said vessel during the voyage aforesaid Four Dollars and twenty five cents (\$4.25) & free wharfage per thousand feet delivered; one fifth off undressed as customary. * * * It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched) commencing from the time the vessel is ready to receive or discharge

cargo, and notice thereof given to the parties of the second part, or their agents that is to say:—For loading at the rate of at least twenty five thousand feet per day, Sundays and holidays excepted. For discharging as customary. And that for each and every day's detention by default of said party of the second part, or agent, Twenty dollars per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside, within reach of the vessel's tackles."

The libellant claims for $2\frac{2}{3}$ days' demurrage at shipping port, made up as follows:

"1904

| | | |
|----------------------------|-----------------------------------------------|----------------------|
| June 13 | arrived and reported | 0 |
| 14 | | 1 |
| 15 | | 1 |
| 16 | | 1 |
| 17 | | 1 |
| 18 | | 1 |
| 19 | Sunday | 0 |
| 20 | Time up at expiration of $\frac{1}{2}$ of day | 1 |
| | Overplus for demurrage | $\frac{1}{2}$ |
| 21 | | 1 |
| 22 | | 1 |
| Demurrage at shipping port | | $2\frac{2}{3}$ days" |

There is an additional claim for $3\frac{1}{2}$ days at New York made up as follows:

"1904

| | | |
|-----------------------|-----------------------------------------|------------------|
| July 1. | Friday, reporting day, | 0 |
| " 2. | Saturday for berth | 0 |
| " 3. | Sunday | 0 |
| " 4. | Monday, holiday | 0 |
| " 5. | Tuesday, | 1 |
| " 6. | Wednesday, | 1 |
| " 7. | Thursday, rain 2 to 3:15 P. M. | 1 |
| " 8. | Friday, rain 7 till $8\frac{1}{2}$ A. M | 1 |
| " 9. | Saturday, | 1 |
| " 10. | Sunday, | 0 |
| " 11. | Monday, | 1 |
| | Demurrage to date, | $\frac{1}{2}$ |
| " 12. | | 1 |
| " 13. | | 1 |
| " 14. | | 1 |
| Demurrage at New York | | $3\frac{1}{2}$ " |

The total demurrage claimed is $6\frac{1}{2}$ days, amounting to \$123.33. There is a balance of freight amounting to \$182.53, also charges as follows:

"45c. per M feet for unloading at Harlem on 61,316 feet, \$27.59
And a like charge on an additional amount of 9000 feet, 4.05"

Excluding the last item \$4.05, which does not appear in the libel, the total claim amounts to \$333.44.

Upon the question of demurrage, the libellant's contention is that the principle which should govern here has been established in *Randolph v. Wiley* (D. C.) 118 Fed. 77.

The respondent claims:

"1. That an entirely different question is presented by the charter in this case from that presented in the Wiley Harker Company case relied on by libellant, because the terms of the charter are entirely different.

2. That the evidence presented by the libellant,—respondent in that case, being entirely different from that presented in this case, the ruling of the Court on the questions there presented, do not govern the questions presented in this case.

3. That an agreement was made by the Captain for a valuable consideration to him moving, not to charge any demurrage in the port of New York, and therefore, so far as New York is concerned no demurrage can be charged, or if charged, the extra charges which the libellant asks to have paid should be disallowed."

The respondent's third contention with respect to an agreement not to charge demurrage will be considered first. It appears that a question arose about discharging that part of the cargo destined for 129th Street, owing to a dispute as to by whom the handling should be done. The master wished to use his own crew of colored men and the stevedores at the place declined to work with them on account of their being non-union men. It became necessary therefore to pay the stevedores their charge of 50c. per M, and the respondent's agents say that in consideration of one-half, or 25c. per M, being assumed by the respondent, the master of the schooner agreed to charge no demurrage. The master denies that he made any such agreement. It seems that the respondent was desirous of avoiding delay in the discharge of the lumber and in getting it on cars. The vessel's duty would have been satisfied by a delivery on the wharf and the car charge 20c. per M was to be paid by the respondent. The whole cost of discharging by the stevedores was 50c. per M, one half of which charge, 25c. per M, added to the 20c. per M made 45c. per M. I think the master's version of this part of the controversy should be adopted, which excludes any further consideration of the respondent's third contention.

The remaining controversy turns principally upon the question whether the Maritime Association Rules 4, 5 and 7 are to govern and if so, what is their proper construction.

These rules are:

"Rule IV.

Consignees shall have one full calendar day (Sundays and legal holidays excepted) after the vessel arrives and the captain or vessel's agent reports, in which to furnish the vessel with a berth where she can discharge. * * *

Rule V.

Lay days allowed to consignee for receiving cargo shall be as follows, viz.: One day to furnish berth for vessel as provided in Rule IV, and one running day (Sundays and legal holidays excepted), for each 25,000 feet of lumber 1½ inch and under in thickness, or each 30,000 feet of all other lumber and timber, excepting railroad ties, when entire cargo does not exceed 360,000 feet, or each 35,000 feet of all lumber and timber, excepting railroad ties and lumber 1½ inch thick and under, when entire cargo is in excess of 360,000 feet. The first half of every Saturday, not a full legal holiday, together with the last half or portion known as a half holiday, to count as a lay day. If vessel is ready to discharge cargo in questionable weather, consignee must receive same, but in case of failure of vessel through her fault to discharge the quantities per day as herein provided, consignees shall not be liable for demurrage,

provided they have furnished berth or lighters as provided in Rules III and IV.

After the days herein provided have expired, consignee shall pay demurrage for every running day until vessel finishes discharging.

Rule VII.

The charge for demurrage for vessel shall be at the rate of fifteen cents (15c.) per day per thousand feet board measure of entire cargo delivered. All fractions of a day, over one-half, shall be paid for as a full day, and one-half of a day or less be paid for as one-half of a day."

The rules have been the subject of consideration by this court in *Bowen v. Sizer*, 93 Fed. 227, and in *Randolph v. Wiley*, 118 Fed. 77. Each case proceeded upon its own facts and the libellant is mistaken in assuming that the latter did, or was intended to, overrule the former, concerning the construction to be given to Rule 7. That rule was there expressly excluded from consideration. In all these disputes the trouble is that the facts vary so much that no general rule applicable to all cases can be adopted. As was said in *Bowen v. Sizer*:

"The rules of the maritime association do not state in what way 'feet of lumber' are to be measured or how 'board measure' under Rule 7 is to be computed."

In this case the testimony shows that the application of Rule 7 to demurrage, while freight is to be paid under Rules 4 and 5, would apparently be unreasonable. The theory advanced by the respondent is that it matters not how thick the lumber may be (up to 1½ inch), it will be counted, if 1 inch or less at 1 inch, so that ½ inch lumber would be computed the same as 1 inch. It is said that 1 inch or under is called board measure, so that 300,000 cut in lengths of ½ inch thickness, would be 300,000 for freight purposes and 600,000 for discharging purposes and that 15c. per M under Rule 7, would be proper notwithstanding the computation yielded the vessel for demurrage only half of the quantity she actually transported. An agreement to such effect would be enforced, but it obviously would have to clearly appear what the contracting parties intended in order to secure such result. Here, while doubtless the respondent has heretofore often, if not always, secured such results in settling, it does not appear clearly enough, in the face of conflicting testimony, that the parties intended to abide by the rule involved as to warrant the court in enforcing it. Much of what was said in *Randolph v. Wiley* on the general principles, which govern the court in a matter of this kind, could be repeated here with advantage. There is no reference to the Maritime Exchange Rules in the contract and they can only be considered by virtue of a stipulation which provides

"that the printed rules of the Maritime Association of the Port of New York for shipment of Southern Yellow Pine Lumber may be submitted to the Trial Justice herein and be marked as an exhibit in this case."

Such a stipulation is obviously not equivalent to such an agreement as would be enforced as the contract of the parties. But even in the event of the rules being unquestionably intended to govern, it would still remain uncertain what "board measure" meant. That has been the subject of conflicting testimony heretofore and doubtless will be so in such

disputes as may hereafter be the causes of litigation, unless provision be made in the contracts to avoid any uncertainty as to what was intended. A matter of this kind in an important trade should be made so plain that no doubt can remain as to what the contracting parties designed.

Decree for the libellant for \$333.44, with interest.

TAYLOR et al. v. PROVIDENT SAVINGS LIFE ASSUR. SOC.

(Circuit Court, W. D. Pennsylvania. January 30, 1905.)

1. LIFE INSURANCE—CONSTRUCTION OF CONTRACT—GRACE FOR PAYMENT OF PREMIUMS.

A life insurance policy for a term of 5 years, with a stipulation for renewal at a higher rate of premium, recited that it was issued in consideration of the payment in advance of a stated premium "on or before the 28th day of December in every year" during its continuance. It provided that it should not go into effect until the first premium had been actually paid "during the lifetime and good health of the assured," and contained this further provision: "A grace of thirty days will be allowed in the payment of premiums hereafter due on this policy, provided always that when advantage is taken of this grace, interest at the rate of five per cent. per annum shall be paid to the Society for the time deferred." During the 5-year term, the insured died within 30 days after the 28th of December, the premium then due not having been paid; and within the 30 days such premium, with interest, was tendered and refused. *Held*, that the policy came within the settled rule that all life insurance contracts are intended to run for the life of the insured, subject to forfeiture for nonpayment of premiums, and not merely from year to year, the payment of each premium effecting a renewal, and that under the provision for grace the policy was continued in force during the 30 days, within which time the premium might be paid by the insured, or on his death by his representatives.

2. SAME—TERMINATION OF POLICY—DECLARATION BY INSURED.

A statement by an insured that he did not intend to pay a premium on his policy, which was due, but not then demandible, made to an agent who had no authority to change the contract on behalf of the company, did not have the effect of terminating the policy.

At Law. On questions reserved.

McCleave & Wendt and W. O. McNary, for plaintiffs.

Reed, Smith, Shaw & Beal, for defendant.

BUFFINGTON, District Judge. On December 28, 1900, the defendant, the Provident Savings Life Assurance Company of New York, issued its policy to Selwyn M. Taylor, insuring his life for \$25,000, provided death ensued within five years. The policy was termed a "combined term and renewal option" one, and stipulated for its renewal at the expiration of five years at a higher rate of premium. It recited it was granted in consideration "of the payment in advance of four hundred and seventy-five and ⁵⁰/₁₀₀ dollars on or before the 28th day of December in every year during the continuation of the policy." Under the head of "Privileges and Conditions," the policy provided, "This policy does not go into effect until the first premium hereon has

been actually paid during the lifetime and good health of the assured;" under the subhead of "Grace in the Payment of Premiums," that "A grace of thirty days will be allowed in the payment of premiums hereafter due on this policy, provided always that, whenever advantage is taken of this grace, interest at the rate of five per cent. per annum shall be paid to the Society for the time deferred;" and further that "this policy shall be indisputable after two years from its date of issue, for the amount due, provided the premiums are duly paid as set forth above." The insured duly paid his initial premium and those falling due on December 28, 1901 and 1902. The payment falling due on December 28, 1903, was not paid. The insured died January 24, 1904. The premium, with interest, was tendered the company January 25, 1904. Payment having been declined, suit was brought, and a verdict rendered in favor of the plaintiffs, Taylor's executors, subject to the reserved questions "whether the omission of the insured to pay the premium during his lifetime precluded the right of recovery," and "whether the declaration of the insured to the agent of the company when he requested payment of the premium of January 22, or 23, 1904, that he did not intend to continue the policy, was a waiver of the claim, and terminated his rights under the policy." The court is now moved to enter judgment for the defendant on these reserved questions.

The rights of the parties depend on the terms of the particular contract or policy here involved. By it Taylor obtained insurance upon his life for five years, with the right to a continuance or renewal of such insurance thereafter upon an increased premium, on one of several optional plans and without medical examination. Now, while the provisions for premium, payment and forfeiture for the five-year term alone are here involved, yet, in view of the recited provisions, looking toward a continuance of the policy for life, the contract may be regarded as one intended to cover the whole life of the insured. In construing life insurance contracts, due regard is to be given the fundamental principle which distinguishes them from fire insurance policies. In the latter the contract is from year to year, and its continuance is dependent upon yearly renewal by the payment of annual premiums. In life insurance, however, we start from a different standpoint. By the payment of the initial premium a contract is entered into which contemplates an insurance for the entire life of the insured, and such insurance for life is his object. The company, for its protection, provides for a forfeiture of the contract in case premiums which compensate it for the risk are not paid at certain times. The absolute necessity of making provision for forfeiture for nonpayment of premiums is apparent, for, if a life policy does not provide for forfeiture by reason of nonpayment of premiums, the policy would run for life. *McMaster v. New York Life Insurance Company* (C. C.) 90 Fed. 46. In such case the insurance would continue, and the company could charge the unpaid premiums against the insurance, and collect them on final settlement. When the initial premium is paid, the parties then start, from the standpoint of the insured, with a contract covering his entire life; from the standpoint of the insurer, with provision for forfeiting such contract in case the premiums are not paid at stipulated times. The nature of a life insurance contract in that respect is fixed by the Su-

preme Court of the United States. In *New York Life Insurance Company v. Statham*, 93 U. S. 24, 23 L. Ed. 789, it was said:

"We agree with the court below that the contract is not an assurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, as in fire policies. But the position is untenable. * * * Each installment is, in fact, part consideration for the entire insurance for life. It is the same thing where the annual premiums are spread over the whole life."

As this was followed in *McMaster v. New York Life Insurance Company*, 183 U. S. 35, 22 Sup. Ct. 10, 46 L. Ed. 64, where the court say:

"The contracts were not assurances for a single year, with the privilege of renewal from year to year on payment of stipulated premiums, but were entire contracts for life, subject to forfeiture by failure to perform the condition subsequent of payment as provided, or to conversion in 1913 at the election of the assured. *Thompson v. Insurance Company*, 104 U. S. 252, 26 L. Ed. 765; *New York Life Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789."

—We may regard this view of a life insurance contract as authoritatively settled.

Such being the case, this policy being for the life of Taylor, the next question is, was it forfeited? As stated above, the rights of these parties depend wholly upon the contract they have made, and therefore the crucial question in this case is to ascertain its meaning. At the outset we are met by the fact that this is a question on which fair-minded men differ. Able counsel take different views, and the court found it one which called for careful study and research. Such being the case, it is manifest that, when the parties entered into it, terms were used which left their respective rights open to construction and differences of opinion on the all-important questions—to the insured, of continuance, and to the insurer, of forfeiture. Now, how does the law regard and treat such a state of uncertainty? In considering the clauses which are alleged to forfeit, the principle is to be borne in mind that if policies are open to a double construction, that one will be adopted which avoids forfeiture. *McMaster v. New York Life Insurance Co.*, supra; *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563; *Thompson v. Phoenix Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408. For, as was said in *Worden v. Guardian Mutual Life Ins. Co.*, 7 Jones & S. 317:

"Forfeitures are only enforced when it is clearly shown that they were meant by the actual agreement of the parties. * * * If a life insurance company, with a view of attracting the public and promoting its own business, chooses to extend the period for the payment of semiannual premiums through a period of thirty-five days, and to employ language tending to indicate that the risk is extended through the same period, or which might bear that construction, it is not just that its reasonable intent should be defeated by an interpretation in favor of the insurers."

Such principle of construction is justly based on the fact that the policy is prepared by the company, and, if the language it adopts is open to two constructions, it is reasonable that the one most favorable to the assured prevail. Now, while the policy before us provides for

the payment of the premium "on or before the 28th of December in every year during the continuance of this policy," this is modified by the privilege noted above, that:

"A grace of thirty days will be allowed in the payment of premiums hereafter due on this policy, provided always that whenever advantage is taken of this grace, interest at the rate of five per cent. per annum shall be paid to the Society for the time deferred."

What is meant by this provision? If the grant of the grace month had stopped with the first clause—in other words, had it been, "A grace of thirty days will be allowed in payment of premiums hereafter due on this policy"—would there be any doubt as to what these words meant? Do they, without any implication injected into them, mean anything to the ordinary mind other than a postponement for one month of the payment of the annual premium? There is nothing in the nature of things that makes the selection of the particular named day the only one that could be chosen for payment, or, for that matter, that makes it vital or necessary that it should be an annual day. It is vital only because the parties, by contract, have so stipulated; but if, by the same contract, they postpone such payment until a later day, there is no reason why they should not. In other words, if the parties to this contract dated December 28th had stipulated that the premiums should be paid January 28th, there is no reason why they should not do so. It follows, therefore, that if they made them payable on December 28th, but stipulated for a postponement of payment for one month, if desired, there is no reason why their agreement should not be enforced in precisely the same way as though they had expressly named January 28th as the day of payment. Now, if the first clause of this provision, standing alone, would have had that effect, the added provision for interest would not modify its character as a general unconditional postponement of payment. Then, too, the word "grace," when applied to payments, has a well-recognized meaning in law. Days of grace, by common acceptance, and in the absence of statute, came to be recognized as an absolute postponement of the day of payment of commercial paper, so that payment could not be demanded or suit maintained thereon within that time. Payment during the grace days was deemed performance of the contract to pay on the stipulated previous due day. When, therefore, we find these parties using the terms, "Grace in the payment of premiums," and "A grace of thirty days will be allowed in the payment of premiums hereafter due on this policy," we start with the thought, accepted and acted on in business, that a grant of days of grace, as generally used, signifies a positive and unqualified postponement of payment. It further appears that the grant of grace here stipulated for is accompanied by no limitation or condition as to the payment, and to introduce such conditions or limitations by implication is not only at variance with the rules of construction, but such limitations are against the spirit of the grant, the object of which is to prevent, not to effect, forfeiture. In other words, it is payment generally that is provided for. There is no provision by whom it shall be made, that the insured shall be in good health, or even that he shall be living. But we have not only the fact that silence on these points leaves the provision open to the construction that the payment

is not necessarily to be made by the insured, or that it is conditioned on his being alive, but, in our judgment, the preceding clause, which provides, "This policy does not go into effect until the first premium hereon has been actually paid during the lifetime and good health of the assured," throws light on the succeeding grace clause, here involved. That payment during the assured's life was insisted upon in the initial payment makes the omission of such provision in the following clause highly significant. Nothing was left to implication or construction in the earlier clause in that regard. If the intention of the draftsman was that payment under the grace clause was limited to the insured alone, the first clause challenged his attention, and warned him to insert it in the second. When he meant payment should be made of a particular premium during the life of the insured, he knew how to say it, and did say it in the earlier clause. When, therefore, he provided for subsequent payments, and postponed such payment for a month, there was every reason why, if the same conditions as provided in the first clause were to be imposed in the second, they should have been inserted. manifestly a paper of the importance of a life insurance policy must have been drawn with much care and by experienced counsel. We are warranted, therefore, in concluding the insertion of the condition that the insured be living when the premium was paid in the first provision, and its omission in the second, must have been designed. If the purpose of the draftsman was to differentiate the two, we carry out such intent by a construction which does differentiate them. On the other hand, if the purpose was to omit any such provision, lest its insertion in the grace clause should warn the insured that the supposed grace was a postponement of payment without protection—in other words, that insurance continued only if he lived, and did not need it, and was void if he died, and did—then construction should not come to the aid of such a purpose. Now, manifestly, an expressed provision in a grace-month clause that it could only be taken advantage of if the insured lived would warn the proposed applicant that, if he failed to pay on the due day of the policy, the insurance ceased, and the company was not insuring his life during such month, and would naturally not attract insurance. Indeed, in such case the inequitable result follows, that, when the insured paid on the last day of the grace month 12 months' premium, he was really receiving but 11 months' protection, for during the grace month the company was in no way liable for any insurance on his life. Such a provision would be highly inequitable—would enable companies to collect payment for one month out of every year without incurring risk. It would seem, therefore, that the purpose of the draftsman must have been to convey by this provision to the mind of one contemplating insurance that this provision was a substantial privilege—was a grace month in fact as well as in name, or, as termed by Chief Justice Fuller in *McMaster v. New York Life Insurance Company*, supra, that it entitled him to "one month of grace in addition, that is, to thirteen months immunity from forfeiture." Such a construction as is now contended for by the insurance company is also at variance with the fact that the insured paid for the postponement of his payment, since the delay, if taken advantage of by him, subjected him to the condition, "Provided, always, that, whenever advantage is

taken of this grace, interest at the rate of five per cent. per annum shall be paid to the Society for the time deferred." So it will be seen that, while postponement of the due day of the premium is termed "grace," it is in reality one for which the insured pays.

For all these reasons, we are led to the conclusion that the just construction of this contract is that payment of the premium was postponed one month; that, to compensate the company therefor, payment of interest was exacted; that provision was for payment generally during the month, and was not limited to being made by the insured. Mr. Taylor, having therefore, by the terms used in this particular, a stipulated right to pay his premium within 30 days of the annual due date, we are of opinion he had on the 24th of January, 1904, the day of his death, done or omitted no act which worked a forfeiture of his life insurance, and the first reserved question, namely, "whether the omission of the insured to pay the premium during his life precluded the right of recovery," should be decided in favor of the plaintiffs.

As to the second reserved question, we are equally clear it must be decided in favor of the plaintiffs. If, as found above, the insured had immunity from forfeiture for nonpayment of premium for 13 months following December 28, 1902, then his declining to pay before such immunity period ended could not work a forfeiture. He was not bound to pay during such grace month, nor could he be called upon to do so. Moreover, a statement during the grace month of his intention not to carry the policy could have no effect. It was made to a collecting agent, and the policy provided, "Agents are not authorized to make, alter or discharge this contract * * * or to bind this company in any way." The principals did not meet. No consideration passed between them on which to base a surrender of contract rights by the insured, nor did he mislead, influence, or affect the company by such declaration. Moreover, he could, during the several remaining days of the grace month, change his mind. In that regard we may well adopt the language of Judge Shiras in *McMaster v. New York Life Insurance Company* (C. C.) 90 Fed. 56, since his construction of the policy finally prevailed in *McMaster v. New York Life Insurance Co.*, *supra*:

"Therefore, when *McMaster* died, these policies were in force, unless they had become forfeited under the provisions of the policy. There is nothing in the evidence which tends to show that *McMaster* intended to waive any benefit or protection these contracts would give him, or to yield up any right his estate might lawfully assert thereunder in the event of his death. There is some evidence tending to show that *McMaster* contemplated taking a policy in another company in lieu of part of his insurance in the defendant company, but this purpose had not progressed so far that he had released the defendant company from its liabilities on the policies sued on; nor can it be known, if *McMaster* had lived, whether in fact he would have finally forfeited any part of this insurance or not."

Indeed, treating the question of future conduct as ground on which to base an anticipatory breach, yet, to make it have such effect, there must have been an acceptance of such breach by the insurance company. *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 453.

Judgment will be entered in favor of the plaintiffs on the questions reserved.

Ex parte FONG YIM et al.

(District Court, S. D. New York. January 11, 1905.)

1. CHINESE EXCLUSION—HABEAS CORPUS PROCEEDINGS—JURISDICTION.

Where the chief officer of the Chinese exclusion laws for a state, in his return to a writ of habeas corpus directed to him, has admitted that the Chinese persons in whose behalf the writ was issued are detained by him, and has obtained a stipulation waiving their production in court, the court has jurisdiction to inquire into the legality of their detention, although they may in fact be confined in another district of the state.

2. SAME.

The courts have jurisdiction to determine in habeas corpus proceedings the right of a Chinese merchant domiciled in this country to enter from China, or of members of his family whose right is incidental to his own, where the remedy by appeal to the Secretary of Commerce and Labor has been exhausted, and the right of entry denied.

3. SAME—RIGHT OF ENTRY—ADOPTED CHILDREN OF MERCHANT.

A Chinese merchant domiciled in the United States has the right to bring into this country with his wife minor children legally adopted by him in China, where it is shown that the adoption was bona fide, and that the children have lived as members of his family and have been supported by him for several years.

[Ed. Note.—Citizenship of the Chinese, see note to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

Habeas Corpus.

Max J. Kohler, for petitioner.

William Michael Byrne, Asst. U. S. Atty.

HOLT, District Judge. These are writs of habeas corpus and certiorari to test the legality of the detention of two Chinese children who have been refused admission to this country. The substantial facts in the case are that Fong Fook Chung has been for many years a Chinese merchant, carrying on business and having a commercial domicile at Philadelphia, Pa. He has been married twice. His first wife resided in China, and he from time to time went home to China, and afterwards returned to this country. Two children, Fong Yim, a boy 10 years old, and Fong Dung, a girl 16 years old, were adopted when they were babies by Fong Fook Chung and his wife as their children. They lived with the first wife in China, and were frequently visited there by Fong Fook Chung until about a year ago, when his first wife died. Subsequently Fong Fook Chung went to China, married again there, and returned to this country with his second wife and the two adopted children. He and his wife were permitted to enter this country, but the children were detained at Malone, N. Y., and after a hearing before F. W. Berkshire, chief officer of the Chinese exclusion laws for the state of New York, were denied admission to the United States. An appeal from his decision was duly taken to the Secretary of Commerce and Labor, and the decision was affirmed. Thereupon these writs were obtained.

The district attorney contends that this court has no jurisdiction, upon the grounds that a writ of habeas corpus cannot be issued by this court to review the alleged illegal detention of persons in the Northern District, and that the decision of the Secretary of Commerce and Labor in this case is final. I think that this court would have no jurisdiction to inquire by habeas corpus into the cause of the detention of these children in the Northern District if the respondent had not admitted in this case that he had them in his custody, and a stipulation had not been entered into between counsel waiving their production in court. Mr. Berkshire is the chief Chinese exclusion officer having jurisdiction throughout the state of New York. His principal office is in the city of New York. The children are detained by his orders, but I presume that he is not the person actually detaining them, any more than the Secretary of Commerce and Labor is such person. The person who actually deprives them of their liberty is presumably the person who keeps them confined in the building where they are staying at Malone. But as Mr. Berkshire in his return admits that the children are detained by him, and he and his counsel have entered into and taken the benefit of a stipulation that the children need not be produced in open court, thus having admitted his power and obligation under the writ to produce them, I think the case is to be decided as though he had in fact produced them and they were present in court. If that had been done, there can be no doubt, in my opinion, that the court would have had jurisdiction to determine whether their detention was legal.

The district attorney also contends that the decision of the Secretary of Commerce and Labor in this case is final. He relies particularly upon the case of *Lem Moon Sing v. United States*, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082. In that case a man who asserted that he was a Chinese merchant having a commercial domicile in this country, and that he had temporarily left the country, was refused permission to enter the United States by the decision of the collector of customs at San Francisco. He did not take an appeal to the Secretary of the Treasury. A writ of habeas corpus was obtained, but dismissed for want of jurisdiction, and this decision was affirmed on appeal by the United States Supreme Court. The court in the opinion held that the remedy of the appellant was by appeal to the Secretary of the Treasury. It was also stated in the opinion that by the act of 1894 the authority of the courts to review the decision of the executive officers was taken away. But I think that strictly that part of the opinion was obiter. The actual decision was that the appellant could not appeal to the courts because he still had a right of appeal to the Secretary of the Treasury. The question whether, after the Secretary of the Treasury had decided the appeal, the appellant could apply to the courts for redress was not strictly before the court for decision. But in the very recent case of *United States v. Sing Tuck*, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917, certain Chinese persons who claimed that they were born in this country, and were, therefore, citizens of the United States, under the decision of the United States Supreme

Court in *United States v. Wong Kim Ark*, 169 U. S. 653, 18 Sup. Ct. 456, 42 L. Ed. 890, were excluded from entering the country by an inspector. No appeal from his decision was taken to the Secretary of Commerce and Labor, who is now the officer to whom such appeals can be taken instead of the Secretary of the Treasury, but an application was made to a United States Circuit Court for a writ of habeas corpus. The writ was dismissed for want of jurisdiction. The order dismissing the writ was reversed by the Circuit Court of Appeals on the ground that the parties concerned were entitled to a judicial investigation of their status. This order of the Circuit Court of Appeals was reversed by the United States Supreme Court on the ground that no appeal had been taken from the decision of the inspector to the Secretary of Commerce and Labor. The court held that the remedy provided by the act of 1894 must be exhausted before a resort could be had to the courts, but expressly declined to decide, and left the question open, whether, after the final decision of the Secretary of Commerce and Labor, a further trial might be had in the courts. But if the question is still open to discussion whether the decision of the Secretary of Commerce and Labor is final in respect to the right of a person of Chinese descent who claims to be a citizen of the United States to enter the country, I cannot see why the finality of a similar decision in reference to the right to enter of a Chinese merchant domiciled in this country is not also open to discussion; and if it is open to discussion as to a Chinese merchant, it is open, in my opinion, as to his wife and children, for their right to enter the country is incident to his right.

The language of the Supreme Court in the *Lem Moon Sing Case*, and the general assertions in various cases since the act of 1894, that the decisions of the exclusion officers are final (*Ekiu v. U. S.*, 142 U. S. 652, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Japanese Immigrant Case*, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721, and cases there cited; *Turner v. Williams*, 194 U. S. 295, 24 Sup. Ct. 719, 48 L. Ed. 979), have made me hesitate to differ from them, even in a special case to which it did not seem to me that the general doctrine applied. But I have found no case where it has been expressly held that a Chinese merchant, domiciled in this country, has no right to appeal to the courts after he has exhausted his appeal to the Secretary of Commerce and Labor; and as the Supreme Court in the *Sing Tuck Case*, which I consider an analogous case, expressly holds that the question is still open to discussion, I have with much hesitation concluded that there is no controlling authority establishing that this court has no jurisdiction, and that it is therefore the duty of the court to exercise its jurisdiction and decide this case on the merits.

The authority of any country to exclude aliens from it is, of course, unquestionable. But when this country has entered into a treaty with a foreign nation, by which certain subjects of such foreign nation have become entitled to rights to reside and do business in this country, such rights, in my opinion, are legal rights, and I cannot see how the persons entitled to them can be deprived of a resort to the judicial tribunals of this country to protect and enforce them. The treaties made by this country with foreign nations

are declared in the Constitution to be the supreme law, equally with the Constitution and with the acts of Congress passed pursuant to it, and I can perceive no difference in the right of an alien domiciled in this country to resort to the courts of this country for the protection of the rights secured to him by treaties, and the right of a citizen of this country to resort to its courts for the protection of the rights secured to him by the Constitution. In regard to aliens who have no rights protected by treaties, as in the case of ordinary Chinese laborers, the rule is undoubtedly well established by the decisions that the decision of the executive officers, appointed to superintend the right of entrance into this country, is conclusive. There is some authority to the same effect in respect to aliens who have never entered this country, but who claim a right to do so under treaty provisions. But when an alien, in strict accordance with the terms of a treaty, has been allowed to enter, has resided here for many years, has engaged in business, entered into contracts, acquired property, and incurred obligations in reliance on the rights secured to him by the treaty, I cannot believe that it was the intention of Congress, or that it is within the constitutional power of Congress, to take away from such persons the opportunity to resort to the judicial tribunals of this country for the enforcement of their treaty rights. I concur with the statement of Mr. Justice Brewer in *Turner v. Williams*, 194 U. S. 295, 24 Sup. Ct. 724, 48 L. Ed. 979, when he says:

"I do not believe it within the power of Congress to give to ministerial officers a final adjudication of the right to liberty, or to oust the courts from the duty of inquiry respecting both law and facts. 'The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.' Const. art. 1, § 9, cl. 2."

It is claimed that these children, having never before entered this country, stand on the same footing as ordinary Chinese persons who have acquired no right of domicile; but the answer is that their adopted father has such right, and that their right to enter is incident to his right to enter. The question is perhaps not so much concerning their right to enter as it is concerning his right to have them enter. Of course, whether adopted children have the same rights as natural children is a different question, but, assuming that they have, the fact that they have never been in this country does not put them, in my opinion, in the same position as an ordinary Chinese alien who has never been in this country, and who has no relations with any one in it. The decision of the United States Supreme Court that a Chinese merchant domiciled in this country has an inherent right to bring his wife and minor children here, and that they are entitled to enter because occupying that relation, without certificates or compliance with other provisions of the law (*United States v. Mrs. Gue Lim*, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544), is, it seems to me, decisive upon that subject.

The real question, therefore, in this case, on the merits, is whether a domiciled merchant in this country has the same right to bring in his adopted children as he has to bring in his natural children. The inspector, in his decision, states that it does not seem to him

that the law contemplated covering such cases, as that would give all domiciled merchants an opportunity to adopt children at will and bring them into this country. Of course, the question whether the adoption is a genuine one is a question of fact, open to investigation, and if it were found that the adoption was a sham proceeding for the purpose of evading the exclusion laws, undoubtedly the person claiming such adoption could be excluded. But in my opinion in this case the proof establishes that these were genuine cases of adoption. They occurred many years ago. The children ever since have lived with and have been supported by the adopting parents. The adoption of children is a practice almost universal in all countries. There are different formalities prescribed by different countries, but universally, when the proper proceedings for adoption have been taken, the child so adopted becomes subject to the same obligations and entitled to the same rights as natural children. This is peculiarly the case in China. It is well known that the people of that country consider it a religious duty to have, after death, the rites of sepulture properly discharged by descendants. This makes it especially important, in the opinion of Chinamen, that they leave surviving a son, either actual or adopted. The evidence shows that the practice of adopting children in China is very common, that it takes place substantially without legal formalities, but that the rights and obligations of children adopted and recognized as such are similar to those of natural children. Under these circumstances I can see no difference between the legal status of adopted children and of natural children. The Supreme Court having decided that a Chinese merchant domiciled in this country has the right to bring into it his natural children, I think that the same decision is authority for the proposition that he has the right to introduce his adopted children.

My conclusion is that these children should be released from detention, and permitted to join their adopted father in this country.

INTERSTATE COMMERCE COMMISSION v. LAKE SHORE & M. S. RY.
CO. et al.

(Circuit Court, N. D. Ohio, E. D. January 27, 1905.)

No. 6,521.

1. CARRIERS—INTERSTATE COMMERCE COMMISSION—LAWFULNESS OF ORDER.

An order of the Interstate Commerce Commission, based on a finding that the action of certain railroad companies in changing their classification by advancing hay and straw in car loads from the sixth to the fifth class was unlawful, commanding them to cease and desist "from classifying hay and straw in car loads as fifth-class freight, and from charging and exacting fifth-class rates for the transportation of such commodities in car load quantities," and requiring them "to wholly cease and desist * * * from failing and neglecting to properly classify hay and straw in car loads as sixth-class freight, * * * and from failing and neglecting to apply sixth-class rates for the transportation of hay and straw when shipped in car loads." is invalid as an attempt to fix rates and beyond the power of the commission.

2. SAME—PROCEEDING TO ENFORCE ORDER—POWERS OF COURT.

In a proceeding in a Circuit Court under section 16 of the interstate commerce act (Act March 2, 1889, c. 382, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165]), to enforce an order of the Interstate Commerce Commission, the court has no power to amend or modify such order, or to sever from the remainder a part which is illegal, but must enforce the same, if at all, in its entirety as made by the commission.

In Equity. Proceeding to enforce order of Interstate Commerce Commission.

John G. Carlisle, John J. Sullivan, U. S. Atty., and L. A. Shaver, for complainant.

Adelbert Moot, George C. Greene, George W. Wall, and Edgar J. Rich, for defendants.

WING, District Judge. In this cause the Interstate Commerce Commission files its bill against the Lake Shore & Michigan Southern Railway Company, the New York Central & Hudson River Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the Boston & Maine Railroad Company. Many other railroad companies have intervened and become defendants, subject to the order to be made herein, and answers have been filed by all of the defendant companies. In addition to the proof taken before the commission, oral testimony was offered at the hearing. Most able argument has been heard in behalf of the complainant and of the several defendants.

The suit is authorized by section 16 of the act to regulate commerce, as amended March 2, 1889 (25 Stat. 859, c. 382 [U. S. Comp. St. 1901, p. 3165]), which provides as follows:

"Whenever any common carrier * * * shall violate or refuse or neglect to obey or perform any lawful order or requirement of the commission created by this act * * * it shall be lawful for the commission * * * to apply in a summary way by petition to the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable; * * * and said court shall proceed to hear and determine the matter speedily as a court of equity and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises."

The cause, then, is in equity, but by a complainant in whose favor there exist no equities, except by virtue of the statute. The order, the enforcement of which is sought by this suit, is shown in Exhibit F, attached to the bill, and is as follows, with the omission of certain matter unnecessary to be quoted:

"This case being at issue upon complaint and answers on file, and having been duly heard and investigated by the commission, and the commission having, on the date hereof, made and filed a report and opinion herein containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order:

"It is ordered, in accordance with said report and opinion, that the defendants * * * be, and they severally are hereby, notified and required to wholly cease and desist, on or before the 1st day of December, 1902, from

classifying hay and straw in car loads as fifth-class freight, and from charging and exacting fifth-class rates for the transportation of such commodities in car load quantities.

"It is further ordered, in accordance with said report and opinion, wherein the action of said defendants in increasing on January 1, 1900, the classification of hay and straw in car loads from sixth to fifth class, and the rates on said commodities in car loads from sixth to fifth class rates, and continuing to enforce such advance in classification and rates, is found and decided to be unlawful, that said defendants be, and they severally are hereby, notified and required to wholly cease and desist, on or before the 1st day of December, 1902, from failing and neglecting to properly classify hay and straw in car loads as sixth-class freight, with other articles included in class 6 of their freight classification, and from failing and neglecting to apply sixth-class rates for the transportation of hay and straw when shipped in car loads."

To understand the force of the order, it is necessary, first, to examine briefly into what is meant by "classifying," "classification," "fifth-class," "sixth-class," and "classification rates."

It appears, from the oral testimony of Clayton E. Gill taken before this court, that the system of classification adopted by the railroads was made effective about the date of the interstate commerce law, in 1887, and that it was entirely the result of the action of the railroad companies. An official classification committee, so called, was formed by representatives from various sections of the country, who were traffic officials of the various railroads. Since the organization of this committee to the date of the hearing, 24 different classifications have been made and filed. The territory with respect to which this particular committee arranged rates was that territory lying east of the Mississippi river and north of the Ohio, and has been designated as "official classification territory." In this classification there were six classes. The classification consisted in assembling into different groups various articles of freight habitually carried by railroads, and designating those different groups as numbered classes, from 1 to 6, and affixing to each class a different rate of freight. At the time the order of the commission was promulgated, it appears that 30 cents per 100 pounds was fixed as the rate for the carriage of articles included in the fifth class, and 25 cents per 100 pounds for articles in the sixth class. This action of the railroad companies in classifying freight was purely voluntary, and in no wise required by law. These public classifications, however, were the means used by the railroad companies of complying with the requirements of the interstate commerce act with respect to publishing rates.

Some time prior to the hearing before the commission, this classification committee had changed hay and straw from the sixth class, in which it had been retained for some years, to the fifth class. The action of the commission was instigated by a petition of the National Hay Association, filed with such commission, in which it was complained, in subdivision 8, as follows:

"That the fifth-class rates charged and exacted by defendants for the interstate transportation of hay and straw in car loads in said official classification territory are unreasonable and unjust. That the action of defendants in increasing the rates throughout said official classification territory on hay and straw in car loads from sixth to fifth class rates, and the whole of said

increase or advance in rates was unreasonable and unjust, and such advance in rates on hay and straw, and the whole thereof, is now unreasonable and unjust. That the defendants, by charging and demanding said fifth-class rates on hay and straw in car loads and by making and maintaining the advance from sixth to fifth class rates aforesaid, have subjected all producers, merchants, shippers, and consumers of hay, including the members of this complaining association, the traffic in hay and straw, and numerous localities and hay-producing sections of the country, to unjust discrimination and undue and unreasonable prejudice and disadvantage. That the defendants, by making and maintaining the advance in rates on hay and straw aforesaid, have worked and given, and are giving, undue and unreasonable preference and advantage to the production, sale, and shipment of grain and grain products, and all kinds of stock feeds and other articles capable of being used in the place or stead of hay or straw, many persons engaged in the production, sale, and shipment thereof, and of localities and sections of the country wherein the same are produced or manufactured. That the defendants, by making and maintaining the advance in rates on hay and straw as aforesaid, have unjustly discriminated against and wrongfully put to prejudice and disadvantage those descriptions of traffic in favor of and to the unlawful preference and advantage of all other descriptions of traffic, and particularly such kinds of traffic as are given by them the same rates as or lower rates than those enforced by them on hay and straw. That the defendants, by acting as aforesaid, have been, since the 1st day of January, 1900, and are now, violating sections 1, 2, and 3 of said act to regulate commerce."

From the decision of the Interstate Commerce Commission, it appears that it had principally under consideration the claimed impropriety of the action of the classification committee, and the adoption thereof by the railroad companies made defendants, in the advance in classification of hay and straw made on January 1, 1900. It is said, on page 304 of the opinion of the commission, which is made a part of the order:

"If it be assumed, however, that some valid reasons existed for increased revenues to the defendants, we are nevertheless dealing with a case where the relation of rates as between hay and straw and other commodities is a chief matter for consideration, and this involves the recognized legal duty of the carriers to so classify traffic and fix charges thereon that the burdens of transportation shall be reasonably and justly distributed among the articles they carry."

And again, on the same page:

"If the defendant carriers had advanced all of their class rates, in case of complaint against the increased rate upon any particular article the reasonableness of such higher charge might well have been the principal question; but what these defendants did on January 1, 1900, was to increase the classification rating and consequently the rates upon numerous commodities selected by them from the classification, including hay and straw, and by such action they laid themselves open to the additional charge of having subjected such higher rated traffic and those interested in it to undue prejudice and unjust discrimination. Proceeding now to the particular questions in this case, the first point for consideration is whether the advance in the classification and rates on hay and straw was reasonable."

The defendants object to a decree in this cause against them, first, for the reason that the order made by the commission is not a lawful order, in that it is an attempt to fix rates. It is undoubtedly the law, as shown by ample authority, and was so conceded at the hearing, that the commission has no power, directly or indirectly, to make an order fixing rates to be observed in the future. The order made by the commission, and sought here to be enforced, undeniably

undertakes to fix a rate for the carriage of hay and straw, by ordering that the defendant companies shall cease and desist from failing and neglecting to properly classify hay and straw in car loads as sixth-class freight, with other articles included in class 6 of their freight classification, and from failing and neglecting to apply sixth-class rates for the transportation of hay and straw when shipped in car loads. There is another provision of the order, to the effect that the railroad companies shall cease and desist from classifying hay and straw in car loads as fifth-class freight, and from charging and exacting fifth-class rates for the transportation of such commodities in car load quantities.

The part of the order first quoted, if it is an attempt on the part of the commission to fix rates for the future, is unlawful; and the question which arises is as to whether or not the fact that a part of the order is unlawful renders the whole order unlawful. The order of the commission which directs that the defendants shall cease and desist from keeping hay and straw in the sixth class is either an order that hay and straw shall be carried for the same rate of freight as other articles in that classification, no matter what the rate may be, or it is an order that the rate of 25 cents per 100 pounds shall be the freight charge for the carriage of hay. The opinion of the commission, and its findings of fact, are to the effect that any higher freight charge than that which, at the time of the decision, was attached to the sixth class, was unreasonable. At the end of the opinion, it is said:

"We are of the opinion that the defendants are mistaken in believing that hay and straw were improperly classified and carried by them as sixth-class freight, and that their action on January 1, 1900, whereby those commodities were raised to fifth class and thereafter charged fifth-class rates was unreasonable and unjust."

It is to be gathered, then, from the opinion and the findings of fact of the commission, that any action by the railroad companies, other than that of keeping hay and straw in the sixth class, would not satisfy the order of the commission. It is no province of this court to sit in review of the order of the commission. This hearing is *de novo*, and this suit, as has been stated, has for its purpose the enforcement of a lawful order of the commission. If no lawful order has been made, there is no order to enforce.

It is urged, on behalf of the commission, that the court may enforce a part of the order only; that the order of the commission is severable, and, in analogy to the rulings with respect to contracts and statutes, that the question whether the whole instrument, or only a part, is void, depends on whether the invalid part is severable from the rest. If the one cannot be severed from the other, the whole is void; but, if it be severable, the bad part may be rejected and the good retained. The question arises: Can the first part of the order, which directs the defendants to cease and desist from keeping hay and straw in the fifth class, and charging the rates attached thereto, stand alone, without support from the last part of the order, which directs that hay and straw shall be placed in the sixth class, and be subject to the freight rate attached to that

class? If only the second part of the order had been made, it would have included the first. An order that hay and straw shall be put into the sixth class contains within itself an order that it shall be taken from the fifth class, since commodities cannot be in two classes at the same time, any more than a physical object may be in two localities at the same time. It seems plain, from the opinion of the commission and its findings of fact, that what was sought to be done was to remedy what appeared to the commission to have been the unlawful conduct of the defendants, to wit, the raising of hay and straw from the sixth class to the fifth. The order, therefore, was adapted to compel the railroads to reverse their action, and restore hay and straw to the sixth class. Everything in the opinion and findings of fact of the commission indicates that it intended the order to be treated as an entirety. The prayer of the bill filed herein is for the enforcement of the order in its entirety. The enforcement of the order in its entirety would be the only effective remedy for the evil which the commission found to exist. I find, then, that the order, as an entirety, is beyond the power of the commission to make, and is therefore not a lawful order, and is not an order which this court is empowered by the statute to enforce.

It has been urged, in behalf of the commission, that the court has general equity powers in this cause to make such mandatory injunction, other than the enforcement of the order of the commission, as will satisfy justice. The act itself confines the action of this court to the enforcement of the lawful orders or requirements of the Interstate Commerce Commission. It has been frequently decided in the federal courts that, under the act, the function of the court is to enforce or refuse to enforce, the order of the commission as made; that the court cannot amend or modify an order, or make another order; that the federal court has no revisory power over the orders of the commission; and that it cannot undertake to decide whether the respondents have violated an order which the commission might lawfully have made. There is ample reason for this holding, in this: that the only standing in court which the Interstate Commerce Commission has as a complainant is by virtue of the statute, that it has no general equities in its favor, and that, consequently, the court must be confined, in its orders and decrees, when the Interstate Commerce Commission is a complainant, to the rights of recovery given to the commission by the statute. This view of the law of the case and the record renders it unnecessary to go into the question as to whether or not 30 cents per 100 pounds was an unreasonable freight charge for hay and straw. Taking into the consideration only the cost of carrying hay and straw, and their character as articles of transportation, as shown by the evidence, it is not clear at all that the rate of 30 cents per 100 pounds is an unreasonable and unjust freight charge. The contention of complainant is, rather, that charging a different freight rate for the carriage of hay and straw from the rate charged for the carriage of wheat is unfair discrimination against wheat. These articles are so different in their character, and the conditions of traffic with respect

to wheat are so entirely different from those which pertain to the carriage of hay and straw, that I am of the opinion that the fact that wheat is carried for a less rate than hay and straw is not proof that the higher rate charged for the carriage of hay and straw is unreasonable and unjust.

The bill is dismissed, with costs adjudged against the complainant.

THE BRITANNIA.

(District Court, S. D. New York. January 25, 1905.)

1. TOWAGE—LOSS OF TOW BY STRANDING IN STORM—LIABILITY OF TUG.

A tug, with a ship in tow, bound from New York to Baltimore in February, having failed to make out the Cape Charles Light late in the afternoon, owing to snow and fog, overran her course to enter the bay, and continued until she found by soundings that she was near the Virginia coast, when she turned and attempted to go to sea against a strong wind. Owing to the high freeboard of the ship, and also to the improper bracing of her yards, the tug was unable to make any headway, and the ship finally stranded on the beach and was lost. *Held*, under the evidence, that the tug exercised the skill and ordinary care required of her, and was not liable for the loss; the course taken by the master, although it proved not to have been the best, having been justified by the conditions as they then appeared.

In Admiralty. Suit against tug for loss of tow.

Wing, Putnam & Burlingham, for libellant.

Butler, Notman, Joline & Mynderse, for claimant.

ADAMS, District Judge. This action was brought by the California Shipping Company, as owner of the ship *Henry B. Hyde*, to recover from the tug *Britannia* the damages, said to exceed \$40,000, caused by the stranding and loss of the ship in the early morning of the 11th day of February, 1904. The ship was taken in tow at the Erie Basin, New York, about 2 o'clock p. m. on the 9th day of February to be towed to Baltimore, and went ashore on the Virginia coast, about 13½ miles south of Cape Henry.

The *Hyde* was a full rigged wooden ship of 2449 tons net register. She was 267 feet long, 45 feet wide and had a depth of hold of 29 feet. She was manned with a crew of 8 New York riggers, experienced seamen, together with a master, chief officer, carpenter and steward. She carried 500 tons of ballast and 641 tons of coal, giving her a draft of 16.6 feet forward and 17 feet aft. The distance from the water to the top of the ship's rail amidships was 20 feet.

The *Britannia* was a sea-going tug of 650 horse power, hailing from Baltimore. Her length was 132 feet, her width 25 feet and her depth 12½ feet. She carried a crew of 13 men all told and was engaged in harbor work and the general towing business from the ports of Baltimore, Boston, Philadelphia, New York and of Porto Rico and Cuba.

The tug was engaged by the agents of the *Hyde* to tow the ship from New York to Baltimore, where the latter was chartered to load a full cargo of coal for a voyage to San Francisco. Pursuant to the

towing contract, the tug arrived in New York Harbor in the early morning of February 8th with the expectation of starting on the voyage to Baltimore at noon of that day but owing to a northwest wind having created a low tide, the ship could not get out of the Erie Basin where she was lying and the start was deferred until the next day.

Upon the arrival of the tug on the 8th, her master was informed by the master of the ship that the ship would not carry a pilot as the one engaged had been delayed in Baltimore. The ship master concluded not to take one although he was informed that owing to the delay in starting there would be ample time to bring him on.

The tug and tow left New York in the early afternoon of the 9th of February in fine clear weather with a light northwest wind. Before going to sea a hawser from the tug of from 200 to 225 fathoms in length was shackled to 4 or 5 fathoms of the ship's starboard anchor chain and remained in use. The voyage proceeded without noteworthy incident until the afternoon of the 10th, when shortly before 3 o'clock snow commenced to fall but did not immediately create any difficulty in navigation as it lit up enough about 3:30 o'clock to show Hog Island Light abeam about six miles distant, but soon shut in thick again. The tow then proceeded at the rate of about 9 knots an hour. The course from the Hog Island Light to the next point of departure, Cape Charles Lightship, distant some 18 miles, was S. W. $\frac{1}{2}$ S. It was expected by the tug that she would reach there about 5:30 o'clock. At that hour it was snowing heavily and some fog prevailed, with considerable wind from the N. N. E., and the expected light not being seen, the tug steered W. S. W. with the intention of making the regular course of S. W. by S. to the whistling buoy off Cape Henry, the tendency of the wind and sea being to carry the tow to the southward. The calculation of the master of the tug was that this course would carry the tow close enough to the whistling buoy to hear it.

The ship had, about 6 o'clock in the morning of the 10th, set the lower fore and mizzen topsails, and later the lower mizzen topsails by direction of the tug, given by a previously arranged code of whistle signals. All sail was taken in between 6 and 7 o'clock P. M. by direction of the tug.

Soundings were regularly and frequently taken by the tug from about half past 5 in the afternoon with a view of working in to the bay between the capes before the threatened storm should burst. These soundings at first ran 7, $7\frac{1}{2}$ and 8 fathoms, then 5, $5\frac{1}{2}$ and 6, and up to 9, then diminished to 5, $4\frac{1}{2}$ and 4.

When 4 fathoms were found, the master of the tug, not having heard the whistling buoy and in fear of being too close to the beach, wanting to get off shore, hard-a-ported the helm of the tug and gave a corresponding signal to the ship. The change of the tug, with a reduction of speed, brought her to about a N. N. E. heading, from which direction the wind was blowing. This manœuvre occupied 5 or 10 minutes, when the engines of the tug were put at full speed again and, it is said, were kept continuously so until the ship went aground. The ship obeyed the signal to port and at the same time braced her yards sharply to port, without direction from the tug, under a presumption that the tow would soon be heading up the bay and with the wind from the N.

E. the towing would be eased by so bracing the yards. The tug got a heading of about N. N. E. or N. E. by N. but although she continued to carry a port helm she could not get any further because the ship hung on her starboard quarter, with a heading of about E. N. E., the tug being about 4 points on her port bow and the ship bearing about the same on the tug's starboard quarter.

The wind from 6 o'clock P. M. up to midnight of the 10th, varied in force from 35 to 44 miles and in direction from north to northeast. The tide was flood at Cape Henry at 4:35 in the morning of the 11th.

The vessel and cargo were said to be a total loss. No lives were lost, all on board being saved by the use of the breeches-buoy from the Dam Neck Mills Life Saving Station in the morning of the 11th.

The original charges of fault in the libel were:

"Fifth. The stranding and loss aforesaid were not caused or contributed to by any negligence on the part of the ship Henry B. Hyde or those in charge of her, but were due solely to the negligence of those in charge of the steam-tug Britannia, in not ascertaining and keeping her position and observing the lights along the coast; in not bringing the ship into Hampton Roads where there was a safe anchorage; in not holding the ship off and keeping her in safe water; in not casting the lead, but allowing the ship to drift with the tide and current until she grounded; in giving no signals to the ship and doing nothing to keep her off the shore; in making no attempt to save the ship after she got into a position of danger; in abandoning the ship when she was in a position of danger.

"At the time of the accident although the weather was thick with snow and the wind was blowing strong, there was nothing in the conditions to prevent the tug from taking the ship safely in to Hampton Roads, or if she preferred to remain outside, from keeping the ship on soundings in deep water."

At the time of the trial an amendment charged as an additional fault: in not anchoring the Hyde outside, in case it was not deemed safe to enter the roads.

The answer, after denying the charges of fault, alleges:

"Seventh. The weather and sea through the latter part of 10th February and until the morning of 11th February were fierce, and the disaster occurred by reason of the perils encountered, and not through any fault or negligence on the part of those navigating the tug. From the time of finding themselves in shoal water by soundings, the tug was unable in spite of all efforts, to regain deep water, and in the judgment of the master which was, as the claimant avers, good judgment, he continued those efforts until after the ship stranded and until the tug herself touched bottom."

At the time of the trial, an amendment to the answer, on the testimony already taken, was offered as follows:

"I want to charge that the difficulties of the tug were increased by the unskillful conduct on board the Hyde in holding their helm to port continually, and in bracing their yards to port and keeping them so braced."

The libellant urges that according to the tug master's own testimony there would have been no difficulty in going further to sea with the tug when he failed to get a new point of departure at Cape Charles. The master says he did not do so because he did not think it prudent as there was a gale coming on and he wanted to get the ship off Cape Henry. He did attempt to get to sea when he discovered from the soundings that he had overrun the distances and he then purposed to put off to sea and anchor until the weather cleared up. He could have

attempted the manœuvre earlier and perhaps with success. Probably in the light of subsequent events, it would have been better, but his failure to make the effort earlier was not apparently such a fault as should condemn the tug.

Another criticism made upon the tug's action was that she did not anchor when it was found that she could not make any headway with the ship against the gale. Up to the time of the discovery that the ship was in 4 fathoms of water, the soundings indicated that a proper course had been made and the master did not deem it prudent to anchor. The stress of the storm had not come when at Cape Charles and there was every reason to believe that the bay could be reached in the ordinary course by seeking the channel with soundings. Expert witnesses on the libellant's part say that rather than let the ship go ashore, she should have been anchored. It is admitted that anchoring a ship under such circumstances is a last resort. It is questionable whether such a course was practicable when the ship was near the beach and whether the best hope of saving her even then was not to continue the towing and endeavor to work her off the beach. She was at the last so near the beach that it is doubtful if a sufficient scope of chain to hold her could have been given even if both anchors had been available and it would obviously have caused a loss of time and been dangerous to cut or unshackle the towing hawser from the ship's starboard chain and re-fasten it to the anchor when it was doubtful if she could hold with the port anchor. The experts in the case differ on this point and while there is much to be said, in view of what subsequently happened, in favor of anchoring, it seems to be the wisdom which comes after the results are known in a particular case. Situated as the tug was, I should not feel warranted in condemning her on this ground. It would seem that she was justified in going on until it was evident that the vessels were beyond the entrance to the bay. The ship had a high free-board and was difficult to tow in a violent wind, such as prevailed at the time, and the difficulty was increased by the way she carried her yards, which probably accounted, in some degree, for the inability of the tug to get the desired heading after she had changed her course upon finding herself near the beach. None of the charges of fault set up in the libel, including the amendment, is proved. The tug remained by the ship until she herself touched bottom and then went to sea for her own safety, returning in the morning. In the meantime those on board of the ship had been rescued.

Apart from not making the Cape Charles Light, the tug had seemingly taken every precaution which her duty called upon her to exercise to ascertain that she was on a proper course to make the bay until it was discovered by the soundings, a little after 7 o'clock, that she was so near the beach. About this time Coston lights, indicating danger, were burned on the beach by some of the life savers from Cape Henry Station but then it was apparently too late to do anything except to try to pull the ship to sea. This the tug endeavored to do and probably would have been successful if the ship had co-operated with prudence and skill. The weather and the exposure of so much of the ship to the wind made it a hard undertaking for the tug but she did keep the ship away from the beach for several hours, and probably

would have succeeded eventually had it not been for the difficulty of towing the ship to sea when her yards were braced the wrong way.

It is urged by the libellant that the tug permitted the hawser to become slack and get under the ship's forefoot. There is a controversy upon this point, the ship contending as stated and the tug that she kept full speed ahead excepting when making the change to go to sea. I think the tug witnesses' statements that the engines were kept full speed ahead all the time after the turn to sea, except when momentarily slowed to prevent racing, are entitled to credence.

The tug doubtless made a mistake, as it turns out, in keeping on after the Cape Charles Light was not made. When the whistling buoy off Cape Henry was not made, the mistake was discovered and the master then endeavored to do what he probably should have done before, that is to go to sea, but the weather was such, in connection with the arrangement of the ship's yards, that he could not succeed. The liability of a towing vessel under such circumstances is described in *The E. Luckenbach* (D. C.) 109 Fed. 487, where it was said by Judge Brown (page 489):

"Even if the master made an error of judgment in not returning sooner, this is not the same thing as negligence, and negligence does not seem to me to be established by the testimony."

In affirming the District Court, the Circuit Court of Appeals said (113 Fed. 1018, 51 C. C. A. 589):

"*PER CURIAM*. The facts are quite fully stated in the opinion of the District Judge. In one respect his statement of them is fairly open to criticism. The testimony hardly warrants the finding that there was a sudden increase of wind; but we concur with him in the conclusion that the allegations of fault on the part of the tug are supported mainly by the wisdom that comes after the event. It would have been good judgment to stay in port. It would have been good judgment to turn back at Sewall's Point, when return was feasible and safe; but we are not prepared to say that in deciding to push on the master of the tug displayed such bad judgment as would amount to recklessness or negligence. * * * Although the storm had not finally broken, the wind had gone down very much before they started from the haven they had put into overnight, and according to the weather records it continued to fall much lower during the two hours ensuing their departure. The master made a mistake in pushing on beyond Sewall's Point, but we concur with the district judge in the conclusion that it was not an error of judgment so gross as to justify a finding of negligence. The decree is affirmed, with costs."

I conclude that the tug here exercised all of the skill and ordinary care which her duty required.

The libel is dismissed.

RICO et al. v. SNIDER et al.

(Circuit Court, N. D. California. January 31, 1905.)

No. 13,681.

1. INJUNCTION—RESTRAINING LEGISLATIVE ACTION OF MUNICIPAL BODY—POWERS OF COURT.

A court of equity is without power to interfere by injunction to prevent legislative action by a municipal body, unless the proposed legislation is beyond the scope of its corporate power, and its passage would work irreparable injury. Where it is within the powers vested in the legislative body, the possible consequences of one course of action cannot be set up as a basis of equity interposition before any action at all has been taken.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 154.]

2. SAME—DIVISION OF RECLAMATION DISTRICT IN CALIFORNIA—RESTRAINING ACTION BY BOARD OF SUPERVISORS.

Pol. Code Cal. §§ 3446-3493½, relating to the reclamation of swamp lands, having, inter alia, vested boards of supervisors with power to divide reclamation districts where the land therein has not been reclaimed, the question of fact whether the lands of a district have been reclaimed, arising on a petition for a division of the district, is one within the jurisdiction of the board, and to be primarily determined by them; and a court of equity is not authorized to determine it in advance of their action, and thereupon to enjoin them from exercising their statutory functions.

In Equity. On motion for preliminary injunction.

Complainants, who are citizens of Portugal, farmers and landowners in the state of California, pray for an injunction against the respondents, as individuals, and also as members of the board of supervisors of the county of Yolo, state of California, to restrain them from considering or acting upon a petition of respondent Glide praying for the formation or organization of a certain swamp-land reclamation district, referred to in the petition, or from taking any action whatever in the premises, and that the respondent Glide be restrained from taking any action in the matter of the division of a certain reclamation district or the formation of an independent reclamation district, or from taking or interfering with the levees of a certain reclamation district (No. 307). Complainants allege that the land concerning which this action is brought is what is commonly known as "swamp land," but that by the erection of certain levees and pumping plants the lands have been reclaimed. It is alleged that the lands are situated in Reclamation District No. 307 of the state of California, said reclamation district having a board of trustees, and having been organized pursuant to the laws of the state of California in 1877; that various assessments have been made upon the landowners within the district for building levees; that the said district is provided with a levee running on its northerly and westerly sides, and known as "Babel Slough Levee," and joining with the Sacramento River levee, and also by a levee along the Sacramento river to the southeastern portion of said district, and then by a cross-levee, and that said levees have been constructed for more than 10 years; that there is a pumping plant; that there are 70 landowners in the district; that the natural trend of the lands is in a southerly direction; that very large sums of money have been spent, through the board of trustees, for strengthening the levees; and that, by reason of the expenditures and the improvements, all the lands in the district have been fully reclaimed, and been in crops; that the Babel Slough levee forms a natural barrier and protection against flood waters; and that the lands, by the lapse of ages, have become hard and compact. It is alleged that a certain levee along the Sacramento river forms a natural barrier against flood waters, and a firm foundation for the erection of levees,

and that the boundaries of the reclamation district consist of the natural barrier formed by the slough levee and by the levee along the Sacramento river, improved by the expenditure of money, and also the back levee connecting same, constructed by the landowners of the district, and that all of the lands of Reclamation District No. 307 are capable of reclamation in but the one mode described, and that, if it were not for the maintenance and protection of all the levees of the district, the lands would again become swamp and overflowed, and the property of the complainants would become ruined and valueless. It is alleged that certain assessments were made to reclaim the lands, and that large sums were collected; that the respondent Glide is the owner of certain lands situated in Reclamation District No. 307, and that his lands are protected from overflow by the boundaries and levees of the district, as built and erected by the complainants and their predecessors; that Glide's lands are traversed by ditches in said district, and that the waters are let down into the main ditch owned and controlled by the district, and are thereupon pumped into the Sacramento river; that Glide's lands are not capable of independent reclamation, but have been fully reclaimed by the district reclamation works. It is then alleged that the other respondents are members of the board of supervisors of the county of Yolo; that one of them (Snider) is brother-in-law to Glide, and that Glide has not contributed to reclaim his lands, except as a landowner in said reclamation district, but that, notwithstanding this, Glide has made a petition praying that certain lands of his be set apart into a separate reclamation district; and that the supervisors will set off the lands belonging to Glide into a separate district, and will transfer to Glide the property of the district, namely, the levees and canals and ditches on Glide's land, and deprive the complainants of the use and benefit thereof, and of the protection afforded by certain levees, and forming part of the continuous system of reclamation works of the district. It is alleged that no notice was given by Glide before the filing of his petition, and that the board of supervisors, without hearing testimony, arbitrarily agreed to vote for the petition of Glide, and to separate his lands from the other lands of Reclamation District 307, and that it agreed to convey to him that portion of the Babel Slough fronting on his premises and certain other portions of levees, and to deprive complainants of their rights in such levees, and, unless enjoined, they will make an order allowing Glide to use as his sole and separate property certain levees, to the great damage of the complainants; that if the supervisors do as they threaten to do, and if thereby they deprive Reclamation District No. 307 and the lands therein of the protection of said levees, it will be necessary to build other levees at great cost; and that it will be impossible to build a barrier in a certain place, owing to the fact that the southern boundary of Glide's land is what is known as "reclaimed tule land," and no foundation could be obtained. It is further alleged that Snider is disqualified from acting by reason of his relationship to Glide, but, notwithstanding this, he will vote in favor of granting Glide's petition. It is alleged that in 1877, when the reclamation district was formed, the predecessors in interest of Glide agreed to the formation of the district, and that it was decided then that all the lands were capable of reclamation in but one mode, and that the action of the supervisors had at that time has never been modified or amended, and that Glide was one of the trustees for the reclamation district for many years, and participated in requests for assessment, and in the collection of certain moneys to carry on reclamation work, and that the defendants now intend and threaten to deprive these complainants of their interest in the levees to be given to Glide; that all of the complainants' lands are highly productive, and have a rental value of at least \$2,500 per annum, but that, if an order of separation should be made, their lands will be ruined, and the loss they will sustain will be \$16,000; that the damages cannot be compensated for in money, and can only be prevented by the interposition of a court of equity; and that, if the petition of Glide should be granted, complainants and other landowners will be in constant litigation with Glide, and will be compelled to go to great expense, and will be greatly injured, because their lands will be placed in their original condition, as unreclaimed swamp and overflowed lands.

A temporary restraining order was issued by the court, and an order to show cause was made upon respondents, requiring them to show cause, if any they could, why a preliminary injunction should not issue as prayed for. Respondents other than Glide answered, denying that they had ever agreed with Glide or any one that they should set off the body of lands described in the petition of Glide, or that they would give or set off to Glide any portion of the Babel Slough levee or the Sacramento River levee, or that they would transfer to Glide any part of Reclamation District No. 307, or deprive complainants of the use and benefit thereof, or that they threatened or intended to set off said body of lands described in the petition of Glide into an independent reclamation district, and deny that they intend to make any order granting the petition of Glide, unless the evidence taken at the hearing shall fully justify such action. Respondents then allege that, when the petition of Glide was filed with the board of supervisors, due and legal notice was given by publication as required by law, and that a landowner appeared by counsel, requesting a continuance until May 8, 1903, and that before the petition came on for hearing the said landowner procured an injunction to be issued out of the superior court of the state of California, in and for the county of Yolo, enjoining these respondents from hearing or acting upon the petition of Glide. Respondents allege that they never at any time intended to act upon the petition of Glide without a full hearing of all parties interested, and that they did not intend and they never have intended to do any act or thing in relation to the granting of said petition, except to take such action as might be justified by the evidence to be introduced upon the hearing of said petition. Respondents then allege that in all respects they had acted in accordance with the laws of the state of California in respect to the hearing of the petition, and that they intend and have always intended to pursue the course and practice provided by law with reference to hearing the same.

Glide filed a separate answer. He denies that the lands of the complainants are now, or that they ever have been, reclaimed; denies that Reclamation District No. 307 has constructed levees around all the exterior boundaries of said district; and alleges that certain of the levees are only partly constructed, and that the portion surrounding his lands were constructed by him and his predecessors, and not by the reclamation district. He denies that for five years preceding the filing of the complaint each and every acre of said land has been reclaimed, or that crops have been produced during the said period, and alleges that in 1902 the lands were covered with water, which prevented the raising of crops. He alleges that on the southern boundaries of said reclamation district, and at a point where the south levee of the district is built, water reached a great depth during high water, and that the ground on which the levee is built is weak and unable to sustain the pressure of the water against the outside of the levee. He denies that the complainants are owners of any interest in any of the levees surrounding the district; denies that the Babel Slough levee forms a natural barrier for protection against flood water, and that the levee along the Sacramento river forms a barrier sufficient to restrain the flood waters; and denies that the lands of said reclamation district are capable of but one mode of reclamation. He denies that certain assessments were legally made upon the land in manner required by law; denies that the trustees have expended 50 per cent. of the assessments, or any sum, for the purpose of strengthening and widening said levees. Denies that his lands are not capable of independent reclamation, and denies that the same are reclaimed by the reclamation works of the district or otherwise. He denies that the supervisors of the county intend to set off lands belonging to him from said reclamation district, unless the facts ascertained at the hearing will fully justify such action. Respondent then sets up that on April 7, 1903, he presented his petition to the board of supervisors, and the said board fixed May 6, 1903, to hear the petition; that this notice was published for four weeks next preceding the date fixed for the hearing, as required by law; and that the affidavit of publication, in due form, was filed with the said petition by the clerk of the board of supervisors. Denies that there was any agreement on the part of the supervisors to vote for the petition, or to separate his lands from the other lands

in such reclamation district, or that they agreed to convey to him any portions of certain levees. Denies that the supervisors will separate his lands, or allow the formation of a reclamation district, unless the evidence introduced in support of his petition at the hearing shall fully and lawfully justify the making of said order. He denies that if the petition should be allowed, and a separate district formed, it will allow him to use and control, as his sole and separate property, the levees of the district, or any part thereof, or any levees situated in the said proposed district, but alleges that such levees as may be within the proposed district will belong to said district, and will be public property subject to the disposition of the state, and denies that action on the part of the board would subject the lands of the complainants to any greater danger from overflow than now exists. He denies that in 1877 or at any time the board of supervisors of the county made an order that all of the lands within said reclamation district were susceptible of but one mode of reclamation; denies that he ever received any money from any landowner or expended any money in constructing reclamation works in said district, but alleges that all collections were those of the board of trustees; denies all allegations of intent to deprive complainants of the benefit of reclamation works. As a separate defense, Glide alleges that the state courts have heretofore assumed jurisdiction of the subject-matter of this action, and are now maintaining jurisdiction thereof. He then sets up that an action was commenced in 1903 in the courts of the state to enjoin the board of supervisors from hearing or acting upon his petition, and that the hearing upon said petition has ever since been continued, and that on June 30, 1903, respondents herein appealed to the Supreme Court of the state of California from the order granting an injunction, and that the appeal is now pending in the said Supreme Court; that on June 25, 1904, one Dwyer, a landowner within said district, commenced action in the superior court of the state against respondents by filing a complaint, the allegations of which are substantially the same as those contained in the complaint herein, and that on June 24, 1904, the superior court of the county of Yolo, state of California, issued a writ of injunction restraining respondents from acting upon the petition of said Glide, other than to continue the hearing thereof, and that said injunction is now in force, and that respondents do not intend to do anything concerning the petition of Glide until the courts of the state have finally decided the case upon its merits.

The complainants filed certain affidavits which were read at the hearing before the court. One was made by J. C. Pierson, a civil engineer, wherein his professional opinion was given to the effect that all the lands of the district had been reclaimed, and that, if the petition of Glide were granted, great injury would be done to the lands of the complainants. The affidavits of the trustees of the reclamation district were also filed. Affiants therein also say that, for reasons which are specified in their affidavits, the granting of the petition of Glide would greatly damage the value of the lands of these complainants, and that many lawsuits would result, and that the reclamation, which is now full and complete, would be destroyed and rendered incomplete and incapable of completion if the lands of Glide should be segregated as sought in the petition of Glide. The affidavit of J. C. Franks was filed. Affiant states that he is experienced in the construction of levees for purposes of protecting swamp lands from overflow, and that he has examined the levees in Reclamation District No. 307, and that they are amply sufficient to protect the lands from overflow, and that he has so reported that fact to one of the trustees of the district, and that the trustees employed him to widen and heighten certain levees, and that he performed the work and made them durable and permanent, and that the lands of the district were and have been fully reclaimed.

The respondents filed an affidavit of P. N. Ashley, a civil engineer and surveyor, and county surveyor of the county of Yolo, state of California. He states that he is familiar with the lands embraced within the reclamation district, and the levee and works thereon; that some years ago he had made certain surveys and estimates for the reclamation district; and that the board of trustees adopted his report, and employed affiant as a civil engineer to superintend the works of reclamation, but that the board of trustees

thereafter did not pursue the plan he had recommended, but followed a radically different one. Affiant attached a map to his affidavit, illustrating the exterior boundaries of the district described in the petition filed by Glide, and also the construction of levees as indicated upon the map and indicated in Glide's petition. Affiant says that it would not be very difficult to build a levee along the south boundary of the proposed new district; that a firm foundation could be had, and that certain levees in the present reclamation district are a constant menace to the lands of the district, for the reason that Babel Slough levee along Glide's lands is not large enough to prevent the high waters from overflowing said district. He avers that the lands described in the petition of Glide are capable of independent reclamation, and he expresses the opinion that the lands contained in the reclamation district have not been fully reclaimed. A counter affidavit by Mr. Pierson is also filed, wherein he disputes the professional statements and opinions advanced by Mr. Ashley.

Devlin & Devlin and Olney & Olney, for complainants.
A. L. Shinn and Arthur C. Huston, for defendants.

HUNT, District Judge (after stating the facts). The reclamation of swamp lands is a public work, control over which is vested in the Legislature of the state. *Hagar v. Supervisors*, 47 Cal. 222; *In re Madera Irrigation District*, 92 Cal. 313, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. The Legislature has delegated to the boards of supervisors of the various counties power to create and to divide reclamation districts for the purpose of promoting such reclamation. The procedure is prescribed by the Political Code of the state of California. *Williams v. Supervisors*, 65 Cal. 160, 3 Pac. 667; *People v. Levee Dist. No. 6*, 131 Cal. 30, 63 Pac. 676; *Pol. Code Cal.* §§ 3446 to 3493½.

The method of forming reclamation districts is begun by petition of the landowners, and notice, followed by a hearing by the board of supervisors, and finding. The management of the districts when formed is in boards of trustees, public agencies, with general supervision in the boards of supervisors. Where lands have not been reclaimed, the boards of supervisors have power to divide the district. The landowners themselves in certain instances may form a district (section 3472) without trustees and without any by-laws. Such a district respondent seeks to establish. His petition filed with the board of supervisors contained all that the law required it should contain. Due notice of the hearing of such petition was given. By the law the board of supervisors acquired jurisdiction to act upon respondent's petition.

Complainants contend that the board of supervisors have no jurisdiction because the lands are reclaimed, and that on this account there is no power to consider or grant respondent's petition. Defendants deny that the lands are reclaimed. To hold that the lands are reclaimed would be to pass upon the disputed facts of the case. It would not be proper at this time. It would, in effect, be to control the action of the board of supervisors by injunction. It does not appear that the board is about to act beyond the scope of its lawful powers. The doctrine which seems to me to be applicable has been well expressed by Judge Deady in the following language:

"The authorities are not uniform on the question of the power of a court of equity to restrain a municipal corporation in the exercise of its legislative functions. The more modern, and I think the better, doctrine is that the

court ought not to interfere by injunction with legislative action of a municipal corporation, unless the proposed legislation is beyond the scope of the corporate powers; and its passage would, under the circumstances, work irreparable injury. After the passage of such an ordinance, its enforcement, if attended with such injury, may be enjoined. *Murphy v. East Portland* (C. C.) 42 Fed. 310; *Alpers v. City and County of San Francisco* (C. C.) 32 Fed. 503."

The case, in its present state, is one where, power to act having been delegated to the board of supervisors, the wisdom or need for the exercise of power one way or another are questions which rest primarily within the appropriate jurisdiction of such board, and ought not to be decided in advance by the court. It is the duty of the board alone to ascertain the fact whether the land is or is not reclaimed, and thereafter to exercise a judgment and discretion as may be proper and expedient. But as said, the ascertainment of the fact rests with the board, and does not affect their jurisdiction. *People v. Hagar*, 66 Cal. 59, 4 Pac. 951; *Board of Directors v. Tregoe*, 88 Cal. 335, 26 Pac. 237. The supervisors deny that they have agreed to find in favor of Glide, petitioner before the board. They have not yet acted, and the presumption is that they will do their duty.

Under my view of the case as it is presented to me, it is not necessary to decide the question whether, if the division of the district is made, it will impair the obligation of a contract between the state and the complainants, and affect the property rights of the complainants in the lands which might be set apart. The duty of considering and acting being upon the board, the possible consequences of one course of action cannot be set up as the basis of equity interposition before the board has acted at all. *McChord v. Louisville*, 183 U. S. 495, 22 Sup. Ct. 165, 46 L. Ed. 289. Whether, after the board has acted, the execution of its acts can be restrained, is a question not necessarily calling for adjudication at this time.

Reserving any opinion upon the important questions which may hereafter arise, these suggestions occur to me: Did not the complainants take their land subject to the power of the state to promote its reclamation as the lawmaking power might regard as best to carry out such reclamation? Are not complainants' rights in subordination to the paramount title in and right of the state to make reclamation of the land? Is not the state under a duty to the government of the United States to perform this obligation? Are not the levees property of the state, subject to use for purposes of reclamation as may seem best to the legislative power, or to the board to which the Legislature has delegated power? There seems to be force in the reasoning which leads to affirmative answers to these questions, provided that the use of the levees is always for reclamation purposes. If there were a diversion of such property to another purpose than reclamation, other questions would be raised, and doubtless injunction would lie to prevent diversion from the trust to which the property can only be lawfully applied; or it may be that if, after the division of a district, the execution of the act will work great and irreparable injury to the lands of the older districts, such as overflowing, injunction will lie.

But as the record does not make a case now justifying injunction, it is ordered that the petition of the complainants be denied.

STANWOOD et al. v. WISHARD et al.

(Circuit Court, S. D. Iowa, Central Division. February 13, 1905.)

1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—CREDITORS' SUITS.

In a suit brought in a federal court by creditors of an insolvent corporation on behalf of themselves and all other creditors similarly situated to recover property alleged to belong to the corporation, but to have been fraudulently acquired by certain of the defendants, where the claims of some of the complainants exceed \$2,000, others may join although their claims are less than that amount.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 891.

Jurisdiction of circuit court as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

2. SAME—SUIT ON JUDGMENTS OF STATE COURT.

Judgment creditors of an insolvent corporation may maintain a suit in a federal court to enforce a trust against a third party in property alleged to belong to the corporation, and to have been acquired by defendant in fraud of their rights, where diversity of citizenship appears, and the requisite amount is involved, although complainants' judgments were recovered in a state court in suits on assigned notes, of which the federal court would not have had jurisdiction.

3. ATTORNEY AND CLIENT—PROPERTY ACQUIRED BY ATTORNEY ADVERSELY TO CLIENT'S INTERESTS—SUIT TO DECLARE TRUST.

An attorney employed to collect a claim cannot acquire for himself assets of the debtor which he should have subjected to the claim of his client, and where he has so acquired title the court will impress the property with a trust in favor of the client, regardless of the question whether or not the client had acquired a legal lien thereon.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 250-263.]

4. SAME—LACHES.

A suit in equity by clients against an attorney for the declaration of a trust in property purchased by defendant while acting in their behalf, in fraud of their rights, will not be held barred by laches because of a delay of six years before bringing suit, where complainants resided at a distance, and had no knowledge of the transaction, there being no duty of diligence resting upon them to inquire into the honesty of their attorney's conduct of their business.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 571-573.]

In Equity. On demurrer to amended bill.

See 123 Fed. 499.

Charles A. Clark and Walter C. Marquis, for complainants.

Read & Read and Berryhill & Henry, for defendants.

McPHERSON, District Judge. July 29, 1903, the original bill in equity was filed herein. After a time a plea was filed, and that plea was held insufficient. Then the defendant answered. Thereupon an amended and substituted bill was filed, to which a demurrer has been filed, which is now for determination. In substance, the bill is as follows: It charges a conspiracy against defendants Wishard and the bank of and concerning some valuable real estate in Des Moines of the Loan & Trust Company, of which all the plaintiffs were and still are creditors. This action is brought

not only for themselves, but all other creditors of that concern, now insolvent. This real estate was acquired by the trust company from one Kennedy in exchange for a large body of lands. But the title was taken in defendant Wishard's name, to be by him held in trust for moneys owing to him by the company, and to indemnify him for certain contingent liabilities of the company to him. It is alleged these have all been paid and extinguished. When the company received this property by taking the title in trust in Wishard, there were three mortgages thereon given by Kennedy at a prior date. One was for \$2,000, another was for \$6,000, and the third was for \$25,000. This large one was to the bank defendant herein. The trust company became insolvent in 1896, at which time a receiver was appointed by a state court at Des Moines. Prior thereto Wishard had been an active officer of the company, and was entirely familiar with its affairs. It bought and sold commercial paper and its own bonds. The paper sold it indorsed. Much of the paper thus sold was to parties in the East, where the plaintiffs reside. In addition to his duties as such officer of the trust company, Wishard was a lawyer, residing at and with an office at Des Moines, where he engaged in the practice of his profession in both the state and federal courts. He sold to the plaintiffs the obligations of the company, and professed friendship for them, and much concern for their interests. At about the date of the insolvency of the company Wishard was employed as the attorney for plaintiffs to take such action as their interests required, and in all respects protect them in their just claims against the company. And as their attorney he obtained judgments against the company on said claims. Some of the judgments were considerably in excess of \$2,000, and others for lesser sums. But one claim was placed in judgment before the foreclosure decrees to be noticed. Many orders and a sale of the company's assets took place in the receivership case in the state court. But few, if any of them, need be mentioned, because none of them are at all decisive of the demurrer now before me. Suffice it to say that the judgments of plaintiffs were taken in the receivership case, and Wishard was their attorney. And the real estate in controversy, subject to the \$33,000 of Kennedy mortgages, belonged to the company, subject to the trust for which Wishard held the title. One matter pertaining to the alleged question of laches will be noticed later on. The claim was made on the hearing on the plea that the property in suit had been sold by the receiver to himself. But the facts with reference thereto do not merit discussion, and no purpose can be served by setting them out. Down to this point Wishard alone was acting in hostility to plaintiffs. Then, as is charged, the conspiracy was formed between the bank and Wishard to so manipulate the title to the real estate, an asset of the company, as to prevent plaintiffs or other creditors from asserting any claim against it. The bank and Wishard obtained assignment of two of the Kennedy mortgages hereinbefore noticed, aggregating \$8,000; the bank already owning the other \$25,000 mortgage. This being done, decrees of foreclosure were entered on all three for the principal and interest and costs, including large at-

torney's fees. All the real estate was sold at sheriff's sale, and a year thereafter a sheriff's deed was taken in Wishard's name. As one of the plaintiffs had a judgment against the company, she was made a defendant. But process was not served upon her. She being a client of Wishard, he prevailed upon her to allow him to file an answer for her, admitting she had no claim against the property, and, of course, the decree went against her. At the sheriff's sale no money was paid other than the costs. But in the meantime all plaintiff's judgments had been rendered. By fraud the assignment of one of them was obtained to an officer of the bank. He claimed the right to redeem. But this was done to swell by \$2,000 the apparent amount necessary for other creditors to redeem. Excepting for such purposes, no other use was made of it. By these methods Wishard obtained the paper and legal title to the realty. He had been in possession from the time of the Kennedy conveyance. After thus obtaining the legal title, he gave the bank two mortgages on account of the three mortgages thus turned over to him for foreclosure purposes and for an additional sum he was personally owing the bank. But the rents of the real estate have practically paid off all incumbrances. If not entirely paid, plaintiffs are ready to discharge all valid incumbrances. All of which, and with much more detail, is charged to be a fraud upon the rights of plaintiffs, clients of Wishard, and to all of which the bank was a party to aid in consummating the fraud, and with full knowledge of plaintiffs' rights. The defendant company has not appeared. The trust company has no interest in the property. Its rights have been foreclosed and cut off. I do not think it a necessary party at all, and nothing more than a proper party. I see no impropriety in making it a party. But it has no interest in common with plaintiffs, and as such could not be joined with plaintiffs in this or in a state court. It has committed no fraud and has not been wronged.

As some of the plaintiffs have claims less than \$2,000, it is contended that this court is without jurisdiction, and many cases are cited. I will notice a few of them. *Colvin v. Jacksonville*, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053, was a suit by a single taxpayer to enjoin the issue of municipal bonds. Held, that the interest of that one taxpayer determined the question of jurisdiction. *Carne v. Russ*, 152 U. S. 250, 14 Sup. Ct. 578, 38 L. Ed. 428, simply held that in a suit to redeem the amount necessary to pay was the jurisdictional sum as to an appeal. *Davies v. Corbin*, 112 U. S. 36, 5 Sup. Ct. 4, 28 L. Ed. 627, that an appeal from a mandamus the amount of the entire tax fixed the jurisdiction. *Gibson v. Shufelt*, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083, held that where there were several plaintiffs an appeal would lie only as to those having claims of the jurisdictional amount. That these and other like cases are not in point is apparent. But that creditors with claims of less than \$2,000 may join with those with claims of more than that sum has been held in the following cases: *R. R. v. Parker*, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66; *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Clay v. Field*,

138 U. S. 464, 11 Sup. Ct. 419, 34 L. Ed. 1044. There are many similar holdings. And, even if the rule were as contended by defendants, only part of plaintiffs would go out of the case.

It is contended that the claims of plaintiffs are based on notes payable to the trust company, and by it sold to plaintiffs. And therefore it is said that, as this court would not have taken jurisdiction against the trust company in suits on the notes, this court cannot take jurisdiction against Wishard in a suit to declare a trust. These claims were reduced to judgments in the state court at the suit of plaintiffs, by Wishard, their attorney. This suit is not on those notes. They are creditors, seeking to declare a trust against Wishard. It is of frequent occurrence that creditors' bills are filed in the United States Circuit Courts whose claims on notes were reduced to judgments in state courts. This contention is without merit. *Indiana v. Glover*, 155 U. S. 513, 15 Sup. Ct. 186, 39 L. Ed. 243. It seems to me that counsel for defendants do not meet the situation. They seem to be impressed with what was done in the receivership case in the state court. That is not the point to the bill at all. There was and is no occasion to allege those matters excepting as historical of what was consummated, and as showing that with plaintiffs more than a thousand miles away Wishard was acting in the state court of and concerning their claims and as their attorney. And as I understand the law to be, and as I want to be understood as holding, when the relation of attorney and client of and concerning a claim is once formed, the attorney can never afterwards buy up or speculate upon the assets that the attorney should have subjected to the payment of the claims placed in his hands for collection. And that is the whole point to the amended bill before me. To me it is wholly immaterial what occurred in the state court receivership case, excepting that Wishard was there as plaintiffs' attorney in seeking to get their money justly due them from an insolvent concern. With all that occurred in the receivership case recited in the bill or with all of it eliminated, the point remains that Wishard, while sustaining the relation of attorney to these complaining parties, bought up, either with money or as a paper transaction, as is charged, and the subject of the acquisition was what he should have acquired for his clients. That is the point to this amended bill, and the demurrers for the time being, at least, admit them to be true. Not only so, but the bank, as is alleged, with full knowledge, assisted in bringing this transaction on paper about. And no court, federal or state, can at this late day be persuaded to allow an attorney to do this. And it would not aid Wishard in the slightest degree in his attempt to retain the title if he had paid for the property in money, and with his own money. The court would or would not allow him to recover his money back, or would deny him that, according to the fact. That point has not yet been reached. I adhere to what I said at the former hearing of this case as reported in 128 Fed. 499.

It is fundamental that the court will decree such property to be held in trust for the clients, and it is absolutely immaterial whether the clients' claim is a legal lien or not when the attorney buys it. The court in such a case will impress a lien, and decree the trust. And it would result in the same decree if plaintiffs' claims were still only in

the form of naked notes. Wishard holds the paper title. The mortgages of the bank may or may not have been extinguished. They may or may not be valid. But suppose they are valid? Suppose its liens are superior to the rights of plaintiffs? It is good practice and a recognized practice to make superior lien holders parties defendant, to the end that the character and amounts of their liens may be decreed, and then parties bidding at a master's sale do so with full information of what they are buying, and an additional price is often obtained. And so here. If the court, on full hearing, shall decree that Wishard turn the property over to plaintiffs or to all creditors, they have a right to know from a decree what liens, if any, are on the property. And such is the very purpose in giving a plaintiff the right to bring in all parties having, asserting, or who possibly may assert a claim to the property or a claim against it.

As to laches: Plaintiffs were nonresidents. Some of them were women. Wishard was on the ground. He was their attorney. He rendered no effective service. Aside from some costs, he did not expend a dollar. He has received the rents for 10 years. By naked transactions on paper he has the legal title. He asserts absolute ownership in the property. This property belonged to the creditors of the company. Such are the allegations, and, if true, they constitute a fraud on plaintiffs. And on proof that such are the facts the court will decree a trust. Plaintiffs say they had no knowledge of the fraud until July, 1903, and that the details thereof have come to their knowledge largely since then. The time covered by laches and a statute of limitations are sometimes the same. But not always. It is largely a question of burden of proof. In a case decided by the Circuit Court of Appeals for this circuit within the last few months it was held that, if the plaintiff contends that a longer period than the statute of limitations shall not invoke the doctrine of laches, the plaintiff has the burden of showing that the doctrine shall not apply. But if the defendant insists that a less time than the statutory period defeats plaintiff, then the burden is on the defendant. It does not appear from the lapse of time that the situation of the parties has changed. There is no reason for believing that the property has materially changed in value. From the bill the alleged fraud is not in doubt. What could the plaintiffs have done at an earlier time? Must they all the time have suspected their attorney of fraud? Is that to be the rule? They reposed confidence in him. When did such confidence cease? Was it when they failed to get their money? Must a lawyer, when failing to get results, stand impeached for fraud? If so, then there is no lawyer of high or low station but must go over the dam. In the case at bar there is no innocent person to suffer by reason of delay. The whole case stands precisely as it would have been if this suit had been brought the day following the sheriff's deed. In *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, it was held that the fraud was known when it could, by the exercise of diligence, have been known. That was a statute of limitations case. But, assuming that the same would be the rule in a case of laches (which is not always so), what diligence could have been used by these plaintiffs? None whatever. Defendants' contention

is, in effect, in asking a court to hold that a litigant must first suspect his lawyer of fraud. Then on such suspicion he must travel 1,500 miles, and go to work to unearth the fraud of his own lawyer, and then bring his suit because of an actual fraud. No such requirements are exacted of any one, and particularly is this not to be exacted of clients so far distant, some of whom quite likely are not familiar with business affairs. In *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076, the Supreme Court held that 36 years was not too late to bring an action against an executor who bought in the assets of the estate with which he had been entrusted. And on more than one phase of this case as alleged in the bill—and that is the only case now before the court—what the Supreme Court held in that case is nothing new, but is well worthy of keeping in mind. The Supreme Court said:

"The rule in equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest or not, carries fraud on the face of it."

And surely an executor is no more subject to the charge of fraud than is an attorney, who is told from the first day he enters a law school or law office that he must not and shall not buy property the subject of real or possible litigation by his clients. The case of *McIntire v. Pryor*, 173 U. S. 38-54, 19 Sup. Ct. 352, 43 L. Ed. 606, collects the cases that conclude all discussion that as against an actual fraud, and as against one perpetrating a fraud when acting in a representative and trusted capacity, the period of the statute of limitations is largely if not wholly immaterial. And that a lawyer who buys in property on a paper transaction, paying but nominal sums, receiving such rentals as soon pay for it, when such property was subject to his client's claims, commits an actual fraud, and one which no court will wink at, is too plain for debate. The amended bill charges such a fraud. The demurrer, for the time being, admits them to be true. And, if not denied, or, if denied, but sustained by the proofs, there can be no other decree but one declaring that Wishard holds the property in trust. Defendants must answer the amended bill within the time allowed by the rules, or elect to stand upon their demurrer.

The demurrers are overruled.

FOSTER v. MERCHANTS' & MINERS' TRANSP. CO.

(District Court, E. D. Virginia. January 21, 1905.)

1. COLLISION—TOW AND CROSSING STEAMER—VIOLATION OF RULES.

A tug picked up two barges which had gone adrift in Norfolk Harbor in the night, and while taking them back to the docks, having one on each side, one of them came into collision with a ferryboat making its regular trip on a crossing course. The tug had the ferryboat on her starboard hand, and was therefore bound to keep out of the way, under article 19, Inland Rules, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2383], but did not change her course or speed, nor did she maintain a lookout nor carry proper towing lights, and her side lights were obstructed by the

barges, which did not carry side lights, and probably none at all. *Held*, that such violation of the rules and negligent navigation by the tug, and the absence of the lights required by the inspector's rules from the barges, placed them in fault for the collision, and rendered them solely liable for the damage, in the absence of clear proof of contributory fault on the part of the ferryboat.

2. SAME—TUG WITH TOWS—FAILURE TO CARRY PROPER TOWING LIGHT.

A tug navigating with tows in the night in a harbor did not comply with article 3 of the Inland Rules, 30 Stat. 97 [U. S. Comp. St. 1901, p. 2877], which requires her to carry two bright white lights in a vertical line, one over the other, not less than three feet apart, where, although having two towing lights, they were suspended from either end of a horizontal cross-piece on the flagstaff, about a yard in length, and such failure to observe the rule was a serious fault, which renders the tug liable for damage caused by a collision between her tow and another vessel.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 105–108.]

In Admiralty. Suit for collision.

Whitehurst & Hughes, for libellant.

Hughes & Little, for respondent.

WADDILL, District Judge. This is a libel in personam, filed by the libellant as master, and as such agent of the owners, of the steam ferryboat City of Portsmouth, against the Merchants' & Miners' Transportation Company, a corporation of the state of Maryland, to recover damages sustained in a collision between the said City of Portsmouth and barge No. 21, a house barge used for the transportation of freight in the harbor, the property of the respondents, at the time in tow of the tug Apollo, also owned by the respondent. The collision occurred on the night of the 18th day of September, 1903, about 2:30 a. m., in the harbor of Norfolk. The ferryboat was en route from its slip in the city of Portsmouth to the city of Norfolk, and the tug and tow, consisting of said barge No. 21 in collision, and another house barge, No. 17, of the respondent, was crossing the harbor, and came into collision with the City of Portsmouth. The libellant's charges, in effect, are that the respondent, being the owner of said barges, on the night in question negligently moored them to a pier near the Boston Wharves, in the city of Norfolk, without having a shipkeeper on board; that during the same night, while removing one of its steamships, the Chatham, from one berth to another, at its said Boston Wharf, it negligently and carelessly caused her to collide with the barges thus improperly moored, casting them adrift into the harbor; and thereafter, when the tug Apollo had gone between and made fast to the barges so adrift, and was engaged in their navigation, the tug and tow were so carelessly and negligently navigated as to cause the collision with the City of Portsmouth; and that, among other things, at the time of the collision, there were no proper lights either upon the barges or the tug, nor did they give proper warning of the dangerous condition in which they were, nor keep a proper lookout for vessels approaching them in their then condition, or properly keep out of the way of the said

City of Portsmouth, or slacken speed, stop, or reverse upon approaching the latter steamer. The respondent, while in effect admitting that its steamship Chatham did collide with and break loose the barges as alleged, insists that there was no negligence in so doing or in the mooring of said barges, and that upon the barges being cast loose, under the influence of the flood tide and the strong northwesterly wind then prevailing, they drifted rapidly up the harbor, and were overtaken at the earliest moment by its tug Apollo, which, in the most practical way, made fast thereto, and removed them from the dangerous position in which they then were; and further insists that the tug did have proper lights, was properly navigated, and that, while the barge in collision had no side lights, there was a bright light upon its end; and that the City of Portsmouth was negligent in her navigation, in that she did not keep out of the way of the tug and tow, as it is insisted it was her duty to do, nor seasonably slacken her speed, stop, or reverse, or have a proper and efficient lookout, was proceeding at too rapid speed, and did not discover the proximity of the tug and tow as quickly as she should have done.

One of the questions presented for determination is whether or not the vessels at the time of the collision were on crossing courses, or the City of Portsmouth was an overtaking vessel, as contended for by respondent. The conclusion reached by the court, after full consideration of all the evidence, is that the tug and tow were crossing the course of the City of Portsmouth at the time of the collision, and that the rules applicable to vessels crossing, as distinguished from those of an overtaking vessel, should govern in the consideration and determination of the questions involved in this case. Not only does the evidence of the libellant, which includes, in addition to its officers and crew, three disinterested witnesses who were on the bow of the ferryboat at the time of the collision, sustain this view strongly, but it is supported as well, in the view of the court, by the respondent's evidence. The course on which the vessels were necessarily proceeding at the time of the collision, as shown by the report of the master of the tug, quite clearly sustains this contention. And while the respondent attempts to avoid the effect of this evidence by the character of the injury to its tug, any inference to be drawn from this fact should not overcome the great weight of evidence adduced; and, moreover, the character of the injury may be accounted for in part by the shape of the ferryboat's bow, and the fact that when in the act of collision she caused her wheel to be put hard apart, with the view of lessening the force of the impact as far as possible, and thus avoid cutting down the barge; and the precise angle at which the two boats were when in collision was most likely affected by the fact that the tug was navigating between the two barges, making it a matter of more or less doubt just to what extent the tail of the barge in collision may have been out of line from the course of the tug. Assuming the vessels to have been on crossing courses, the tug and tow having the City of Portsmouth on her own starboard side, it was the plain duty of the tug to have kept out of

the way of the ferryboat, and at least not to have attempted to cross ahead of her, and, if needs be, to slacken speed, or stop or reverse, and pass astern of the ferryboat; and the latter was required to keep her course and speed (articles 19, 21, 22, 23, of the Inland Rules of Navigation, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), unless there existed certain exceptional reasons for not so doing, as shown by article 27 of the same rules. It is admitted that the tug and tow did not discharge their duty in this regard, but expressly violated the same.

That the barge had upon it, at the time of the collision, proper running lights, is not claimed by the respondent; but it insists that there was a white light upon the barge in collision, so placed as to have been visible to the navigators of the ferryboat. Upon this question the evidence that no such light was visible to, or in a position to be visible to, the navigators of the ferryboat, is overwhelming. That there may have been a white light upon one of the ends of the barge is possible, but the probabilities are against its existence at the time of the collision. It may have been placed upon the barge at the time it was lashed to the wharf, but, after the barges were broken loose by the Chatham and sent adrift in the harbor, it is extremely doubtful if it remained in its place or continued to burn. It was the duty of the barge under Inspectors' Rule 11, adopted January, 1902, by the Board of United States Supervising Inspectors of Steamboats, under authority of an act of Congress approved June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2875], to have the colored or running lights placed on the barges so as to be visible to approaching vessels during the navigation of such barge, and for accidents arising from such failure the barge will be liable. *The Lyndhurst* (D. C.) 92 Fed. 681; *The Nettie L. Trice* (D. C.) 110 Fed. 461; *The Komuk* (D. C.) 120 Fed. 841. As to the existence of the running lights on the tug, the evidence quite clearly establishes the fact that, while it had the proper running lights, the same were excluded from the view of the navigators of the ferryboat by the position of the tug between the two barges, upon each of which was a house considerably higher than these lights on the tug; and this may be said to be true whether this be treated as a crossing or overtaking case, since the screens behind the lights would obstruct their view from those on the ferryboat in any event. As to the tug's towing lights, the facts are somewhat different. While the tug likewise had her towing lights burning, the contention is that they were improper lights, and did not conform to article 3 of the Inland Rules of Navigation, which provides that a steam vessel, when towing another, shall, in addition to her side lights, "carry two bright white lights in a vertical line, one over the other, not less than three feet apart." 30 Stat. 97 [U. S. Comp. St. 1901, p. 2877]. The towing lights as carried on this tug were not in vertical line, one over the other, and could not have been by reason of their construction. Instead of being placed as required by statute, they were placed upon a prong, said by the master of the tug to be about a yard long, across the mast or flagstaff, from each end of which the lights

were attached or hung by means of a cord, and let down one lower than the other, a distance supposed to be three feet. This was the condition in which the lights were at the time of this collision, and, confessedly, lights so constructed were not in strict accordance with the rules of navigation, and could not be said to be in a vertical line, one over the other, having reference to the flagstaff to which they should be attached. Lights so constructed upon this prong or crossbeam placed horizontally from the flagstaff would be liable to be on a horizontal rather than a vertical line, unless the greatest care was exercised in placing them by means of the cords that drew them up to the ends of the prong; and, if such should be the case, naturally one light would obstruct the view of the other to a vessel on a crossing course, and particularly to a person observing the lights from a high range, as did the ferryboat's master. In no event would they be such as was contemplated by the statute, when it expressly provided that one should be placed vertically above the other and three feet apart. In the present case, while the stern of the tug protruded slightly out from the end of the barges, the towing lights over the tops of the barges were not observed by the navigators of the ferryboat until within 50 feet of the tug and tow, they seeing first one and then the other, when they were confounded by the ferryboat's navigator, who viewed them from a higher elevation than the tug's lights, with lights supposed to be at Clark's Wharf on the Norfolk side of the harbor. This very confusion may have been caused by the peculiar construction of this arrangement for the towing lights, and certain it is that the lights were not discovered, being, as they were, in part behind the barge, until the two vessels were virtually in collision; and, since their construction was not such as the statute requires, the ferryboat, under the circumstances of this case, should not be held liable for her failure to observe the same earlier. The failure to properly place the lights on a ship is a serious fault, and for which liability should follow when persons or property are injured thereby. *The Conoho* (D. C.) 24 Fed. 758; *The Arthur* (D. C.) 108 Fed. 557; *The Komuk* (D. C.) 120 Fed. 841.

The libellant charges as a contributing cause to the collision the negligence of the respondent in mooring the barges to the front of the Bay Line Wharf, near the Boston Piers, and the breaking therefrom of the same by the collision with the Chatham, another of respondent's steamships, in moving her from one place to another at its piers. In passing, it may be said the evidence tends to establish libellant's contention in this regard in both particulars, as it would seem that respondent should neither have made fast its barges so that they would break loose and go adrift without some one on them, nor handled its ship while at its piers so as to allow the same to be brought in collision with other shipping properly located; and certainly, under the circumstances of this case, there was nothing to indicate why there should have been any difficulty in either respect. Just how far this negligence should be taken into account in this case need not be determined, since, in the view of

the court, the collision itself was brought about by the negligence of the respondent as hereinbefore stated.

Respondent's contention that this is an overtaking case, instead of a crossing case, is not borne out by the evidence. Indeed, the conduct of its own officers at the time of the collision is inconsistent with this theory of the case. Those navigating the tug and tow did no act such as was required by the rules in giving an alarm or emergency signal, that would have been required of them had the ferryboat been overtaking them. Indeed, it is quite clear from their conduct that their view of the ferryboat was entirely obstructed by reason of the tug's location between the barges, which would not have been the case for a moment had the ferryboat been approaching them from behind, the lights of which would have reflected directly upon and been in full view of the navigators of the tug.

Nor is the contention of the respondent that the collision was the result of inevitable accident tenable upon the proof adduced. There is no element in the case tending to establish such a theory. On the contrary, the negligence of the respondent in all the particulars referred to would exclude the same. The tug and barges having violated the statutory rules of navigation, as well in respect to their lights as the navigation of the tug at the time of the collision, and such violations being within themselves sufficient to bring about the accident, the burden is upon the respondent to show that the violation not only did not probably produce, but could not have contributed to, the collision, and under such circumstances it will not do for the respondent to raise a doubt as to the management of the other vessel. All reasonable doubts as to the vessel in fault must be resolved in her favor, and she held not contributing to the collision unless her fault is clearly proved. *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; *The Oregon*, 158 U. S. 186, 197, 15 Sup. Ct. 804, 39 L. Ed. 943; *The Victory and Plymouthian*, 168 U. S. 410, 423, 18 Sup. Ct. 149, 42 L. Ed. 519.

It follows from what has been said that the injury in this case arose solely from the fault of the tug and tow, and a decree may be entered to that effect.

UNITED STATES v. PARKERSBURG BRANCH R. CO. et al.

(Circuit Court, N. D. West Virginia. February 4, 1905.)

1. BRIDGES OVER NAVIGABLE STREAMS—RIGHT OF RAILROAD COMPANY TO MAINTAIN—GRANT BY CONGRESS.

A railroad company which has built a bridge across a navigable river in full compliance with an act of Congress permitting it has a vested right to maintain the same so long as it is used for railroad purposes, of which it cannot be deprived by the courts on the ground that the bridge is an obstruction to navigation, but only by the action of Congress and on the payment of just compensation.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, §§ 86, 91.]

2. SAME—RAILROAD BRIDGES ACROSS OHIO RIVER—ACT JULY 14, 1862.

The right of a railroad company to maintain a bridge across the Ohio river, built in conformity to Act July 14, 1862, c. 167 (12 Stat. 569) which contained no reservation of the right to alter or amend it, is not affected by any subsequent acts relating to the same subject-matter, all of which are by their terms prospective in their operation.

3. SAME—RENEWAL OF PARTS—INJUNCTION.

The right of a railroad company to maintain a bridge across the Ohio river, lawfully built under an act of Congress, includes the right to repair the same, when necessary to its safe use, without substantially changing the structure; and a court will not, at suit of the United States, enjoin the replacing of the superstructure by a new one resting on the same piers, where such rebuilding in no manner increases the obstruction to navigation.

In Equity. On motion for preliminary injunction.

Reese Blizzard, U. S. Dist. Atty.

Hugh L. Bond, Jr., for defendants.

JACKSON, District Judge. The United States filed their bill in this court against the Baltimore & Ohio Railroad Company and the Parkersburg Branch Railroad Company, operated by the said Baltimore & Ohio Railroad Company, and John W. Davis, receiver of the Parkersburg Branch Railroad Company, alleging that the bridge across the Ohio river, at Parkersburg, is an obstruction to navigation at that point, and a great injury to the commerce on the Ohio river. The allegations of the bill are supported by sundry affidavits, some 15 in number. The prayer of the bill is for an injunction to restrain and enjoin the defendants, their agents and all others acting under them, from constructing or proceeding to construct "the contemplated bridge across the Ohio river between Parkersburg and Belpre." To this bill the defendant companies have filed their answer, claiming that, under an act of Congress passed and approved July 14, 1862, c. 167, 12 Stat. 569, they were authorized to build and construct said bridge, subject to the terms and limitations as expressed in the act. The answer of the defendant companies alleges that a bridge was not only built and constructed in compliance with the terms and provisions of the act, but that the defendant companies did more than they were required to do, in building and constructing two channel spans instead of one, and giving greater space of waterway between the stone piers for navigation than was required by the act.

It may be conceded, and I suppose it is true, that the piers upon which the superstructure of the bridge rests are at times, especially in high flood tide, to some extent obstructions to navigation. It does not appear that they are serious obstructions in an ordinary stage of water in the river. Assuming that navigation is more or less obstructed at times, the question for the consideration of the court is, what, if any, remedy exists. In the outset of the case, it cannot be denied that a bridge was built in pursuance of the act of Congress. It is not contended that the companies have not fully complied with the terms and provisions of the act of 1862, under which the bridge was constructed. By an act of Congress passed July 11, 1870, c. 240, 16 Stat. 227, § 5, the Secretary of War was required to detail three engineers to examine the bridges across the Ohio river, and, amongst other require-

ments, to report whether any of them interfered with free and safe navigation. In pursuance of that act the chief engineer detailed three distinguished engineers, who made and submitted to him a report which he afterwards sent to Congress. In this report the engineers found no cause to criticise the company in the construction of this bridge, but stated in their report, as the law required only one channel space of 300 feet, that "the bridge companies are deserving of very great credit, not only in providing two spans instead of one, but in making each space between the piers eighteen feet wider than was required by law for the widest space." This report of the engineers established the fact that the bridge was built and constructed in full compliance with the act of Congress which authorized its erection. It would seem from this report that the government was estopped from denying that the bridge was built in compliance with the act of 1862, and that it is therefore a lawful structure. We are therefore confronted with the question whether it can be removed upon the alleged ground "that it is a serious obstruction to navigation." We answer "Yes," but it must be removed by the same power that granted it. Congress alone, in the exercise of its sovereign power, can remove the bridge, but it must be upon terms that are just and right to the owners of it. While, under our laws, private property can be taken by a sovereign when the public good requires it, yet it must be done upon just compensation. This bridge is the private property of the defendant companies; they built it at their own cost and expense, and upon the assurance that when they did so, under the act of Congress, they had acquired a vested right of a permanent character.

It is claimed, however, that the act of Congress passed December 17, 1872, c. 4, 17 Stat. 398, superseded the act of 1862; but this act, passed subsequent to the act of 1862, as well as all the subsequent acts, cannot deprive railroad companies of their franchises acquired under the act of 1862. In the act of 1862 there is no right reserved to alter or amend it. It appears that every limitation or restriction in the act was fully complied with in the erection of the bridge. The act of 1872 is not retroactive, but prospective, and was the first act in which Congress reserved to itself the right to alter or amend the acts, which reservation is found in subsequent acts relating to the bridges across the Ohio river. It is evident that Congress did not suppose, when it passed that act, that it had the right to require any change in bridges constructed under it. The seventh section of the act of 1872, which was the first act following the act of 1862, expressly reserved the right to alter or amend that act as to the future construction of bridges, so as to prevent or remove all obstructions to navigation; but this reservation applied only to that act, and there was no attempt on the part of Congress to repeal, in express terms, the act of 1862, if, indeed, such a power be conceded, except upon the terms of just compensation. The same criticism is applicable to the subsequent acts of 1883 and 1890. It will be observed that the act of 1872 and all subsequent acts are prospective in their character, and do not in any way affect the rights of any of the parties who built bridges under the act of 1862.

While Congress would, as we have said, in the exercise of its sovereign power, have the right to destroy and remove this bridge, still it

has now no power to delegate that right; if it attempts to exercise the power, it must be done with a due regard for the rights of the owners of the bridge. When Congress passed the act of 1862, she said to any and all persons that the Ohio river might be bridged under the terms and provisions of the act. Therefore, when the defendant companies, in pursuance of that act, erected the bridge complained of, according to its terms and provisions, their rights became vested, of which rights Congress only could deprive them upon terms of just and equitable compensation. The bridge, being private property, could not be taken for public use, except upon indemnifying the owners for its value. The acceptance of the act of 1862 by the defendant companies, and the erection of the bridge under it, became, in law, a binding contract between the parties which this court must recognize and enforce. To hold otherwise, in the view the court takes of this case, would be unconstitutional and "impairing the obligation of contracts." *McGahey v. Virginia*, 135 U. S. 692, 10 Sup. Ct. 972, 34 L. Ed. 304. It is claimed, however, that the act of 1862 was merely a license to any one who wished to avail himself of the grant it contains, upon complying with its terms and provisions. I cannot concur in this position. The United States, in their sovereign capacity, passed this act, which was a grant of power to the defendant companies for the benefit of the public and to promote interstate commerce, and, so long as the property is used for the benefit of the public, the court must protect the right of the defendant companies. Of course, it follows that, when the bridge ceases to be used for the benefit of the public, the power exists to revoke the grant.

The court is asked to award its restraining order and enjoin the defendants and their agents from constructing or proceeding to construct the contemplated bridge across the Ohio river between Parkersburg and Belpre. The answer denies that they are constructing a new bridge across the river, but that the defendant companies are merely rebuilding the superstructure on the present piers and abutments, without alteration. This is shown to be the fact by the evidence filed in the case. Under the bill, answer, and exhibits in the case it does not appear that the defendant companies are building a new bridge, nor does it appear that the new superstructure in any wise affects or impedes navigation. When the new superstructure is placed in position, it will rest on the same piers upon which the present superstructure rests. What would a restraining order, if granted, accomplish? Certainly it cannot be said that the present superstructure in any respect interferes with the ordinary navigation of the river. The granting of an application for an injunction will not remove the piers in the river or the present superstructure on the piers, nor does it appear from the evidence that the new superstructure will interfere more with the navigation of the river than the present superstructure. Certainly the right to repair the bridge, to alter it or to improve it, for the safety of the public, is incident to the power to build it.

It must appear from what we have said that an injunction furnishes no remedy for the grievances complained of in the bill. This is the third application that has been made for an injunction, before the judges of this court, against the Baltimore & Ohio Railroad Company,

involving the act of 1862. Judge Goff heard the case of the United States against the Baltimore & Ohio Railroad Company, which was an application for an injunction to prevent reconstruction of the Benwood Bridge. He dismissed the bill on March 27, 1900. Judge Goff and I heard the case of the Baltimore & Ohio Railroad Company against Leidecker, one of the United States engineers, in which the same question was involved, in which, upon a review of the case decided by Judge Goff as well as the case then under consideration, we reached the conclusion that the United States could not interfere with the reconstruction of the superstructure of the bridge which was built under the act of 1862. And now we have this application, which I have under consideration, involving the same question. It would seem to me that the action of the court heretofore had in previous cases should be adhered to in this case. In all the cases the judges of this court, either sitting alone or together, have reached the conclusion that the act of 1872, and those acts subsequent thereto, do not in any wise affect the rights of the Baltimore & Ohio Railroad Company in relation to any and all of the bridges built under the act of 1862.

For the reasons assigned, the court is of the opinion to refuse the injunction in this case, and suggests that the only remedy is to apply to Congress for an act to remove the bridge, if it is such an obstruction to navigation as to justify their action, upon such terms and conditions that the Baltimore & Ohio Railroad Company should receive compensation for the destruction of the bridge.

Motion for injunction is refused.

EVANSVILLE & H. TRACTION CO. v. HENDERSON BRIDGE CO.

(Circuit Court, W. D. Kentucky. December 24, 1904.)

1. STATES—STATUTE REGULATING USE OF INTERSTATE BRIDGE—LIMIT OF JURISDICTION.

A statute of Indiana cannot give a right to use a bridge across the Ohio river beyond low-water mark, which constitutes the boundary line of the state.

2. FEDERAL COURTS—JURISDICTION—ENFORCING RIGHTS UNDER STATUTE OF ANOTHER STATE.

A federal court in Kentucky cannot enforce rights given by a statute of Indiana with respect to the use of so much of a bridge across the Ohio river as is situated within the state of Indiana.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 806, 807.]

3. RAILROADS—KENTUCKY STATUTES—RIGHTS OF FOREIGN CORPORATION.

Const. Ky. § 211, provides that no railroad corporation organized under the laws of another state, doing or proposing to do business in the state, shall exercise the right of eminent domain or acquire right of way or real estate until it shall incorporate under the laws of the state. Ky. St. 1903, § 841, provides that any such corporation "may, for the purpose of possessing, controlling, maintaining, or operating" a railway in the state, incorporate by filing its articles of incorporation as therein specified; section 763 provides the manner of organizing railroad corporations in the state; and section 765 provides that no railroad corporation of another state shall exercise the power of eminent domain, or acquire right of way, or purchase or hold land for railroad purposes, until it shall have become

organized as a corporation of the state in conformity with section 763. *Held*, that under said provisions, as construed by the highest court of the state, a foreign railroad corporation, which has merely complied with the provision of section 841 by filing its articles of incorporation, acquired thereby only the right therein given to "possess, control, maintain, and operate" a railroad in the state, and that it had no power to exercise the right of eminent domain, or to have the property of another subjected to its use by legal proceedings, unless it became a full Kentucky corporation, by organizing as such under section 763.

4. SAME—SUBJECTING TO USE PROPERTY OF ANOTHER COMPANY.

While a public service corporation, like a railroad company, is bound to render to the public certain services appropriate to its particular functions, it is not bound to permit its property to be subjected to use by a rival corporation, unless by express statutory enactment and by due process of law thereunder.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 111-113.]

In Equity. On demurrer to bill.

See 132 Fed. 402.

Du Relle & McHenry and Edwin C. Henning, for complainant.
Helm, Bruce & Helm, Reuben A. Miller, and Wilbur F. Browder, for defendant.

EVANS, District Judge. The complainant, by its bill, seeks the decree of the court that the defendant shall give the complainant the right to connect its tracks with those of the defendant at or near the Kentucky end, and also at or near the Indiana end, of defendant's bridge, and thereafter to permit complainant to equip the bridge for the operation of an electric railroad, and to run and operate its cars across the Ohio river on and over defendant's bridge. The bill further seeks the judgment of the court compelling the parties to make an adjustment between themselves of reasonable tolls for the servitude to which the bridge is to be subjected for complainant's benefit, or else for the court to adjust those tolls by its decree. The claim to these matters of relief is made by complainant upon several grounds, one of which is that under the law of Indiana, the benefits of which defendant has accepted, the bridge is a public highway, and is adapted to the complainant's uses. The defendant has demurred to the bill upon six grounds, the fifth of which was abandoned, and need not be further noticed.

Many important questions were raised in the very interesting argument at the hearing of the demurrer. One was as to whether the bridge was "adapted" to complainant's uses, within the meaning of that word as used in the Indiana statute. On its face the bill shows that, at least at present, the bridge is not in fact adapted to the uses of the complainant, which it is averred intends to impel its trains or cars by electricity as its motive power; but in the alternative it is claimed by complainant that it may, in certain contingencies, use steam for that purpose. While in the first aspect of the question the bill may affirmatively show that the bridge is not yet adapted to the uses of the complainant, still in the other aspect it does not, and on demurrer we feel inclined to take the view that this is a question of fact, rather than one of law merely, and therefore to be determined upon the evidence, and not on demurrer.

Beyond this, however, is the question, much discussed at the hearing, as to whether the Indiana law can have any controlling effect upon the propositions involved in the case. Neither by virtue of its enactment by the Indiana Legislature, nor by the lesser matter of its acceptance by the defendant, could Indiana law have any vigor south of the low-water line on the Indiana side of the Ohio river, which line is the boundary limit of the state of Indiana and of its jurisdiction. Even assuming that defendant's bridge is a public highway in Indiana, the laws of that state and the consent of defendant to accept the benefits thereof cannot give any vigor to those laws in Kentucky. The mere acceptance of their benefits by a Kentucky corporation, with the consent and under the authorization of this state, does not bring those laws across the Ohio river even on a bridge. This seems clear enough, and, if the court be correct in that conclusion, the provisions of the Indiana law, both as respects the uses to which the Indiana end of the bridge may be put and as to the duties of the defendant in Indiana, may be laid out of consideration, leaving us only to deal with the rights of the complainant and the duties of the defendant in this state, as they may be fixed by or as they may depend upon the laws of Kentucky alone. It may be inconvenient to have to bring two suits—one in Kentucky and one in Indiana—to obtain complete relief in a given instance; but that consideration cannot give this court any jurisdiction beyond the limits of this district nor within those of any other state. When a railroad extends through several states, it may, for example, be necessary, in enforcing a mortgage upon it, to have ancillary or other proceedings simultaneously going on in several states; but the inconvenience of such a course cannot usually affect its necessity, though comity and judicial courtesy may, by harmonious action, reduce the inconvenience to the minimum.

The demurrant contends that under the law of Kentucky the complainant has manifested no right to any part of the relief it seeks. Necessarily, if this be true, the demurrer must be sustained, but otherwise not. This brings us to the consideration of the constitutional and statutory provisions of Kentucky law applicable to the subject. Section 211 of the Constitution of Kentucky is as follows:

"Sec. 211. No railroad corporation organized under the laws of any other state, or of the United States, and doing business, or proposing to do business, in this state, shall be entitled to the benefit of the right of eminent domain or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this commonwealth."

The statutory law governing railroad corporations is embraced in article 5 of chapter 32 of the Kentucky Statutes of 1903, covering sections 763 to 842, inclusive, of that volume. Sections 763, 765, and 841 are in full as follows:

"Sec. 763. Any number of persons, not less than seven, may associate to form a corporation for the purpose of constructing, operating and maintaining a railroad. Such persons shall execute articles of incorporation, which shall specify the name of the proposed railroad, the number of years the corporation is to continue, the amount of its capital stock, and the number of shares into which the same shall be divided; the number of directors, which shall not be less than five nor more than fifteen, and their names; the places from and to which, and the name of each county into or through which it is in-

tended to be constructed, and its length as near as may be. Each subscriber to such articles shall set opposite his name his place of residence and the number of shares subscribed by him. Whenever two hundred and fifty dollars per mile has in good faith been subscribed, and twenty per cent. thereof paid in cash, to the persons named in the articles as directors, and an affidavit made to that effect by two of said named directors and attached thereto, a copy of said articles and affidavit shall be filed in the office of the Railroad Commissioners, and in the office of the Secretary of State; and when a certificate of such fact is delivered by the said officers to the incorporators, the persons who have subscribed such articles shall be a body corporate by the name specified in the articles, and as such may sue and be sued, contract and be contracted with, have a seal, and change the same at pleasure; may elect or appoint directors, who shall choose from their number such officers as may be necessary; may require from any officer or employé a bond for the faithful discharge of his duties, and prescribe such by-laws for its government, and exercise such powers as are necessary to the conduct of its business not inconsistent with law."

"Sec. 765. No railroad corporation, organized or created by or under the laws of any other state, shall have the right to condemn land for, or acquire the right of way for, or purchase or hold land for its depots, tracks, or other purposes, until it shall have first filed in the office of the Secretary of State of this state, in the manner provided in the first article of this chapter, its acceptance of the Constitution of this state, and shall have become organized as a corporation under the laws of this state, which it may do by filing in the office of the Secretary of State and the Railroad Commission articles of incorporation in the manner and form provided in section seven hundred and sixty-three of this article."

"Sec. 841. No company, association or corporation created by, or organized under, the laws or authority of any state or country other than this state, shall possess, control, maintain or operate any railway, or part thereof, in this state until, by incorporation under the laws of this state, the same shall have become a corporation, citizen and resident of this state. Any such company, association or corporation may, for the purpose of possessing, controlling, maintaining or operating a railway or part thereof in this state, become a corporation, citizen and resident of this state by being incorporated in the manner following, namely: By filing in the office of the Secretary of State, and in the office of the Railroad Commission, a copy of the charter or articles of incorporation of such company, association or corporation, authenticated by its seal and by the attestation of its president and secretary, and thereupon, and by virtue thereof, such company, association or corporation shall at once become and be a corporation, citizen and resident of this state. The Secretary of State shall issue to such corporation a certificate of such incorporation."

If the Kentucky Court of Appeals has given any construction to those sections, this court is bound to follow it, and will, of course, do so; for the rights of the complainant and of the defendant alike must in this case depend upon the laws of this state and their construction by its highest court. Only one opinion of that court construing those sections at all pertinent to this case has been called to my attention. That opinion was rendered on the 2d of the present month in the case of Cincinnati, New Orleans & Texas Pacific Railroad Co. v. Commonwealth of Kentucky, 83 S. W. 562; and it seems to me to be quite important at this point. It was there held that by proceedings under section 841 a corporation of another state would become "naturalized," and in that status only was a corporation in Kentucky, and consequently did not become liable to an organization tax. The court further held that only under section 763 did a railroad corporation become what may be styled, for convenient distinction, a "native" corporation. Possibly a similar result might follow if full compliance were made with section

765, because that would expressly involve, also, compliance with section 763. The construction thus given to these statutory provisions may have an important, and possibly a controlling, bearing upon the question now before us. It is nowhere claimed, in the bill of complaint or in the argument, that the complainant ever organized in Kentucky under or pursuant to the provisions of 763, or that it is now a native corporation. The utmost that is shown by the bill is that the complainant "naturalized" under section 841, and this brings us squarely to the point of ascertaining and determining whether what the Court of Appeals has designated as a "naturalized" corporation has, by the process of becoming such, acquired the right to have the relief insisted upon in the prayer of the complainant's bill. What may be called a "native" corporation under section 763 has given to it certain specified powers set forth in that section. What is called a "naturalized" corporation, under the construction given by the Court of Appeals to section 841, has, by that section, been expressly given the power of "possessing," "controlling," "maintaining," and "operating" a railway, or part thereof, in this state. These powers, and all that can fairly be implied from the language used, are given upon the express condition that copies of the articles of incorporation, authenticated in due form as prescribed, are filed in the office of the Secretary of State and in the office of the Railroad Commission. If a corporation organized in another state also organizes in Kentucky in accordance with the provisions of section 763, in addition to filing its articles of incorporation with the Secretary of State and the Railroad Commission, then under that combination of circumstances, under section 765, it has the power and right to condemn land, or acquire right of way, or purchase or hold land for its depots, tracks, and other purposes. But these powers, by the express language of section 765, are only given when the foreign corporation not only files a copy of its articles of incorporation, but also organizes under section 763; and, as we are powerless to eliminate that clause, it seems to us to be perfectly plain that there is no escape from the conclusion that compliance with it is essential before any rights are acquired, except those given by section 841.

As before observed, the complainant never organized as a native corporation under section 763. It has done no more than comply with the provisions of section 841, and it would seem inevitably to follow that it can claim none of the powers given by section 765, because that section, to say nothing of section 211 of the Constitution, expressly forbids the exercise of certain powers until the corporation has organized (under section 763) into what we have called a "native" corporation. By simply naturalizing under section 841, however, the complainant did acquire the rights and powers given by that section, which, as I have stated, include the power of possessing, controlling, maintaining, and operating a railway in this state. While in this mode and under this section complainant has doubtless acquired the rights last indicated, those powers do not seem to me to embrace, nor by any fair construction to include, any one of the items of relief prayed for in complainant's bill. *Prima facie*, at least, they would seem only to include the right to possess, control, maintain, and operate a railway, the title or right to

which the complainant may in some form acquire by voluntary lease or purchase. It will be observed that section 211 of the state Constitution places certain prohibitions upon legislation. These prohibitions are not violated by section 841, which gives foreign or naturalized corporations certain powers upon certain conditions therein specified, and which complainant has complied with. Section 763 deals only with corporations organized in Kentucky, and it may be quite true, as argued by the learned counsel for the complainant, that section 765 was a later and amendatory enactment; but, even if that be true, it in no way conflicts with the two other sections we have named. It merely expands the previous law, and allows foreign corporations to have certain powers, which they otherwise could not acquire, but does this upon certain conditions, one of which is that they shall comply with the provisions of section 763, which is expressly named in section 765. We have no doubt that section 211 of the Constitution authorizes both section 841 and section 765, one of which gives certain rights upon one condition, and the other of which gives additional and further rights and powers upon other and superadded conditions. I do not doubt that it was perfectly competent under the state Constitution for the Legislature to make this difference.

It may be remarked in this connection that what is demanded by complainant by its bill is closely akin to the exercise of the right of eminent domain, namely, the right to have the property of another subjected to complainant's use; and I find in the Kentucky Constitution and statutes no power given to a corporation situated precisely as the complainant is situated to exercise that right, directly or indirectly. The right to use property belonging to one corporation acquired at its own expense cannot be obtained from an unwilling owner by another corporation, especially one that is foreign, otherwise than under express and positive law; and while a mere naturalized corporation has been given certain rights and powers by statute in Kentucky, no provision—certainly no express provision—has been made for granting to the complainant the rights it asks the court to enforce in this suit. And, while fully recognizing the well-known doctrine that public service corporations are bound to render to the public certain services appropriate to the particular functions of the corporation, that doctrine has not been supposed to reach far enough to make the corporation serve the purposes or be subjected to the uses of a mere rival in business. One water company or one telephone company or one telegraph company or one street railway company or one railroad company, while bound appropriately to serve the general public, cannot, unless under express statutory enactment and by due process of law thereunder, be compelled to give its property to the uses and benefits of a rival, except by some form of condemnation. The rival is not, ordinarily, to be included in the term "general public." See, especially in this connection, Elliott on Railroads, §§ 922, 974, 1084, and cases cited. In short, it seems to me that the entire relief prayed for is beyond the power of the court to give to this complainant in its present situation.

Section 216 of the state Constitution was also cited in the argument. That section provides:

"All railway, transfer, belt lines and railway bridge companies shall allow the tracks of each other to unite, intersect and cross at any point where such union, intersection and crossing is reasonable or feasible."

The provisions of that section we conceive would become important if the complainant had enforced or obtained a physical connection of its tracks with those of the defendant, or had enforced or obtained a crossing. If, under those circumstances, it had become necessary to prepare a decree, or to determine whether the complainant could go further, and pass over and along the defendant's bridge as part of its track, we could then construe section 216. But it seems to be too far ahead at present to demand further consideration.

It is also urged that complainant has no railroad track, nor a grade for one, prepared at any point, and it is contended that this is a moot suit, in which judgment is sought upon an abstract proposition. It is quite true that the bill shows that complainant has done nothing, except to survey, locate, and stake off its line from Evansville, Ind., to Henderson, Ky., including as a part thereof defendant's bridge, over and along the entire length of which and its approaches the complainant proposes to have its railroad; but it does not appear that by the time of final hearing, if this case should proceed that far, complainant's tracks might not be completed up to those of the defendant. Hence, on the demurrer, this question has not seemed to be very urgent or decisive, although the matter thus urged might be most important if this were a motion for an injunction pendente lite, or if we were now determining this action upon its merits at a final hearing, instead of passing upon a demurrer to the bill. Certainly, if at the final hearing it were made to appear that complainant still had no track laid, nor grade either completed or begun in good faith, it might be most important to consider whether complainant would be entitled to an injunction, which might then appear from those circumstances to be upon a speculative case, and relief which, in the sound discretion of the court, should be denied. But this phase of the case may well be postponed.

As it is in the actual case before us, it seems to me that the bill is without equity. The demurrer will therefore be sustained, and the bill dismissed, with costs, unless there is a desire to amend it.

In re MacNICHOL CONSTRUCTION CO.

(District Court, E. D. Virginia. January 28, 1905.)

BANKRUPTCY—INVOLUNTARY BANKRUPT—CONSTRUCTION COMPANY.

A construction company engaged in constructing bridges, wharves, bulkheads, and driving piles for foundations for buildings, etc., cannot be adjudged an involuntary bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as a corporation engaged in "manufacturing, trading, or mercantile pursuits."

[Ed. Note.—What persons are subject to bankruptcy laws, see note to *Mattoon Nat. Bank v. Bank*, 42 C. C. A. 4.]

Upon Involuntary Bankruptcy Proceedings.

A. B. Seldner, I. W. Eason, and T. D. Savage, for petitioning creditors.

N. T. Green and R. T. Thorp, for W. H. Venable, trustee under assignment.

WADDILL, District Judge. This is an application on the part of certain creditors of the MacNichol Construction Company to have adjudicated the said company an involuntary bankrupt, because of an assignment made by the company with preferences to certain of its creditors. The company answers, admitting the assignment, but insists that it cannot be adjudged an involuntary bankrupt, because it is not included in the class of corporations which can be so adjudicated, within the meaning of section 4, subsec. "b," Bankr. Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3b, 32 Stat. 798, pt. 1 [U. S. Comp. St. Supp. 1903, p. 410], which subsection is as follows:

"(b) Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default of an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. * * *"

The sole question to be determined by the court upon the evidence and pleadings is whether the defendant corporation is one engaged principally in manufacturing, trading, or mercantile pursuits, within the meaning of this section. Confessedly, it is not covered by any other of the designated companies named in the act, namely, mining, printing, or publishing companies. The words "manufacturing, trading, or mercantile pursuits" would likewise exclude this company, unless an unnatural meaning should be given to such language, or an unusual interpretation of the word "manufacturing" applied. It is true that to the word "manufacturing," under the present bankruptcy act, a very liberal interpretation has been given by many of the text-writers and some of the courts (an interpretation perhaps justified by the facts in the particular cases referred to); but it is to be doubted whether any of the cases (certainly unless it be the case of *In re Niagara Contracting Co.* [D. C.] 127 Fed. 382) goes far enough to cover such a case as the one under consideration. Of that case it may be said that it was exceptional in its character, in that it was an effort to set aside an adjudication long theretofore had, because the company was not such a one as should have been adjudicated. The president of the company now in question, in answer to an inquiry as to what the company was principally engaged in, said: "We build bridges, build wharves, build bulkheads, and drive piles for foundations for buildings;" and in answer to a further question, the witness said his company had no regular workshop, but an office; and further described his business as follows:

"Q. In building bridges, do you only build the bridge under contract? For instance, where a county wanted a bridge, you would construct it? A.

That is all—where the city council or any other corporation wanted a bridge. Q. And you undertake to construct and build that bridge? A. Yes, sir; furnish all the materials for and build, and then we would supply the tools. Of course, we have nothing to build with except tools, and we would supply the other part, and turn it into this work. Q. But you did nothing to the bridge until you had contracted with some person to put it up? A. That is right. We only frame them as we put them together. Q. Who did you build bridges for chiefly? A. I built them for railroads and turnpike companies and private individuals; that is, different corporations—land corporations, etc. By Mr. Green: Q. This pile-driving business in the construction work you did for other people, like the city of Norfolk? A. Yes, sir. Q. Did you ever do any work for the city of Norfolk? A. Yes, sir; I was building Mahone's Lake Work—building the bulkhead. Q. You never had any place, except some office, for your business. A. Not a thing anywhere only an office. Q. In other words, did you carry your tools with you from place to place? A. Yes, sir; and had a different place for tool place, and took them as we wanted them. By Mr. Eason: Q. Your machinery was all portable? A. Yes, sir. Q. All of your machinery portable? A. Yes, sir."

It will thus be seen in this case that no element of manufacturing entered into the work performed by this company; that is to say, such as might have occurred with a large bridge establishment, where regular shops were maintained and operated for the purpose of manufacturing the structural parts of bridges, viaducts, etc., and the building proper would be the mere putting them together at the place of erection. Here bulkheads were constructed, wharves were built, bridges were put up, the timber being in each case purchased under contract or otherwise, and brought to the place where it was to be used, and then and there incorporated into the bridge; not unfrequently by the driving of a pile as cut in the forest. The petitioning creditors rely especially upon the case of *Columbia Iron Works v. National Lead Co. and Others*, 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645. In that case the corporation was chartered to construct and repair vessels, carry on a general shipbuilding and ship-repair business, construct and operate a marine dry dock, etc., and its principal business consisted in the building of large steel vessels and repairing others. The corporation there was held liable to be adjudicated a bankrupt. This case, however, is readily distinguishable from that. The work incident to building steel vessels and in repairing others was largely, in the nature of things, work of a manufacturing character, and the company there maintained a large plant for the purpose of manufacturing the material from the raw state by hand labor and machinery, etc., into forms, shapes, and designs requisite for the construction and repairing of vessels to be used in the commerce of the country. The case expressly recognized a distinction, which would seem to include work of the character here under consideration, from that included in that case. It says:

"The distinction would seem to run along the line of those articles which are more or less fixed in place, and not ordinarily the subject of bargain and sale, as articles of commerce, as distinguished from those which are movable and ordinarily regarded as subjects of manual transfer—articles of trade in the common course of mercantile business."

The nature of the work to be performed in this case was of a permanent character, and in every instance affixed to the soil. In

other words, it was work clearly of construction, as distinguished from manufacture; and to include this company in the classes that are the subject of bankruptcy would not only give to the language of the bankrupt act in the enumeration of the incorporated companies subject to its provisions a strained and unnatural interpretation, but would, in effect, add an important class of companies not covered by the act at all. A construction company, in the sense of doing construction work, is a company clearly distinguishable from a manufacturing company, and the word "manufacturing," by no natural meaning, should include such latter company; and since a construction company for the purpose of structural work is as much an independent company as a manufacturing company is for manufacturing purposes, the former company should not be included within the words "trading or mercantile pursuits."

The court is not unmindful of the fact that there would seem to be no good reason why a construction company as well as a manufacturing company should not be subject to the provisions of the bankrupt law; and the possible injustice that may arise from the fact that the former company, as in this case, can prefer certain of its creditors, to the exclusion of others, whereas like action on the part of a manufacturing company would be avoided by the bankrupt act. The reply to this is that Congress has so enacted, and the courts have only to administer, and not make, the laws.

Counsel for petitioners, in support of the liberal construction of the language of the bankruptcy act, have, in addition to the foregoing citations, referred to *Collier on Bankruptcy* (4th Ed.) pp. 56, 57, and *Commonwealth v. Keystone Bridge Co.*, 156 Pa. 500, 27 Atl. 1; and the defendant company to *Hughes*, Fed. Juris. 86; *In re Minnesota & Arizona Construction Co.* (Ariz.) 60 Pac. 881; *In re New York & West Chester Water Co.* (D. C.) 98 Fed. 711. Without attempting to review these decisions at length, it may be said, in passing, that a critical examination of those relied upon to maintain the right to adjudication in this case will demonstrate that in each of the cases in which an adjudication was had, the business of the company adjudicated bankrupt was chiefly manufacturing in character, as distinguished from structural work.

The conclusion of the court is that this particular company does not belong to the class which may be adjudicated involuntary bankrupts, and the petition asking its adjudication is dismissed.

GALLICE et al. v. CRILLY.

(Circuit Court, E. D. Pennsylvania. January 24, 1905.)

No. 34.

NOTES—ACTION AGAINST ACCOMMODATION INDORSER—MOTION FOR JUDGMENT ON PLEADINGS.

Where, in an action against an accommodation indorser, the affidavit of defense sets up a written contract to which plaintiff was a party, pursuant to which the indorsement was made, and under which its enforcement was optional with plaintiff, together with facts dehors the record tending to show an election not to enforce it, the court will not undertake to construe the contract, or determine its effect upon the defendant's liability, on a rule for judgment, but will permit the case to proceed to trial, that the entire transaction may be shown.

At Law. On motion for judgment for want of a sufficient affidavit of defense.

Beck & Robinson, for plaintiffs.

Thomas R. Elcock and John G. Johnson, for defendant.

HOLLAND, District Judge. This is a motion for judgment for want of a sufficient affidavit of defense to a claim of \$2,501.42, with interest from the 14th day of April, 1903, at the rate of 3 per cent. per annum, upon a note made by Du Vivier to the defendant, dated April 14, 1903, and due May 14, 1904, which note was indorsed to the order of Gallice & Co. by the defendant, and, when due, Du Vivier failed to pay the same. Suit was instituted for the recovery of the amount of the said note, together with protest, against the defendant, the accommodation indorser. The defense set forth in the affidavit filed by the defendant is (1) that the note is signed by "Du Vivier," and not by "Du Vivier & Company," as recited in the statement, without any allegation that Du Vivier & Co. traded under such a name, or assumed any liability by virtue of such a signature; (2) that Charles A. Du Vivier, one of the firm of Du Vivier & Co., for which defendant indorsed certain promissory notes on April 14, 1903, has since died, and before the bringing of this suit; (3) that no consideration whatever passed to the defendant from either Du Vivier & Co. or the plaintiffs for said indorsement, it being well known to the plaintiffs that defendant was simply an accommodation indorser.

The affidavit of defense refers to a certain agreement entered into between the plaintiffs, Du Vivier, and the defendant, wherein it appears that Du Vivier & Co. were indebted to the plaintiffs in the sum of \$471,926. The defendant was also a creditor of Du Vivier & Co., but for a much less amount. Du Vivier & Company's assets were not more than \$251,054. It was agreed that the plaintiffs would take 29 notes, each for the sum of \$2,500, dated April 14, 1893, one of which was payable to the plaintiffs on the 14th of each succeeding month, making a total of \$75,000, all of which were to be, and in fact were, made payable to the defendant, and by him indorsed to the plaintiffs, and, when paid, to be in satisfaction of the entire claim of the plaintiffs against Du Vivier; and "it was

stipulated in this agreement that, if the said notes were all paid at maturity, then the plaintiffs would execute and deliver a general release of said indebtedness of said sum of four hundred and seventy-one thousand nine hundred and twenty-six dollars (\$471,926), but, in case of default in the payment of any of the said notes, the whole of the said debt, with interest (less any payments made in pursuance of the said agreement, and any collections by legal proceedings or otherwise made upon any of said notes), should become due and payable forthwith." It is further alleged in the affidavit of defense that the first four notes falling due were paid by Du Vivier & Co., but since that time seven more of said notes have matured and not been paid, upon which no notice of nonpayment by Du Vivier & Co., was given to the defendant, nor had the defendant received notice of protest of these notes; showing that the plaintiffs did not at the time contemplate holding defendant liable on the same. It is further stated that one of the reasons for the specific terms, as defined in the agreement, was that in the event of the failure of Du Vivier & Co. to pay the notes at maturity, and bankruptcy following as a consequence, the plaintiffs anticipated a recovery as dividends from the bankrupt's estate on the whole of said indebtedness of an amount exceeding the compromise sum or the amount of the notes indorsed therefor by the defendant. Upon this affidavit of defense, it is alleged that at the maturity of a number of these notes the action of the plaintiffs was such as to indicate that their intention was not to hold the defendant upon his indorsement, but to look to the original debtor for a recovery of the entire amount, or so much thereof as the assets of the Du Vivier & Co.'s estate might pay in case of bankruptcy or otherwise. The notes are made to defendant, and by him indorsed to plaintiff. If the defendant's liability depended alone on his indorsement, the case would be comparatively easy of solution, but the transaction is accompanied by an agreement which must be considered in connection with the notes. The construction of this agreement, and its effect on the defendant's liability as indorser on the notes, is, no doubt, for the court; but in cases like this, where facts and circumstances dehors the instruments are involved and set up, they frequently are important in order to enable the court to properly construe them—not to alter their terms, but to properly understand them. In *Kerr v. Culver*, 209 Pa. 14, 57 Atl. 1105, a similar case, the court held:

"Where, in an action on a bond and an agreement accompanying the same, the defendants file an affidavit of defense denying absolute liability, averring that the transaction involved only a conditional guaranty, and setting up matters dehors the instruments, which matters, they averred, in equity and good conscience, relieved them from answerability, the court will not, on a rule for judgment, attempt to construe the instruments, but will permit the case to proceed to trial, so that the whole transaction may be investigated."

Motion for judgment for want of a sufficient affidavit of defense is overruled.

BARBER et al. v. LOCKWOOD et al.

(District Court, D. Connecticut. February 13, 1905.)

No. 1,412.

1. ADMIRALTY—PLEADING—ISSUES AND PROOFS.

The proofs of the respective parties in admiralty must conform to the issues tendered by their pleadings.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 544-556.]

2. WHARVES—INJURY OF VESSEL FROM BROKEN SPILE—LIABILITY OF WHARF OWNER.

A wharf owner *held* liable for an injury to a barge properly moored to his wharf, from settling with the falling tide upon a broken spile, which could have been discovered and removed by such owner by the exercise of a fair degree of care.

In Admiralty. Suit for injury of barge at respondents' dock.

Peter S. Carter, for libelants.

Warner & Goldschmidt, for defendants.

PLATT, District Judge. This is an action to recover damages which the libelants' barge, the Bright Star, sustained while lying at the defendants' wharf at South Norwalk, Conn., on the 13th day of June, 1903. The fourth and fifth articles of the libel are the important ones:

"Fourth. That on or about the 12th day of June, 1903, the said boat, with her cargo, properly manned and equipped, while lying alongside of or off from said pier, waiting to discharge, and properly fastened, with the fall of the tide her bottom settled upon a sunken spile or rock which was projecting alongside of or off from said bulkhead, wharf, or pier, penetrating the bottom of said boat, and causing her to spring a leak, and she shortly afterwards sank. Said boat had to be raised so that the cargo could be discharged, and the damages which said boat received required it to be placed on a dry dock to have said damages repaired.

"Fifth. That bulkhead, wharf, or pier aforesaid was in an unsafe, dangerous, and unfair condition, or within the limits of the berth at the said place where the libelants' boat was invited to lay at for the receiving and unloading of loaded boats—a fact which was well known to the respondents, and had been known to them for a long time prior to this accident. And as your libelants are informed and believe, other boats sustained damages by coming in contact with the sunken spile or rock."

The fifth article of the answer is also important:

"That said boat, properly manned and equipped, with her cargo, was on or about the 12th day of June, 1903, towed by the steamboat of the libelants to, and arrived off, said pier, bulkhead, or wharf, in the night season, and that the captain of said steamboat told the captain of said barge to lay his said barge a little off said pier or wharf, so that when the tide fell said barge would settle away from said wharf or pier, where she would lie safely. That said barge was not properly or safely fastened to said wharf or pier, but was fastened by one line only from said barge to the northeast corner of said pier or wharf, with her bows within, or so that her bows subsequently swung away from, said pier or wharf of the defendants and into an adjoining slip of one George Warren, which was not used by the defendants, and which they had no right to use, or permit said barge or any other vessel to use, and which the defendants did not authorize the libelants or the said barge or any person to use, and of which use by the said barge or its captain

the defendants had no knowledge. That inside said slip of the said Warren, and inside the harbor line, and the line of the said wharf or pier, to which said barge Bright Star was so improperly fastened, was a sunken pile, upon which said barge rested when the tide fell, and which pile caused said barge, as the defendants believe, to spring a leak, and afterwards to sink; and it became necessary to raise said barge, so that her cargo could be discharged and the damage to said barge repaired."

It is urged by the libelants that defendants' proof does not correspond with the facts alleged to have been true in said article, and should therefore be rejected. Objection was made at the taking of the depositions.

The law is clear that defendants' testimony must accord with the articles of the answer, just as the libelants' testimony must follow the articles of the libel. The parties make up their issues, and must stay by them until the end. *McKinlay et al. v. Morrish et al.*, 21 How. 343, 16 L. Ed. 100. The view which is taken of this case will, however, make it unnecessary to apply strictly the rules of admiralty practice. Allusion is made to the matter now for the benefit of proctors hereafter.

The length of the barge Bright Star was 100 feet on deck and 95 feet on the bottom. It was 23 feet broad on top, and 22 feet on the bottom. The ends were square, and it drew, as loaded at time of accident, 9½ feet. It was in excellent condition. At low water the depth along the front of the wharf was from 4 to 6 feet. At high tide it was about 7 feet deeper. The barge was moored, with its bows to the north, along the front of the wharf, during the evening of June 12, 1893, at about high tide. She was securely fastened with four lines. A stout cable was attached to a bunch of spiles about 18 feet north of the wharf, and substantially in a line therewith. Another cable was fastened to a bunch of spiles some distance south of the wharf, and ropes from amidships were secured to spiles at the two ends of the wharf proper. The wharf had a frontage on the channel of 33.7 feet. The barge was moored so that its width was about the middle of the dock, and the bottom extended about 10 feet beyond the bunch of spiles on the north to which the bow was fastened. Having moored the barge with care, the master retired to his cabin, and remained there with his sick wife. Early in the morning of the 13th it was discovered by the captain of the steam tug Portchester, and by a man who was sent by defendants to work at removing the coal, that the barge was in trouble. She had listed over toward the channel, and was being rapidly filled with water. The cause of the trouble is unanimously conceded to have been that a sunken pile, which had been broken off below the surface of the water, entered her bow about 4 feet from the port side of the bottom, and right underneath the turn of the bow. The only dispute arises over the exact location of that sunken pile. On this point the testimony is quite as contradictory and unsatisfactory as it usually is in admiralty causes. The defendants attempt to show that the sunken pile was certainly no nearer, and probably a little farther off, the channel than the bunch of spiles to which the boat was fastened; that it was some 10 or 12 feet north of the bunch of spiles, and was on the prop-

erty of the next dock owner to the north, one George Warren, and beyond the control of the defendants; and then they argue that they cannot be held responsible for a defect in their neighbor's wharfage. These things the libelants claim that the defendants cannot show, because they alleged an entirely different state of things in their answer; but, as I said at the beginning, it is unnecessary to pass upon that question, because I cannot follow the defendants in their contention. I cannot adopt the facts exactly as the defendants urge them, and I cannot accept the law which they seek to apply to the facts which they consider established.

Hansen was a diver employed by the Baxter Wrecking Company, and examined the wreck while the schooner *Fly* was pumping out the water. He found the scow canting a very little bit offshore, and a little away from the dock. He locates the sunken spile as 25 or 30 feet from, and off the end of, the dock. His location of the sunken spile, in so far as it affects its relation to the bunch of spiles then existing, is probably inaccurate, but it certainly carries it far away from the defendants' suggested location. Snack, the master, marked the spile when the diver told him about it, so as to avoid it later. He puts it 6 feet from the bunch of spiles to the north, and about 6 or 7 feet on an offshore slant from them. Smith, for defendants, places it a little out from line of dock, 6 or 7 feet northeast. Reid, one of the defendants, was told by the diver where the spile lay, and he places it at or near "X" on defendants' map. This map only represents guesses as to the actual location of the sunken spile and of the bunch of spiles to which the bow of the scow was fastened, for the former is said to be "about at X," and the latter had disappeared before the surveys for the map were made.

From all the testimony, I conclude, that the sunken spile was from 6 to 10 feet northerly and a little easterly from the original bunch of spiles. It is not important, however, whether it was a little easterly of, or on a line with, or a little westerly of, a line along the edge of the dock, continued northerly through the bunch of spiles. The libelant was invited to use the dock as a mooring place, and for the delivery of freight. It was also invited to fasten its scow to the bunch of spiles on the north. The scow was so constructed that it could not have been properly moored at such a narrow dock without extending at least a dozen feet northerly of that bunch of spiles, and a very slight outward swing of the stern must inevitably have thrown the bow somewhat to the westward of a line following the face of the dock, and continued to the north. It may also be fairly assumed that the bunch of spiles was a little further toward the west than appears on the map.

The proprietor of a dock has no right to invite a boat to use that berth for business purposes when the situation is such that no work can be done there without exposing the boat to great danger from an existing defect, which could have been discovered and removed by the exercise of a fair degree of prudence. To permit so dangerous an object as the sunken spile to remain where any person has attempted to locate it constitutes a breach of duty

and an act of negligence for which the defendants must respond. There is no evidence worthy of discussion which shows that the libelants were at fault in any respect.

Let a decree be entered for the libelants.

UNITED STATES v. JOE DICK.

(District Court, E. D. Pennsylvania. February 4, 1905.)

1. CHINESE EXCLUSION—MINOR SON OF MERCHANT—EFFECT OF FATHER'S RETURN TO CHINA.

A Chinese minor lawfully entering the United States as the son of a Chinese merchant domiciled in this country lost such status on the return of his father to China to remain permanently, leaving the son, who was still a minor, in this country, and his status thereafter was determined by his own occupation.

[Ed. Note.—Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

2. SAME—REGISTRATION ACTS—EFFECT OF LABORER'S MINORITY.

The fact that a Chinese laborer was a minor 19 or 20 years old at the time of the passage of the registration acts did not exempt him from the duty of registering thereunder.

Appeal from Order of Deportation.

J. Whitaker Thompson and Jasper Yeates Brinton, for the United States.

Fred Taylor Pusey, for defendant.

J. B. McPHERSON, District Judge. Assuming the testimony offered in this case to be true, and regarding it in the light most favorable to the appellant, it establishes these facts: Joe Dick was born in China in 1874. In the same year his father, Joe Kin, came to the United States, and either then or soon afterwards began trading as a merchant in San Francisco. In 1882 the father sent for his son, and the boy was brought over by a cousin, Joe Sing, and went to live in his father's house and family. In 1886 the father sold out his interest in the business, left the country permanently, and went back to China, where he has since remained. Joe Dick declined to accompany his father, and, being thrown upon his own resources, began at once to earn his living by manual labor; first as a farm hand in California until 1898, and since that time as a laundryman in the city of Philadelphia. He knew that laborers were required to register by the acts of 1892 and 1893, but did not ask for a certificate, his only excuse being that he "did not have any money then." In these years he was 18 and 19 years old.

The government concedes that if, when the acts of 1892 and 1893 were passed, the appellant was privileged to remain in this country as the minor son of a Chinese merchant, he is not now liable to deportation, since, to quote from the government's brief, "it was evidently not the intention of the registration acts to require those to register who in the eye of the law were not laborers at the date of the passage of the acts." The crucial fact, as it seems to me, in determining how far the

appellant was privileged at the date of the registration acts, is his father's return to China with intent to remain in that country, and his actual residence there from 1886 to the present time. What effect did this severance of the actual family relation have upon the appellant's status? He came into the country lawfully as the minor son of a resident merchant (*United States v. Gue Lim*, 176 U. S. 468, 20 Sup. Ct. 415, 44 L. Ed. 544), and, so long as that status continued he was entitled to remain. Whether he could have acquired an independent status for himself as a laborer during his minority, if his father had remained in the United States and had gone on with his business, need not be determined. The question now is whether his status as the minor son of a resident merchant continued during the rest of his minority, although his father had ceased to be a merchant, had broken up his household, had abandoned the support of his son, and left the United States without the intention to return? In my opinion, the appellant's privilege ended with the disappearance of the facts on which it was founded, and thereafter his status, for present purposes, was such as he himself chose to make it. His father emancipated him by the convincing act of turning him loose upon the world to shift for himself, and it would be anomalous, indeed, to hold that after such a rupture of the family relation the court must treat the relation as if it were still unimpaired. If the court is thus bound in spite of the truth, the fiction should also be applied under other circumstances, although the appellant, I suppose, would hardly contend that, if his father had been a laborer, his own status as a laborer's son (*United States v. Chu Chee*, 93 Fed. 797, 35 C. C. A. 613) would have persisted, although, after the father had gone away, the appellant had become a merchant, and was engaged in that business when the registration acts were passed. The case of *United States v. Chung Shee* (D. C.) 71 Fed. 278, is not in point. There a Chinese woman, having been refused permission to land, petitioned the District Court of Oregon for a habeas corpus, and upon the hearing was adjudged to be entitled to enter the country because she was the wife of a Chinese merchant. This was in 1894, and, after her husband's death a few months later, the question of her right to remain in the country without a certificate came before the District Court for the Southern District of California on her appeal from an order of deportation, and the court simply decided that the lawfulness of her residence in the United States was conclusively established by the former judgment. Nothing was discussed or decided except the extent to which the doctrine of *res adjudicata* should be applied. In *United States v. Sing Lee* (D. C.) 71 Fed. 680, it was held that a person who was a merchant when the act of May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], was passed was not liable to deportation because he became a laborer afterward. Similar facts existed in *Re Chin Ark Wing* (D. C.) 115 Fed. 412, and a similar ruling was made by Judge Lowell, who gave as the incontrovertible reason therefor that the appellant was prevented by an "unavoidable cause" from obtaining a laborer's certificate in 1892, because he was then a merchant, and not a laborer. The District Court of Montana in *Louie Juen v. United States* (D. C.) 128 Fed. 552, and the District Court for the Eastern District of Missouri in *United States v. Leo Won Tong*, 132 Fed.

190, reached the same conclusion. These four cases are obviously concerned with a change of occupation after registration, and have, therefore, little to do with the question now before the court, which simply is, what was the appellant's status or privilege when the registration acts were passed? The remaining case cited by the appellant's counsel upon this point is *Re Yew Bing Hi* (D. C.) 128 Fed. 319, but this, I think, is even less to the purpose, for it only decides that a Chinaman who entered the country as a merchant in 1897, but became a laborer afterwards, could not be deported, because the registration acts had omitted to provide for such a situation. No decision has been cited that is precisely in point, but the purpose of the registration acts, namely, to compel all Chinese laborers in the country to furnish evidence by which they could be identified, seems to be in harmony with the conclusion to which I feel obliged to come. Undoubtedly the appellant was a laborer in 1892 and 1893, and it would be the merest fiction to look upon him as a minor son in the household of his merchant father. He was in fact no longer in the household, but was making his own livelihood, and his father was no longer a merchant, nor even a resident in the United States. A similar question might arise concerning the domicile of a minor. Mr. Jacobs, in his excellent work on *Domicile*, thus speaks of it in sections 236, 237:

"The domicile of the child is necessarily that of the father, at least so long as the former remains in any manner under the guardianship and control of the latter.

"A case may be supposed, however, in which it would seem unjust to apply this general rule of derivation; e. g., where a father has abandoned his child, and has emigrated to a foreign country or a distant state. Under extreme circumstances in such a case a court might, and probably would, refuse to seek in a distant land a domicile for the child with a parent who had been faithless to parental duty, or, if it did recognize such domicile, refuse to attach to it the usual legal consequences."

It is argued further that the appellant's legal infancy in 1892 and 1893 was a valid excuse for not registering. The question was suggested briefly and passed over in *Tsoi Sim v. United States*, 116 Fed., on page 922, 54 C. C. A. 154, but is now presented for decision. Whether a laborer, who was a minor and living in the household of his father, who was also a laborer, was obliged to register as if he had been an adult, may be left for determination until such a case is presented. The laborer now before the court was near his majority; he had been given the privileges of an adult by his father, and been forced to take up an adult's burden; he was man enough to earn his own living, and intelligent enough to know that registration acts had been passed affecting the class to which he belonged. Under such circumstances I am at a loss to know upon what principle his exemption from the duty to register can be placed. The act says nothing about minors or adults. It is "laborers" that are referred to; and the presumption is, I think, that their age is a matter of no importance. Of course, the statute is to receive a reasonable construction. Very young or very old persons, incapable of "labor" in the ordinary meaning of that word, are probably not included, although they might be able to do some inconsiderable work with their hands. But when a youth has grown strong enough to do an adult's work, I see no reason why he should not be classed with

his companions in labor, although some of them may be his elder by several years. In my opinion, the test should be capacity, and not merely age.

The appellant asks also to be permitted to register now in case the court should decide against his present right to remain in the country. There are, however, two insuperable obstacles in the way of such permission: First, there is no evidence that "by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate" (section 6, Act May 5, 1892, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320]); and, second, he has not proved by at least one credible witness other than Chinese, that he was a resident of the United States on the fifth of May, 1892 (Act Nov. 3, 1893, c. 14, § 6, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1320]). All the witnesses before the commissioner and before the court were Chinamen.

The appeal must therefore be dismissed, and the order of deportation made by the commissioner is hereby affirmed.

WEIR et al. v. NORTHWESTERN COMMERCIAL CO.

(District Court, D. Washington, N. D. January 28, 1905.)

No. 2581.

SHIPPING—DEMURRAGE—DISCHARGE ACCORDING TO CUSTOM OF PORT OF NOME.

A charter for the carriage of a cargo of coal to Nome, Alaska, provided that the cargo should be discharged by the ship and received by the charterer at the rate of 500 tons "per weather working day. * * * Ship to discharge according to custom of port." It is the custom at the port of Nome, owing to the lack of any harbor, to discharge vessels at all hours of the day and night, and 24 hours constitute a day's work; any portion of time worked less than that counting as a fraction of a day. Neither the ship nor the charterer was capable of handling 500 tons of coal in less than a day of 24 hours. *Held*, that such custom of the port governed in computing demurrage, and 24 hours, day or night, during which the weather was such that the work could safely proceed, constituted a "weather working day," within the meaning of the charter; any less number of hours worked being counted as a fraction of a day.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 576-582.

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

In Admiralty. Suit to recover demurrage for detention of ship at Nome, Alaska, caused by failure of consignee to expedite discharge of cargo according to agreement contained in charter party. Heard on the merits. Decree for libellant.

On the 7th day of July, 1903, libelants chartered to respondent the steamer Wyneric for the carriage of a cargo of coal from Nanaimo, British Columbia, to Nome, Alaska. The particular clauses of the charter party which are material in this case are as follows:

"Seattle, Wash., July 7th, 1903.

"This charter party this day made and concluded upon between James Laidlaw & Co. of Portland, Ore., agents for owners of the steamship 'Wyneric' of the measurement of 3,264 tons register, or thereabouts, now at Port Town-

send, of the first part, and the Northwestern Commercial Co. of Seattle, of the second part.

"Witnesseth, That the said vessel being tight, staunch, strong, and every way fitted and provided for the voyage shall proceed to Nanaimo, B. C., and there receive on board, where she may safely lie, always afloat, a minimum quantity of 4,000 tons (of 2,240 lbs.) of sacked coal and being so loaded shall therewith proceed to Nome, Alaska, or so near thereunto as she may safely get, and there deliver the same, being paid freight on the same at the rate of \$4.75 per ton of 2,240 lbs. taken aboard. * * *

"Cargo to be delivered at ship's tackle.

"Owners agree to discharge and charterers agree to receive cargo at the rate of 500 tons (2,240 lbs.) per weather working day, Sundays and holidays excepted, such time to count from receipt of notice of readiness to discharge from Master. Ship to discharge according to custom of port. * * *

"Demurrage, if any, incurred in loading and/or discharging to be at the rate of three pence per gross register ton per day.

"Ship to have a lien on the cargo for all freight, demurrage and all other legal charges.

"The Act of God, perils of seas or other navigable waters, barratry of the master and crew, enemies, pirates, civil commotions, robbers, thieves, arrest or restraint of princes, rulers or people, riots, strikes, or stoppage of labor, capture or seizure, or arrest under civil process mutually excepted."

Thereafter, and with reasonable dispatch, the vessel proceeded to Nanaimo, British Columbia, where it took on a cargo of 4,800 tons of coal, and arrived at Nome on the 8th day of August, 1903. The delivery of said cargo to the lighters of respondent was completed on the 5th day of September, 1903, at 12:30 p. m.; and libelants claim that the vessel was detained 12 days beyond the time allotted under the terms of the charter, and that the respondent therefore owes them demurrage at the rate of \$303.25 per day, being a total of \$3,639, with interest thereon as said demurrage accrued.

The principal controversy in this case relates to the true construction of the clause of the charter party which, in effect, provides that the delivery of the cargo should be made at the rate of 500 tons per weather working day, Sundays and holidays excepted, according to the custom of the port; libelants claiming that a weather working day was 12 hours, and respondents claiming 24 hours as a weather working day, according to the custom of the port at Nome. Respondents also claim that they should not be charged for the time that they were prevented from operating their lighters owing to a strike among their employés, and libelants contend that this strike was not general, and therefore respondents should not be allowed this time.

There was some conflict as to the condition of the weather at the ship and at the shore; the ship's log showing favorable weather for unloading at times when, according to the record kept on shore, the sea was too rough for lighters to venture out.

The following facts were established by the evidence: There is no harbor at Nome, and ships anchor in Behring Sea about two miles from the shore, and cargoes must be discharged into lighters, which are then taken to shore and unloaded upon the beach. The shore is bleak, barren, and covered with sand, and storms often arise on very short notice; making it impossible to transfer freight from the vessels to lighters, or to land it on the shore. The sea is shallow, and, because thereof, becomes rough and dangerous in a very short time after a storm arises. The water may be smooth near the shore, and yet too rough where the vessel is anchored to safely place cargo upon the lighters or have them lie alongside; and sometimes, when there is only a moderate sea at the vessel, caused by the wind blowing towards the shore, there may be a surf on shore, so that it will be impossible to safely land cargo from the lighters. From the time of the commencement of business at Nome, which was in 1889, it has been the custom to work at all hours of the day and night in unloading vessels, when the sea would permit, and 24 hours constitutes a day's work; and, if discharge is carried on for only a portion of the 24 hours, it is, according to the custom of the port, figured as a fraction of a day. Neither respondent nor libelant had the capacity to handle 500 tons per day, as required by the charter, in less than a day of 24 hours.

Upon leaving Nanaimo the agents of the vessel's owners instructed the master to make all preparation to discharge day and night, according to the custom of the port.

Williams, Wood & Linthicum, for libelants.

John P. Hartman, for respondent.

HANFORD, District Judge (after stating the facts). By the terms of the charter party the libelants were obligated to carry a cargo of coal to Nome, and discharge it there according to the custom of the port, and the conditions there make it necessary to work during all of the 24 hours of each day, when practicable. From necessity, it is the practice there to work at all hours when possible. This was understood by the parties to the contract when it was made, and the libelants' agent instructed the captain of the Wyneric to employ a sufficient number of men to discharge cargo at all hours required by the consignee. The charter party also required the ship to deliver the cargo at the rate of 500 tons each "weather working day," except Sundays and holidays, and required the consignee to receive the same at the ship's tackle; and I find that neither party had capacity to handle that amount of coal in less than a day of 24 hours. The charter party also provides for demurrage, at a specified rate, to be paid by the charterer, for each calendar day, in case of detention of the ship by the charterer after the expiration of the time required to discharge the cargo at the rate of 500 tons per weather working day.

I find from the evidence that during the time the vessel was discharging there were days on which cargo was discharged, when, by change of weather and conditions of the sea, it was impossible to work continuously during all of the 24 hours; and it is my opinion that it will be unfair, and not in accordance with a reasonable construction of the contract, to hold either that such days should be entirely omitted from the count, or credited to the ship as full weather working days, and, considering all the provisions of the contract, and the facts proved as to conditions prevailing and the custom of the port, each of such days should be estimated as a fractional day.

The steamer arrived at Nome on Saturday, the 8th day of August, 1903, and commenced discharging cargo on Sunday, the 9th, and finally completed full delivery on Saturday, September 5th, during which time there were interruptions by wind and waves and surf rolling on the beach, and a strike of the respondent's employes, which continued three days, so as to impede the work of receiving cargo, although it did not cause a total suspension of work. The ship delivered coal to the lighters furnished by the respondent during the hours of the night and on Sundays, when the weather permitted, to the extent of the capacity of the crew. But there was no continuous delivery of cargo during the 24 hours of any day, and on some occasions the crew stopped work at night when lighters were waiting, for the reason that the men had worked their full time, and the libelants failed to fully live up to their contract by employing a sufficient number of men for relief shifts. The evidence also shows that time was lost by failure of the respondent to furnish lighters to receive coal at times when the ship was ready to make delivery.

I consider that, upon a fair estimate, making due allowance for interruptions of work by stress of weather and the strike, and failure of the libelants to continuously deliver when lighters were waiting and the weather was favorable, and giving credit for work done on Sundays and on stormy days, when either party might have refused to work, as a set-off for time lost by failure of one party or the other to continue the work at times when the weather permitted, the respondent was in fault, causing detention of the ship six days beyond the time allowed for discharging and receiving the cargo, by the terms of the charter party, construed as I have construed it, allowing 24 hours in workable weather for a "weather working day"; and I direct that a decree be entered in favor of the libelants for the amount of six days' demurrage at the rate specified in the contract, with interest from November 11, 1903, and costs.

BUTLER v. EVENING LEADER CO.

(Circuit Court, D. Connecticut. February 17, 1905.)

No. 551.

LIBEL—PLEADING—DEFENSES.

In an action for libel against a newspaper company, special defenses in the answer, following a general denial, alleging, respectively, that the publication referred to a person other than plaintiff, and that the publication was a news item received in the usual course of business, and published in good faith, are demurrable; both defenses being admissible under the general issue.

At Law. Action for libel. On demurrer to answer.

The substantial portion of the complaint is:

"(1) The defendant corporation was during the year 1903, and for many years previous thereto had been, the owner and publisher of a daily newspaper known as 'The Evening Leader,' which during said years was published in the city of New Haven, state of Connecticut, and had a large circulation in said city, and throughout the state of Connecticut and elsewhere.

"(2) In the year 1903 the plaintiff was, and for many years prior thereto had been, a professional wing and rifle shot and actress, and had been giving performances under the name and style of 'Annie Oakley,' and is almost exclusively known by that name, and under said name had for many years been connected with, and one of the principal performers in, 'Buffalo Bill's Wild West Show,' commanding a large salary, and her performances constituted one of the principal attractions of the exhibition given by that company.

"(3) On August 11, 1903, the defendant published in its newspaper, the Evening Leader, the following headlines concerning the plaintiff:

"'Annie Oakley's Plight.

"'Famous Performer Arrested in Chicago for Robbery.'

And after said headlines the following words concerning the plaintiff:

"'Chicago, Aug. 11.

"'Annie Oakley, who says she won the applause of King Edward of England, by an exhibition of marksmanship at Buckingham Palace, was a prisoner in the Harrison Street police court Monday. She was arrested on complaint of Charles Curtis, who charged her with robbery. She pleaded guilty and was fined \$25. According to the police, the woman is addicted to the use of drugs.

"She formerly was with Buffalo Bill's show and commanded the salary of a light opera prima donna, was petted and feted and awarded the honors at meetings of fashionable gun clubs. She was arraigned yesterday in Justice Caverty's court and her pitiful condition discovered.

"She was destitute and forced to accept shelter from an old colored man named Curtis. It was he who had her arrested. He relented, however, and would not appear in court against her on seeing her condition. Justice Caverty nevertheless sent her to the Bridewell for 25 days, to be restrained and cared for and treated there."

"(4) Said publication was false and malicious.

"(5) By reason of said publication the plaintiff has been, still is, and will be greatly and permanently injured in her good name and credit, and has suffered great mental anguish and bodily pain, and her health has been to such an extent impaired that she is and will be physically and mentally incapacitated from performing her professional duties and earning a livelihood as a professional wing and rifle shot and actress, whereby the plaintiff has suffered and will suffer heavy pecuniary loss. The plaintiff claims \$10,000 damages."

Second Defense.

"(1) The defendant further answers said complaint, and says that on or about the 10th day of August, 1903, in the city of Chicago, state of Illinois, one Lillie Cody was arrested, prosecuted, tried, and found guilty in the police court of the city of Chicago, First District, before Justice John R. Caverty, upon the complaint of one Charles Curtis, and that said court found said accused guilty, and fined said accused twenty-five dollars, together with the costs; and the court further ordered and adjudged that, if in default or refusal on the part of said defendant to pay said fine and costs, that said accused be committed to the house of correction, there to be detained until said fine, penalty, and costs should be found paid and satisfied, provided said imprisonment shall not exceed the period of six months from the time of her commitment, and that execution issue therefor.

"(2) That said defendant, Lillie Cody, claimed to be related to William Cody, better known as 'Buffalo Bill,' by marriage; and the said Lillie Cody further claimed that she was an expert rifle shot, and had been connected with the show known as 'Buffalo Bill Show,' and that she had often given entertainments, both public and private, in marksmanship, and that she was known by the name of 'Annie Oakley.'

"(3) The defendant says that each and every part of said publication, as set out in the third paragraph of the plaintiff's complaint, refers solely to the aforesaid trial and conviction of the aforesaid Lillie Cody, and to the statements and claims made by the said Lillie Cody as to her occupation and name, and to no other person whatever.

Third Defense.

"(1) The defendant further answers said complaint, and says that said publication as set out in the plaintiff's complaint was received by the defendant in its regular course of business, as an item of current news, from the Publishers' Press Association, and the defendant published the same in good faith.

"(2) The defendant says that said Publishers' Press Association is an organization doing a large business both in this and in foreign countries in obtaining current news and matters of public interest, and that said association uses all proper and suitable precautions to obtain a fair and true statement of facts, and that said news and facts so obtained by said association are telegraphed to the different newspapers connected with said association, with the expectation that said news so telegraphed should be published.

"(3) This defendant now has, and for many years last past has had, a contract with, said Publishers' Press Association, in which this defendant pays said association large sums of money each year, and that association, in return therefor, is bound to and does furnish to this defendant items of current news and matters of public interest to be published by this defendant;

and this defendant says that the article set forth in the plaintiff's complaint was obtained in its regular course of business from said Publishers' Press Association, and published in good faith."

Demurrer to the Second Defense.

"The plaintiff demurs to the second defense:

"(1) Because the allegations therein do not constitute a justification for the publication of the libel complained of, as it is not averred that the words published of the plaintiff were true, or that the plaintiff was the Lillie Cody therein named.

"(2) Because said allegations are equivalent to the denial contained in the first defense, and the facts alleged, if admissible at all, are admissible only by way of mitigation of damages under the denial heretofore pleaded, and cannot be pleaded either in bar of the action, or as bearing upon the question of damages.

Demurrer to the Third Defense.

"The plaintiff demurs to the third defense:

"(1) Because the fact that the libel was published upon information received from others constitutes no defense to the action.

"(2) Because the fact that the information was received in the regular course of business, and was published in good faith, constitutes no defense to the action.

"(3) Because said allegations are equivalent to the denial contained in the first defense, and the facts alleged, if admissible at all, are admissible only by way of mitigation of damages under the denial heretofore pleaded, and cannot be pleaded either in bar of the action, or as bearing upon the question of damages."

Watrous & Day, for plaintiff.

Stoddard & Goodhart, for defendant.

PLATT, District Judge. As to the second defense: If it be assumed that both Annie Butler and Lillie Cody had appeared as wing shots with Buffalo Bill under the nom de plume of "Annie Oakley," and that both had been praised by King Edward, etc., even then a statement that "Annie Oakley, the wing shot," etc., passed through the experience set forth in the article, with no earmarks pointing to Lillie Cody, would not, as I read it, be a complete justification as against the plaintiff. As the case will stand, the plaintiff must bear the burden of showing that the article referred to her; and the defendant, in denying that, is at liberty to show that it referred to some one else. If it referred to some one else, and not to plaintiff, it is unimportant whether it is true or false.

The facts alleged in the third defense can be introduced under the general issue. *Atwater v. Morning News Co.*, 67 Conn. 510, 34 Atl. 865. Notice of intention to produce them is permissible under the practice act, but a definite defense can hardly be construed to be such a notice and nothing more.

Let the second and third defenses be stricken out, at defendant's costs.

In re DUNN HARDWARE & FURNITURE CO.

(District Court, E. D. North Carolina. January 27, 1905.)

BANKRUPTCY—CLERK'S FEES—NOTICE TO CREDITORS.

Bankr. Act July 1, 1898, c. 541, § 51, 30 Stat. 558 [U. S. Comp. St. 1901, p. 3441], provides that clerks shall receive as full compensation in each estate a filing fee of \$10, except where a fee is not required from a voluntary bankrupt. Section 58c, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444] provides that all notices shall be given by the referee, unless otherwise ordered by the judge, and general order 35, § 1 (89 Fed. xiii, 32 C. C. A. xxxiv), declares that the fees allowed to clerks shall be in full compensation of all services performed by them, etc., but "shall not include copies furnished to other persons or to expenses necessarily incurred in publishing or mailing notices or other papers." District rule 8 (89 Fed. vi, 32 C. C. A. x) provides that the notice of final meeting shall be issued by the clerk in accordance with official form 57 (89 Fed. lvii, 32 C. C. A. lxxxi), which includes the petition for the bankrupt's discharge, order of notice, jurat, etc. *Held*, that clerks were not entitled to charge a fee of 25 cents for each notice sent to creditors on notices of a petition for discharge, but were only entitled to the actual items of expense thereon for postage, stationery, and clerical work.

Godwin & Davis, for petitioners.
Stewart & Clifford, for bankrupt.

PURNELL, District Judge. In this cause a controversy has arisen between the referee and the clerk as to the charge of the former clerk, of 25 cents, for each notice sent to creditors on the notices of petition of discharge, amounting to \$38.75. The law is so apparently plain upon this subject that there should be no question about it. Section 51 of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 558 [U. S. Comp. St. 1901, p. 3441], provides that the clerks shall receive as full compensation for their services to each estate a filing fee of \$10, except where a fee is not required from a voluntary bankrupt. Section 58c, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], provides that all notices shall be given by the referee, unless otherwise ordered by the judge. In accordance with authority vested and the duty required of the Supreme Court, general orders in bankruptcy were made, and forms prescribed, and general order 35, § 1 (89 Fed. xiii, 32 C. C. A. xxxiv), follows the act by providing "that the fees allowed by the act to clerks shall be in full compensation of all services performed by them," etc., but "shall not include copies furnished to other persons or to expenses necessarily incurred in publishing or mailing notices or other papers." District rule 8 in bankruptcy (89 Fed. vi, 32 C. C. A. x) provides that the notice of final meeting shall be issued by the clerk in accordance with official form 57 (89 Fed. lvii, 32 C. C. A. lxxxi). This form, as will be noted, includes the bankrupt's petition for discharge, order of notice thereon, jurat, and certificate. From a reading of these sections of the act, and from the rules and orders of the court, the notice on petition for discharge must be issued by the clerk, and the act allows him the actual expenses, to wit, for postage, stationery, and clerical work. This cannot be charged as a fee, but must be charged as an expense, and should be itemized by the clerk, and so charged. When so charged, it is legitimate, and should be paid out of the estate. These

items of expense the court cannot say amount to 25 cents for each notice, but, considering the items which enter into such expense, may amount to this charge.

In re PRESS-POST PRINTING CO. et al.

(District Court, S. D. Ohio, E. D. January 11, 1901.)

No. 111.

BANKRUPTCY—EFFECT OF ADJUDICATION—PROPERTY HELD UNDER CONDITIONAL SALE.

An adjudication in bankruptcy and the appointment of a trustee operate as a seizure under process of property of which the bankrupt was in possession under a conditional sale, and in Ohio vest the trustee with title for the benefit of all creditors, as against the seller, unless the condition be evidenced in writing deposited with the township clerk as required by Rev. St. Ohio, §§ 4155 (2), 4155 (3).

In Bankruptcy. On certificate from referee.

L. F. Sater, O. H. Mosier, M. E. Thrailkill, and Nash & Lentz, for petitioning creditors.

R. McCoy, for bankrupt.

THOMPSON, District Judge. Under the conditional sales referred to in the certificate of the referee, the possession of the property was transferred to the vendee, to be used in carrying on its business. The possession and use of the property were evidence of ownership, and, no doubt, helped the vendee to obtain credit in its business dealings. And the creditors of the vendee who seized the property under legal process are protected against the title of the vendors, unless the vendors have complied with the requirements of sections 4155 (2) and 4155 (3) of the Revised Statutes of Ohio, declaring conditional sales of personal property void as to all subsequent purchasers and mortgagees in good faith and creditors, unless the condition be evidenced by a writing deposited with the township clerk, etc. The adjudication of this court that the vendee was bankrupt, and the transfer of the possession of the property to the trustee, constituted legal process, and operated as a seizure of the property for all the creditors. It was, so to speak, an equitable execution in favor of all the creditors, including the vendors. The vendors are creditors of the bankrupt for the balance of the purchase money. In fact, if not in legal effect, the vendors held the title to the property as security for the purchase money; and this security was available against the vendee, and could have been made available against third parties by a compliance with the statute, or by the resumption of the possession of the property before it was seized by the creditors under legal process. I agree with the construction of sections 57a and 70a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 560, 565 [U. S. Comp. St. 1901, pp. 3443, 3451], given by the court in *Re Legg et al.*, 96 Fed. 326.

The findings and order of the referee will be approved and confirmed.

MITCHELL v. DUKE.

(Circuit Court, E. D. Pennsylvania. January 24, 1905.)

No. 24.

BROKER—COMMISSIONS—VALIDITY OF CONTRACT.

Evidence *held* to sustain the validity of a contract by which plaintiff was to receive a commission on a sale of property by defendant, and to support a finding by the jury that a time limit in the contract had been waived by defendant.

At Law. On motion for new trial, and for judgment notwithstanding the verdict.

Joseph H. Taulane and Thomas Earle White, for plaintiff.
Keator & Johnson and J. S. Freeman, for defendant.

J. B. McPHERSON, District Judge. A review of the evidence in this case has satisfied me that the plaintiff was at liberty to make the contract in question. He was known by the defendant at that time to be the agent for another principal, and the defendant's interests were in no way harmed or endangered by the double employment. All that the plaintiff was to do, as is clearly shown by the whole correspondence, was to bring the parties together. After they met, the whole affair was transacted, and the final agreement was made by themselves, the plaintiff having nothing further to do with the terms. Whether the time limit was waived, was a question of fact which the jury have found against the defendant upon ample evidence. He certainly regarded himself on April 17th as still bound to pay the \$2,200 upon a sale of the property, for upon that date his representative wrote as follows: "When the plant is sold, Mr. D. will give you the amount of commission agreed upon. That part is settled and you need not worry over it." Evidently there was no thought then that the expiration of the 10 days had made any difference.

The motions for a new trial and for judgment notwithstanding the verdict are refused, and to the refusal of the motion for judgment an exception is sealed in favor of the defendant.

THE MARJORY BROWN.

(District Court, S. D. New York. February 2, 1905.)

SEAMEN—DEDUCTION FROM WAGES FOR ABSENCE FROM DUTY—EVIDENCE.

A deduction from the wages of a mate on a small schooner for time lost by reason of drunkenness *held* justified, although no entries of the occurrence were made in the log, as required by Rev. St. § 4597, as amended in 1898 (Act Dec. 21, c. 28, 30 Stat. 761 [U. S. Comp. St. 1901, p. 3115]), the court exercising the discretion given it by said section to receive other evidence.

In Admiralty. Suit by seaman for wages.

Richard D. Currier, for libellant.
Benedict & Benedict, for claimant.

ADAMS, District Judge. This action was brought by Frederick Hallgren against the schooner Marjory Brown to recover a balance of

wages alleged to be due as mate and said to amount to \$11.80, with penalty for non-payment.

The defence is a denial that the libellant was discharged and it is alleged in the answer:

"* * * That while on said vessel on said voyage the libellant for a number of days was unfit and incompetent to perform his duties, and did not perform his duties as chief officer of said vessel by reason of drunkenness. That all he was entitled to receive as such chief officer as wages was the sum of Thirty-three Dollars and twenty cents, and no more. That on the arrival of said vessel in the port of New York the libellant was duly paid the sum of Thirty $20/100$ Dollars, as being the balance in full of all amounts due him for wages, and for all claims whatever against said vessel, and duly gave a receipt therefor."

The testimony supports the allegations of the answer but it is claimed by the libellant that notwithstanding the facts of the case, he is entitled to recover because no entry of the occurrences was made in the log as required by law, referring to sections 4596 and 4597 of the Revised Statutes, as amended by the Act of December 21, 1898. The sections appear in 30 Stat. 760, 761, c. 28 [U. S. Comp. St. 1901, pp. 3113-3115]. The latter provides:

"Sec. 4597. Upon the commission of any of the offenses enumerated in the preceding section an entry thereof shall be made in the official log book on the day on which the offense was committed, and shall be signed by the master and by the mate or one of the crew; and the offender, if still in the vessel, shall, before her next arrival at any port, or, if she is at the time in port, before her departure therefrom, be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as he thinks fit; and a statement that a copy of the entry has been so furnished, or the same has been so read over, together with his reply, if any, made by the offender, shall likewise be entered and signed in the same manner. In any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof the court hearing the case may, at its discretion, refuse to receive evidence of the offense."

The libellant's contention is that the non-payment of the full wages was in the nature of a fine for the part unpaid and no authority can be found for the deduction in the Revised Statutes, especially as no log entries were made of the facts. The testimony showed that the schooner kept no log, as is often the case with small coasting vessels. Whether that was a violation of the law or not, the provisions of the statute leave it discretionary with the court to accept other evidence. On the trial, I exercised this discretion and became satisfied that the libellant did not have a meritorious cause of action. The claimant made a clear case of neglect of duty and of payment in New York of an amount which was sufficient to discharge the vessel's liability, after deducting an equitable sum for the time the libellant lost from duty owing to his bad habits. Moreover, after arrival in New York he was paid a sum of money and thereupon signed a receipt as follows, viz.:

"Receipt.

Received from Capt Thompson the sum of Thirty dollars & twenty cents as wages for my services as mate on board the schr Marjory Brown and for all claims whatever against said vessel and master.

New York April 19th 1904

(\$30 $20/100$)

Witness

Chas. Splitter

Fred Hallgren."

The testimony shows that the receipt was signed with a full knowledge on the libellant's part that he was getting all that he was entitled to. This is not a case in which the statutes should be strained in favor of the libellant, although he was a subordinate officer.

Libel dismissed.

THE THREE BROTHERS.

(District Court, S. D. New York. February 3, 1905.)

SHIPPING—INJURY OF SCOW WHILE BEING TOWED IN ICE—NEGLIGENCE AS BAILEE.

The city of New York held liable for injury to a scow in its employ from floating ice while being moved to a safer place in North river by a tug, also employed by the city, on the ground that it failed to exercise ordinary care as bailee in permitting the scow to remain moored at an obviously dangerous place in the winter.

In Admiralty. Suit to recover for injury to boat by ice.

James J. Macklin, for libellants.

Alexander & Ash, for the Three Brothers.

John J. Delany and E. Crosby Kindleberger, for the City of New York.

ADAMS, District Judge. This action was brought by John Lane and another, as owners of the scow Walter J., to recover from the steamtug Three Brothers the damages caused by contact with ice in the North River on the 5th day of February, 1902. The owners of the tug brought in the City of New York by petition. John Lane subsequently died and the action, on his part, was continued by Jennie A. Lane, as his administratrix.

The scow was in the employ of the city and lying, with three others, in an exposed position at the foot of 134th Street, North River. The Three Brothers was also in the employ of the city and was paid by the hour for what she did, and at an increased rate of compensation on account of work in ice. The increased rate was intended to cover such risk as the tug herself might be subjected to by reason of the nature of the work.

On the day in question, considerable ice was running in the river, causing apprehension of danger to the scows on the part of the city officials in charge of them, and they requested the tug to remove the scows to 50th Street, North River. The tug, it is asserted by the claimant, declined to undertake the work until assured by the said officials that all risk to the scows, incident to their removal, would be assumed by the city. The city officials in charge at 134th Street deny the assumption of the risk, or their authority to make such a contract. It is admitted in the pleadings that the removal was requested. The dumping place at 134th Street was obviously dangerous if ice were running which was to be anticipated and provided against in the winter season.

The tug upon receiving the desired assurance, it is said, made fast to the scows with two hawsers, of about 100 feet in length. The

tow was made up tandem, the scows being fastened within a few feet of each other. The Walter J. was next to the last in the tow. The tide at the time was ebb and large quantities of heavy ice were brought down the river.

The destination was down the river but on account of the tide and ice, the tug took a course across but headed somewhat up the river. When the tail of the tow was about 200 feet out from the pier at 134th Street and a little below, the tow was caught in some heavy ice and carried by the tide, which at that place set on the eastern shore of the river, to 132nd Street, where the Walter J. was injured and, with another scow, was left while the tug took the others to their destination.

The libellant claims that the tug is responsible because she was not of sufficient power to control or handle the scows.

The tug claims that the risk from the ice was assumed by the city and that the lines of the Walter J. were insufficient.

The tug was of ample power for ordinary towing of 4, or more, scows. There is no evidence to support the claim of insufficient lines. The injury was caused by the ice in the river and the question to be determined is, was the tug, the city, or both, responsible for it?

The exact relations of the city to the scow are not shown by the evidence but it appears that she was in the employ of the city and it is contended, in its brief, that the only liability of the city was for the ordinary care due from a bailee for hire. Assuming that the contract was, as contended by the city, it was incumbent upon the city in the exercise of its duty not to leave the scow exposed to obvious danger from the ice. In taking her away from 134th Street, the city used the tug as an instrument. The tug was apparently not to blame for what followed. She had no lookout, but the absence of one was not charged as a fault and was seemingly immaterial. She was apparently doing the best she could under difficult circumstances. I do not hold the city because of any contract on its part with the tug to assume the risk of the towing but because the owners were entitled to more care of the boat than was shown when it was moored, or suffered to remain, in the dangerous locality at 134th Street. The liability turns upon the bailee's undertaking to use ordinary care of the property in its custody. *Gannon v. Consolidated Ice Company*, 91 Fed. 539, 33 C. C. A. 662; *Smith v. Booth* (D. C.) 110 Fed. 681, 684; *W. H. Beard Dredging Co. v. Hughes* (D. C.) 113 Fed. 680, affirmed 121 Fed. 808, 58 C. C. A. 192.

The libel is dismissed as to the tug and the libellant will have a decree against the city, with an order of reference.

UNITED STATES v. GEO. HALL COAL CO.

(Circuit Court, ... D. New York. January 5, 1905.)

CUSTOMS DUTIES—BOARD OF GENERAL APPRAISERS—JURISDICTION—REPAIRS ON VESSELS.

The action of a collector of customs in assessing duty on the cost of repairs of vessels, as provided in section 3114, Rev. St. (U. S. Comp. St. 1901, p. 2032), is subject to review by the Board of General Appraisers, under the provisions of section 14, customs administrative act of June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], giving said board jurisdiction to review decisions of collectors of customs "as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage)."

On Application for Review of a Decision of the Board of General Appraisers.

The decision in question sustained protests by the Geo. Hall Coal Company against the assessment of duty by the collector of customs at the port of Rochester.

Charles H. Brown, U. S. Atty.

George E. Van Keenen, for protestant Geo. Hall Coal Co.

HAZEL, District Judge. Certain vessels enrolled in the United States, owned by the respondent corporation and engaged in transportation of freight from Charlotte and Ogdensburg, in the state of New York, to Canadian ports, were repaired at Kingston, a foreign port. Thereafter, on return to their port of hail, they were held liable by the collector of the port of entry to payment of an ad valorem duty of 50 percentum of the costs of repairs in such foreign port, including the expenses of dockage. The owner protested in writing against the action of the collector upon the ground that a duty on dockage was an unauthorized exaction, not contemplated by section 3114 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 2032], under which section the duty was assessed. The decision of the Board of General Appraisers upon this point was favorable to the owner of the vessels. It held that the expenses of docking a vessel while undergoing repairs in a foreign port is not subject to the payment of a duty. From such decision the United States has filed its petition for review, and contends for the single proposition that the board were without jurisdiction to review the decision of the collector, since the duties were not chargeable upon an importation of merchandise. This proposition, in view of section 3114 of the Revised Statutes, is untenable. The cases cited (*Ex parte Fassett*, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087, and *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937) are inapplicable. The question in those cases was whether a vessel brought from abroad is an imported article, within the meaning of the tariff laws. In the *Fassett* Case it was substantially held, *inter alia*, that the jurisdiction of the board of general appraisers to review a decision of the collector, in the absence of any other provision giving the collector original authority to levy a duty, was limited to classifications of imported merchandise; and it was further held, in effect, that the col-

lector under the customs revenue laws had no power to hold the yacht (*Conqueror*) dutiable, it not being an article of merchandise imported from abroad. It will be observed from a reading of these cases that the question here is quite distinguishable. Congress has made appropriate provisions for charging a duty for the equipments or the expenses of repairs made in a foreign port upon a vessel licensed under our laws. Such being the provision of the statute, no doubt is entertained by the court that the customs administrative act of June 10, 1898, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886], confers jurisdiction upon the board by sections 14 and 15 to review the decision of the collector. Clearly, the intention of Congress was to vest the board with power to review the decision of the collector as to all collections of duties which he may be legally authorized to impose upon the "imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage, etc.);" The language just quoted, which is a part of section 14, considered in connection with section 3114, under which the duty was assessed, would seem to be sufficiently comprehensive to clothe the board with power and jurisdiction to review all duties on imports assessed by a collector. In *The Conqueror*, supra, the Supreme Court again passed upon the question presented in the *Fassett Case*, viz., whether a vessel was taxable under the tariff laws, on the theory that such a vessel was an article of importation. The court there stated that the law does not mention ships or vessels *eo nomine*; that vessels were *sui generis*, and therefore not within the general scope of the tariff act. Here, as we have seen, Congress has specifically provided for taxation of equipments of a vessel or any part thereof, as well as the expenses of repairs made in a foreign country, and the phraseology of the customs administrative act would seem to be sufficiently plain to give the board of general appraisers jurisdiction to review the action of the collector in this class of cases.

The decision of the board is sustained.

WHITE SWAN MINES CO., Limited, v. BALLIET et al.

(Circuit Court, S. D. Iowa, C. D. February 10, 1905.)

JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—FORMAL PARTIES.

To a bill in a federal court seeking to establish a trust in favor of complainant corporation in money alleged, in effect, to have been embezzled from it by one of its officers, and deposited by him with defendants, by whom it is still held, such officer is not an indispensable party, but, if joined, is only a formal party, whose presence will not defeat the jurisdiction of the court, although he is a citizen of the same state as complainant; the requisite diversity of citizenship being shown between complainant and the other defendants.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 857.

Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.]

In Equity. On demurrer for want of jurisdiction.

Berryhill & Henry, for complainant.
Carr, Hewitt, Parker & Wright, for defendants.

McPHERSON, District Judge. That this court is one of limited jurisdiction need only be stated, without argument, and without citation of any of almost innumerable authorities; and it can be said with like emphasis that in doubtful cases the doubt is to be solved against jurisdiction being entertained. While there are nearly thirty distinct classes of cases in which this court will take jurisdiction, there are but two classes comprising nearly all of the cases that come before United States courts: The one involves what is called a "federal question"—cases presenting questions under treaties, a federal statute, or a provision of the federal Constitution. As there is no sort of claim that this case is by reason of a federal question, it merits no discussion. The other class of cases so frequently arising is that of diverse citizenship, and plaintiff claims the case at bar to be of that class. To be such a case, the following must be present: (1) It must be a case of a civil nature; (2) \$2,000 in value must be in controversy; (3) the plaintiff must be a citizen of one state, and all the defendants of one or more other states. In the case at bar, plaintiff is a citizen of California; that is to say, it is a corporation organized under the laws of that state. Defendants Whisenand and the bank are citizens of Iowa. But defendant Balliet is a citizen of California. So that plaintiff and one defendant are citizens of the same state. And the jurisdiction of this court depends upon the question as to whether Balliet is only a formal party, because the authorities are that the plaintiff has the right to join a person as defendant, who is a citizen of California, provided such person is a formal party only. But if such person is a necessary party or an indispensable party, then such joinder defeats the jurisdiction of this court. Therefore the question is, shall Balliet be considered a formal party only, or shall he be held to be either a necessary or indispensable party? The defendants Whisenand and the bank, by demurrer to the bill, insist that Balliet is both a necessary and indispensable party. Another but equally certain way to state the case is, can this court grant a decree without the presence of Balliet?

The bill charges the following as facts: From March, 1900, to March, 1904, Balliet was treasurer and general manager and a director of the complainant corporation, and from March, 1900, to March, 1902, he was secretary, and from March, 1902, to March, 1904, president, of the company. In May, 1902, in the District Court of this district, Balliet was convicted of a crime, and a judgment and sentence rendered against him. He sued out a writ of error to the Circuit Court of Appeals for this circuit to reverse said judgment, and gave a bond in penalty of \$2,500, with defendant Whisenand as his surety. To protect his surety, Balliet took \$2,500 of the moneys of the corporation, and in which he had no interest, and deposited the same in the defendant bank to the credit of Whisenand, the manager and cashier of the bank, which money is still in the hands and under the control of the bank and Whisenand. The deposit of said money with Whisenand was against public policy, and Whisenand has no interest therein. The prayer is that said fund be declared a trust fund, and that the bank and

Whisenand be decreed to hold it in trust for complainant. The bill does not allege what became of the writ of error. But as judge of the District Court, I know the said judgment was reversed, since which time Balliet pleaded guilty, and is now undergoing his sentence. Whether, as acting judge of this court, I take judicial notice of such fact, I do not stop to inquire. Nor is it necessary.

On this point the bill alleges (1) that, as such officer, Balliet appropriated said money; (2) that the money was the property of the corporation; (3) he has never accounted for the same, or any of it. The meaning of all which is that Balliet embezzled the money, and that the bank and Whisenand now have it, and that it belongs to complainant. Of course, I am only speaking of what the bill charges. And if those charges are true, then the question is, is the embezzler either a necessary or indispensable party in an action to recover the money from one having possession and without right? If Balliet had had any ownership in the money, or if he had had the right to use it as his own, and had deposited it with Whisenand, then Whisenand could surrender it only to Balliet, or on his order; and, before the court could otherwise order, both Balliet and Whisenand should be before the court. But under the allegations of the bill, Balliet never owned it. He had no right whatever to use it for his personal ends. I can read the bill in no other way than that Balliet embezzled the money, and that he has no right whatever to any of the money. And if one embezzles or steals my money, and I can trace it to another, who at least no longer holds for a consideration, I cannot believe that, to obtain a recovery, I must join the embezzler as a defendant. It may be that it is proper to join Balliet as a formal party. But I conclude that the case can go to decree without the presence of Balliet. And if the case, on answer and the evidence, should result in a decree in favor of plaintiff, Balliet, after notice to defend for Whisenand, could not recover from him. Of course, there are no allegations that Whisenand or the bank knew whose money it was, and neither is subject to the slightest criticism for having received it. But that does not stand in the way of a recovery against them if the allegations of the bill shall be sustained by the evidence.

The demurrer will be overruled.

In re ISAAC PRAGER & SON.

(District Court, N. D. West Virginia. January 11, 1905.)

BANKRUPTCY—DISCHARGE—GROUNDS OF OBJECTION.

Bankrupts who made a general assignment two years before the enactment of the bankruptcy act, and were not thereafter engaged in any business prior to the filing of their petition in bankruptcy, cannot be denied a discharge on the ground of a concealment of property at the time of the assignment, not shown by objecting creditors to have been in their possession at the time of the filing of the petition, nor because of their failure to keep books of account after they ceased doing business.

In Bankruptcy. On application for discharge.

W. N. Miller, for bankrupts.

H. P. Camden and J. G. McCluer, for petitioners.

JACKSON, District Judge. On the 11th day of May, 1901, the application of Isaac Prager & Son was referred to George W. Johnson, a referee in bankruptcy, to pass upon the petition of the applicants for their discharge. The referee, having executed the order of the court and filed his report, recommended that the bankrupts should be granted an order of discharge. Exceptions were filed by the creditors.

There are two grounds of opposition to the discharge of the bankrupts under Act July 1, 1898, c. 541, 30 Stat. 544-566 [U. S. Comp. St. 1901, pp. 3418-3452], with the amendment of 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797-801 [U. S. Comp. St. Supp. 1903, pp. 409-418]): First. That the bankrupts have committed an offense punishable by imprisonment, as provided in the act. Second. That the bankrupts, with fraudulent intent to conceal their true financial condition in contemplation of bankruptcy, failed to keep books and accounts of their true financial condition, as required, from which their true condition might be ascertained.

There is not evidence sufficient to sustain the charge that the bankrupts in this case have committed any offense that is punishable by imprisonment, in making false returns or false affidavits to their returns.

The main ground that seems to be insisted upon in this case is that the bankrupts have not kept books of account and records, as required by the statute, showing their true condition at the time they filed their petition in bankruptcy. In support of this position, it is alleged in 1896 the bankrupts made a general assignment; that they had in their possession, possibly, large sums of money. There is some evidence tending to show that they had converted some of their property into cash; but, in my view of this case, that has nothing to do with the question before this court. The bankrupts may have acted ever so corruptly at the time of making the assignment, but it does not follow—and there is no evidence to show it—that at the time they filed their petition they had any such assets in their possession. They may have been, at the date of making the assignment, worth a considerable amount of money, and yet in a few days or weeks afterward they may have failed and become bankrupts. I do not understand the bankrupt act contemplates, where a party makes an assignment over two years before the bankruptcy act was passed and took effect, or that Congress intended, that in such case the act should have retrospective effect, to raise issues of fact as to what the condition of the bankrupt was at the time that such an assignment was made, or whether it was evident that he was a bankrupt. The question for the court to consider is, what was the condition of the bankrupts at the time they filed their petition?

One of the main grounds assigned in opposition to the discharge is that they kept no books. It appears that the bankrupts had been out of business for over two years, and, having engaged in no business whatever, as far as the evidence discloses, had no occasion to keep any books. This case is not analogous to *In re Ablowich* (D. C.) to be found in 99 Fed. 81. In that case, one of the bankrupts admitted that he had the books of the company, but did not produce them; and the court thought those books should be produced to show what had become of the assets of the company. In this case there are no books

in existence, except a small memorandum kept by the bankrupt Isaac Prager. The principle laid down in the case just cited can have no application in this case, if, in fact, I concur with the learned judge who delivered the opinion in that case. I confess I cannot well see how a man can be charged with fraudulent intent to conceal true financial condition, in contemplation of bankruptcy, nearly three years before the bankrupt act was passed.

There is a good deal in this case to excite the just suspicions of the court as to what became of the assets at the time of the assignment of these bankrupts; but there is not sufficient proof to convince the mind of the court that, at the time of the filing of this petition, the bankrupts had any other property than that which they surrendered in their schedule. The opposition to the discharge is always in the nature of a new suit. It requires proofs of the grounds set out in the specifications in opposition to the discharge. The proofs must satisfy the mind of the court that the grounds assigned in the specifications are true. The burden of the proof rests upon the opposing creditors, who must show by evidence that the bankrupts are not entitled to their discharge. A bankrupt will not be denied his discharge without proof that satisfies the court that he has committed some one of the offenses named in the statute which would justify the court in its action in refusing the discharge.

The finding of the referee is approved.

WEST HARTLEPOOL STEAM NAV. CO., Limited, v. VOGEMANN.

(District Court, S. D. New York. January 26, 1905.)

SHIPPING—DEAD FREIGHT—RIGHT OF RECOVERY UNDER CHARTER.

Where the charter party required a charterer of a steamer to load her to full capacity or pay dead freight, and provided that all matters of such character should be settled on clearance, and on the statement of the first officer, made after examination, that she was loaded to her marks, the captain signed bills of lading for the cargo and delivered them to the charterer, who permitted her to sail on his own time, and although he had sufficient remaining cargo to supply any deficiency, the vessel cannot recover for dead freight on a subsequent claim that she was not fully loaded.

In Admiralty. Suit against charterer for dead freight.

Guthrie, Cravath & Henderson, for libellant.

Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This action was brought by the West Hartlepool Steam Navigation Company, Limited, to recover from Henry Vogemann certain dead freight, based upon an alleged non-compliance with a charter party of the steamer Kirkstall dated January 10, 1903, which was loaded in New York the latter part of January, 1903. The question presented for determination is, whether the vessel was fully loaded or not under the charter party, which provided:

"* * *—Charterers agreeing to load vessel to full draft allowed by Underwriters' Surveyor or Lloyds certificate—failing which dead freight is to

be paid for the number of tons short shipped as shown by the excess buoyancy, payable on right and sure delivery of the Cargo as per Bills of Lading in cash without credit or discount, at current short exchange on London."

The charter also provided:

"2. The whole of said steamer, including alleyways, covered over spaces on deck, peaks, cross bunkers, bridge deck bunkers, if any, deck room, consistent with seaworthiness of the vessel, and all spaces where cargo has been carried before (with the exception only of the captain's and officers' cabins, engine and boiler house, engine room, sufficient coal space for the voyage, the necessary room for the accommodation of the crew) shall be for the sole use and at the disposal of Charterers for cargo, and no other coal, goods or cargo shall be taken on board unless by the written permission of Charterers. All wooden bulkheads to be taken down and carried on deck if required by charterers.

* * * * *

"7. The Master or person appointed by him, shall sign Bills of Lading as presented without prejudice to this Charter, and the freight as per Bills of Lading to be accepted in liquidation of the amount due under this Charter: any difference between Chartered and Bills of Lading freight being settled on clearance—if in Charterers' favor, by Captain's draft payable three days after arrival at Port of Discharge; if in Steamer's favor, in cash less cost of insurance. Charterer's liability to cease on cargo being shipped and difference of freight and or demurrage, if any, paid, Steamer having a lien on the cargo for freight."

The steamer began loading at the Central Railroad's pier 6 or 7, Manhattan, the 19th of January, and finished the 25th about 9 o'clock P. M., at the elevator slip in Erie Basin, Brooklyn. She sailed the next morning. On the evening of the 25th two of the respondent's representatives went to the steamer for the purpose of having the bills of lading signed and adjusting any question of dead freight. They received definite instructions that if any question of dead freight was left open the steamer should not sail that evening. These instructions were given because the captain of the steamer claimed she would take about 150 tons more than her marks would entitle her to. Under the provisions of the charter party and the rules of the New York Produce Exchange, referred to in the charter party, the charterer had until the following afternoon for the purpose of clearance and the steamer could have been held till then without expense to the charterer.

The chief officer of the steamer was sent by the captain with one of the respondent's representatives to ascertain the draft of the steamer. He reported to the captain that she was down to her marks and the bills of lading were then signed by the master. Nothing was said at the time about a full cargo not having been furnished by the respondent. About 9 o'clock the next morning word was received by the respondent from the captain through the dock people, that the ship was 2 or 2½ inches off her marks. The steamer had already started for sea when the word was received. It is testified that she had considerable space for cargo upon her decks at the time of the examination of the draft and that the respondent had a sufficient quantity of cargo then ready for shipment to supply any deficiency but did not attempt to ship it because of the admission that she was loaded to her marks and it was actually shut out.

The libellant contends it should succeed because of certificates granted by underwriters' surveyors but it appears that, in all probability, the

surveyors had no personal knowledge of the matter, while the chief officer's report was based upon an actual inspection of the steamer's marks just before sailing. The chief officer's statement was accepted by the master and relied upon by the respondent's agents. This in connection with the provision of the charter party that any difference between chartered and bills of lading freight should be settled on clearance, seems to determine the controversy in the respondent's favor. If the captain had claimed he was short of cargo when the bills of lading were signed, the matter could have been adjusted the next day while the steamer remained in port on the ship's time without expense to the charterer. The original dispute with respect to the ship's capacity was apparently amicably adjusted when the bills of lading were signed and the steamer permitted to go to sea upon the charterer's time and it would be unjust to permit a recovery now even if the facts warranted it, which they seemingly do not, the claim being based upon the underwriters' certificates, which are of doubtful correctness.

Libel dismissed.

FEDERAL INS. CO. et al. v. STARIN.

(District Court, S. D. New York. January 27, 1905.)

COLLISION—BARGE IN TOW AND ANCHORED YACHT—ANCHORAGE GROUNDS.

A steamer *held* in fault for a collision between her tow and an anchored yacht on the anchorage grounds in East river in the evening, and the yacht *held* not chargeable with contributory fault because she was not ringing fog signals, in the absence of clear evidence that the weather conditions were such as to require it.

In Admiralty. Suit for collision.

Black & Kneeland, for libellants.

Avery F. Cushman and James D. Dewell, Jr., for respondent.

ADAMS, District Judge. This action was brought by the Federal Insurance Company and the Sea Insurance Company to collect from John H. Starin the losses paid by them as insurers of the yacht *Niagara*, which was injured on the 6th of June, 1903, by a collision with the barge *Starina*, in tow of the steamer *Laura M. Starin*, both vessels being then owned by the respondent. The *Niagara* was at anchor off 28th or 29th Street, East River, on anchorage ground, on about 45 fathoms of chain, some 700 feet from shore, and the *Laura M. Starin*, with the *Starina* on her starboard side, and another barge, the *Nelson*, on her port side, containing an excursion party, were bound from Locust Grove, Cow Bay, for the respondent's pier No. 13 North River. The collision occurred about 10:45 o'clock P. M. The tide was ebb and carried the stern of the yacht to about abreast of 25th or 26th Street. The stern of the *Starina* struck the yacht's starboard quarter, doing some damage to her and to a small boat hung on davits at the side.

The yacht *Rambler* was also anchored in the vicinity, a little further down the river than the *Niagara* and about 400 feet further out in the stream.

The respondent defends on the ground that the yacht had no lights which were visible to those on the Starin or barges and was sounding no fog signals although the weather had been before and was at the time of the contact rainy, foggy and thick.

It appears that the Niagara was exhibiting the regulation riding lights. Having been run into by a moving vessel upon anchorage ground, it only remains to consider whether the Niagara was also in fault for not complying with the bell regulations, viz:

"Art. 15. * * *

In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, namely:

* * * * *

(d) A vessel when at anchor shall, at intervals, of not more than one minute, ring the bell rapidly for about five seconds."

Act June 7, 1897, c. 4, 30 Stat. 99 [U. S. Comp. St. 1901, p. 2880].

It is claimed on the Niagara's behalf that the weather conditions at the time of or just before the collision, though rainy, were not such as to require the ringing of a bell; that shore lights could be distinctly seen as well as lights on the water fully a mile away; that the ferries at 34th Street and 23rd Street were not using fog bells nor other vessels in the vicinity.

The Starin claims that it got thick and misty just after she passed through the Gate and was on the west side of Blackwell's Island and continued so; that she then slowed her speed and rang the statutory bells, which she continued up to and subsequent to the time of the collision.

There is no outside testimony and it is one of those cases where the question of actual necessity for the ringing of a fog bell is dependent upon the testimony of witnesses from the colliding vessels. The Starin and her tow approached sidewise, heading towards Brooklyn, and her lookouts, such as they were, had a view forward only, they appeared to have the Rambler in view and were navigating to avoid collision with her. As has already been stated, the Niagara and boat were struck by the stern of the starboard barge and it was not known on the Starin or tow at the time that a collision had taken place. The quartermaster on watch on the yacht shouted to the steamboat to go ahead but the hails were not heard, probably because of the noise of music on the barges. It may well be doubted if the ringing of a bell would have been any more effective than the shouting under the circumstances. Not that the shouting could be deemed a substitute for the statutory requirement of a bell but that the failure to see the lights and hear the shouts is significant of the Starin's want of attention. It seems a case in which any doubt as to the necessity of a bell should be resolved against the Starin. Her faults were sufficient to account for the collision and clear proof of a contributing fault on the part of the yacht is necessary to impose any part of the burden of the collision upon her. The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The Minnie, 100 Fed. 128, 40 C. C. A. 312.

Decree for the libellants, with an order of reference.

THE KAISER WILHELM DER GROSSE.

(District Court, S. D. New York. February 10, 1905.)

SHIPPING—NEGLIGENT SPEED OF STEAMSHIP PASSING DOCK—SWELL CAUSING LIGHTER TO DUMP DECK LOAD.

A large steamship leaving New York, which passed near a dock on Staten Island at a speed of not less than 12 miles, so that her swell caused a lighter discharging at the dock to dump a large part of her deck load of mahogany logs, some of which were lost, *held in fault*, and liable for the loss and for damage to the lighter.

In Admiralty.

Avery F. Cushman, for libellant.

Choate, Hanford & Larocque, for claimant.

ADAMS, District Judge. This action was brought by the Commercial Lighterage Company against the steamship Kaiser Wilhelm der Grosse, to recover the damages said to have been caused by the dumping of a part of a cargo of mahogany logs from the deck of the lighter Continental, owned by the libellant, at Williams Dock, Stapleton, Staten Island, owing to the steamship's swells when she was passing out to sea in the morning of the 24th of November, 1903, also to recover some damages done to the lighter in the same way.

It is alleged by the libellant that the steamship was proceeding to sea at a high and negligent rate of speed, making large swells which came to the place where the lighter was unloading and caused her to break loose from her moorings and dump a part of her cargo, besides injuring the lighter.

The claimant denies the allegations of the libel to the effect that the steamship was in fault. It avers that the steamship proceeded to sea that morning at an exceedingly low rate of speed that did not and could not possibly cause any damage to the lighter or her cargo, or to any other shipping but that if any damage was sustained by her, or her cargo, the same was solely caused by the carelessness and negligence of those in charge.

A number of interrogatories were annexed to the answer, which elicited the following information from the libellant, viz.: that the lighter contained 203 logs, averaging in weight 2500 pounds; that 126 logs were dumped and 18 lost; that the crew of the lighter consisted of four men, namely, a captain, a mate, a deck hand and an engineer; that 3 logs had been discharged at the time of the accident; that the lighter commenced discharging about 11 A. M.; that the cargo was taken aboard at 6th Street, East River, and towed to Staten Island at 7 A. M. on November 24th, 1903; that the lighter was built in August, 1901, and had been repaired in November, 1903; that the dimensions were 95 feet in length, 31 feet in width and 9½ feet in depth.

It appears from the testimony that the logs were all loaded upon the deck of the lighter in 4 or 5 tiers, altogether 12 to 14 feet high. This method of piling was called "cribbing." The discharging was not commenced until the lighter went to a berth at the upper end of the lumber wharf, facing the bay, and she was then fastened thereto, the starboard side to the wharf, by a spring line aft and a breast line forward. The

deck of the lighter was probably 7 or 8 feet below the top of the wharf, where the logs were to be discharged. The discharging was to be done by means of a boom 60 feet long, stepped into a mast 65 feet high. The boom was 11 feet above the deck. When three logs had been unloaded, the lighter careened to the starboard and many of the logs went overboard, all of which were recovered, excepting 18. The lighter was also damaged somewhat by the catastrophe.

The libelled steamship started to sea that morning about 10:15 o'clock. It is testified on her behalf that she passed quarantine, about a mile below the place in question, about 10:50. Her speed was testified not to have been more than 10 knots at any time that morning before she reached a point opposite the place of the accident and she had made several reductions of speed on account of passing tows.

The whole distance from the starting place of the steamship to the place of the accident was about 7 miles. It took her about 9 minutes to get under way and she had therefore about 36 minutes to cover the distance from the place of starting, which shows a speed of at least 12 nautical miles per hour, without allowing for the reductions she made for other vessels. Her speed, therefore, must have exceeded what was prudent, taking the rights of other vessels into consideration.

There is some discrepancy between the time of the steamship's passing and the time of the accident, which is said to have been after 11 o'clock, but no accurate observations were made of the time on the lighter and such difference cannot overcome the effect of the positive testimony of several witnesses that the accident was the result of swells from this steamship shortly after she passed, though it appears that she was quite a mile away.

The conclusion reached is that the steamship in passing did create dangerous swells which caused the accident. The liability for such damage is well settled. *The New York* (D. C.) 34 Fed. 757; *The Connecticut* (D. C.) 45 Fed. 374; *The Columbia* (D. C.) 55 Fed. 766, affirmed 61 Fed. 220, 9 C. C. A. 455; *The New Hampshire* (D. C.) 88 Fed. 306; *The Havana* (D. C.) 100 Fed. 857.

Decree for the libellant, with an order of reference.

THE CHICAGO. THE PENCOYD. THE ASHBOURNE. THE TOWNSEND.

(District Court, S. D. New York. December 27, 1904.)

COLLISION—FERRYBOAT AND TOW—EXCESSIVE SPEED IN FOG.

A ferryboat, which, on leaving her slip in Jersey City in a dense fog, ran into and sank a canal boat constituting a part of a large tow passing in front of the piers bound to a wharf in the vicinity, *held* in fault for the collision on the ground of excessive speed and because she did not hear the fog signals of the tugs. The tugs also *held* in fault for not having sufficient power to handle the tow with reasonable dispatch, thereby obstructing the ferry slips.

[Ed. Note.—Collision rules, speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

In Admiralty. Suit for collision.

James J. Macklin, for libellant.

Robinson, Biddle & Ward, for ferry boat Chicago.

James Armstrong and Pierre M. Brown, for tugs Pencoyd, Ashbourne and Townsend.

ADAMS, District Judge. This action was brought by the Bowns Pattison Transportation Company, the owner of the canal boat Eliza, to recover the damages sustained through the sinking of that boat, with cargo of coal, on the 2nd day of March, 1904, by collision with the ferry boat Chicago, off the Pennsylvania Railroad Company's ferry slips, Jersey City. The tugs were brought in by petition. A dense fog prevailed at the time. The tide was flood.

The Eliza was the outer starboard boat of the 4th or 5th tier of a flotilla of 24 boats of the Reading Railroad Company, bound from Port Johnson to points in the East and North Rivers, in tow of the tug Ashbourne, on a hawser, with the tugs Pencoyd and Townsend to assist. When the upper bay was reached, the tow was about to be broken up but a dense fog came on and it was concluded by the tugs in charge that it would be better to defer distribution of the boats until the fog should lift. The tow accordingly kept on for the Packer Dock, Jersey City. This was passed in the fog and the locality of the tow not made out until it was in the vicinity of the ferries of the Pennsylvania Railroad Company, a few piers above. The Ashbourne then turned the tow through the west to the south and when straightened out down the river, a few hundred feet from the ends of the Jersey City piers, finding herself unable to hold the tow in the tide, she called upon the other two tugs for assistance. The three tugs were able to make some slight progress with the tow against the tide, probably at the rate of about a half a mile per hour. The result of the turning of the tow and the strong flood tide was that the tow for some time, at least half an hour, remained opposite the slips. Regular fog signals were blown by the tugs up to the time of the collision.

During the time the tugs were manoeuvring, the ordinary operation of the ferries was interrupted by the fog and no regular trips were made by the boats. The Chicago should have left New York at 6:10 in the morning but did not get started until 6:16. She returned to New York and left again at 8:01, arriving at Jersey City at 8:12. She left Jersey City at 8:36 and this was the collision trip. On this occasion she started from her slip under a full speed bell but changed it to slow after going about 100 feet and continued that speed, according to her testimony, up to a few seconds before the collision. She was evidently going at a higher rate of speed than was prudent, in view of the dense fog, because, notwithstanding her reversed engine, she cut nearly through the libellant's boat, which was practically new and substantially built, and her cargo of about 500 tons of coal.

The Chicago did not hear the tugs' fog signals and the first warning of the tow being in her course, was some shouts from the boats in tow for the ferry boat to go back. The extent of the injury seems scarcely reconcilable with the very low speed at which the ferry boat claims she was going and, moreover, she was in fault for failing to hear the fog signals, which it is clearly shown were blown by the tugs

and heard on the tow, even aft of the tier in which was the injured boat. Although there is no obligation on the part of the ferry boats to suspend their navigation on account of a fog—The Orange (D. C.) 46 Fed. 408—yet it is incumbent on them to proceed cautiously, and in this case it was necessary that special care should be taken, in view of the fact that the presence of the tow in the vicinity of the slips was known to the boats going in and out, including the Chicago. The tow had been avoided by two ferry boats, the Newark and the Washington, as well as by the Chicago in entering her slip shortly prior to the collision, and there seems to be no good reason, why the same caution should not have been observed when she left again for New York.

The tugs were brought in by the railroad company upon allegations: (1) that the fog signals required by law were not blown; (2) in endeavoring to handle the tow with only one tug and (3) in proceeding too near the pier head line on the Jersey shore. The first allegation is without merit as the evidence shows that the proper signals were given. The second and third are also without merit, in a strict sense, because three tugs were used and they were bound to a wharf in the vicinity and in that way justified in being in front of the slips. The tugs, however, were not warranted in obstructing the ferry slips an unreasonable length of time, even in a fog, and they must be held to have participated in the negligence which brought about the disaster, because of insufficient power to handle their tow with proper despatch.

Decree for the libellant against all the defendant vessels, with an order of reference.

McWILLIAMS et al. v. CITY OF NEW YORK et al.

(District Court, S. D. New York. December 30, 1904.)

1. CORPORATIONS—LIABILITY FOR NEGLIGENCE OF PREDECESSOR.

A corporation which succeeded to the business and all of the assets of a former company, and was to a large extent identical in membership, held responsible for damages caused by the negligence of its predecessor.

2. SHIPPING—VESSELS MOORED TO OTHERS—LIABILITY FOR SALVAGE SERVICES.

Where a scow owned by one respondent was made fast to one owned by the other respondent lying at a wharf, and the danger from the additional strain was obvious, it was incumbent on both to provide against it by running additional lines to the bulkhead; and where, through their failure to do so, they went adrift, salvage services rendered to the inner scow will be charged against both.

In Admiralty. Suit to recover salvage.

James J. Macklin and La Roy S. Gove, for libellants.

John J. Delany and E. Crosby Kindleberger, for the city of New York.

Frederick W. Park, for the Brown & Fleming Contracting Company.

ADAMS, District Judge. This action was brought against the City of New York by James McWilliams and John Garrett, as owners of the steam tug E. Luckenback, to recover salvage compensation for services rendered on the morning of December 25th, 1901,

in rescuing the city's scow C, then adrift in the East River, in the vicinity of Hell Gate, from a position of some danger. The scow, with its cargo of stone, was worth about \$1,900.

The city brought in the Brown and Fleming Contracting Company to meet the salvage demand, upon the allegation, that while the C was securely fastened at the foot of 39th Street, East River, together with another city scow, called the W, two scows of the contracting company were brought alongside and fastened to the city's scows, notwithstanding the protest of the employees of the City's Department of Docks and Ferries. It was further alleged that early in the morning of December 25th, a tug of the same company came to take away the company's scows and removed them so negligently and carelessly that the city's scows were set adrift. It was further alleged that the company was responsible for any salvage earned by the Luckenback, under the practice of the court in analogy to the 59th Rule.

The contracting company answered the petition with denials in detail and alleged that the respondent, on the 27th day of July, 1903, purchased the assets of the Brown and Fleming Company, without notice of the claim of the libellants and alleged that the libellants and the city had been guilty of gross laches in prosecuting the alleged claim and further that if any scows belonging to the city were loose at the time alleged in the libel and petition, that they went adrift solely through carelessness and negligence on the part of the servants of the city.

The libel was filed on the 10th day of March, 1904, and the answer and petition on the 24th day of March following.

No point of laches was raised by the city. At the end of the trial, I concluded that the libellants had rendered meritorious services and should have an award of \$200. The question then arose by whom was such sum to be paid and decision was reserved upon that point, as it did not clearly appear that a case had been made against the Brown and Fleming Company. Further testimony has since been taken and the city now strongly urges that the decree should be against that company because, it contends that there was positive negligence on the part of Brown and Fleming, the predecessors of the respondent company, in mooring their scows alongside of the city's scows, without putting out extra lines or attaching their own scows in any way to the bulkhead.

The contention proceeds upon the theory that the present respondent is responsible for the negligence of Brown and Fleming and I think the claim is correct that the corporation, so far as it absorbed the assets of the old company remained responsible for its liabilities. The new corporation is doing the same business as the old company and the companies are in many respects identical; far enough so, in any event, to make the successor responsible in a case like the present. *Brum v. Merchants' Mut. Ins. Co.* (C. C.) 16 Fed. 140.

It appears that the scow C was made fast to the bulkhead between 38th and 39th Streets, East River. Fastened to her, but without any additional lines to the bulkhead, was a scow belonging to

Brown and Fleming, which was tied up to the city scow because the dump of that company in the vicinity was occupied. Both scows subsequently went adrift, in the strong tide prevailing there, because of insufficient fastenings, and C became the subject of the salvage services herein. The danger of the additional strain caused by the Brown and Fleming's scow, was obvious and it became incumbent upon both scows to provide against it. The No. 6 H (D. C.) 108 Fed. 429. Nothing, however, was done, with the result stated. The case is not very strong against the Brown and Fleming scow but sufficient to impose a portion of the liability upon the respondent company in view of the prima facie case made against it and the absence of testimony on the respondent company's part.

The defense of laches would probably be a good one if the testimony showed any deficiency of proof by reason of the delay but the respondent company did not make it appear that it was prejudiced by the lapse of time. In fact, it voluntarily produced no testimony upon any branch of the case but defended in a manner which tended to create the impression that it sought to succeed through the absence of proof. Enough was produced, however, to show some liability, which there is nothing in the case to meet.

The amount of salvage will be equally divided between the city and the respondent company. Decree accordingly.

THE ASTRAL.

(District Court, E. D. Pennsylvania. February 16, 1905.)

No. 58.

SEAMEN—ABUSE BY SUBORDINATE OFFICERS—LIABILITY OF VESSEL IN DAMAGES.

A ship is not liable to a seaman in damages because of personal injuries sustained through the failure of the master to maintain proper discipline and to protect the libelant from abuse at the hands of subordinate officers.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, §§ 195-203.]

In Admiralty. Suit in rem by seaman to recover damages for personal injuries.

Joseph Hill Brinton, for libelant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. The libelant was a seaman on board the bark Astral during a voyage from Honolulu to Philadelphia, and has proceeded in rem against the ship to recover damages for injuries suffered by reason of the master's neglect of duty. The cause of action is thus set forth in the libel:

"That during the said voyage, on or about the 5th day of May, A. D. 1904, at about 7:30 o'clock a. m., when the vessel was about ten days out from Honolulu, the libelant was on deck performing his duties, and was approached by Charles Rock, first officer, and was accused by him of being impertinent, and without further cause or provocation was violently kicked in the stomach by the said officer, causing him great pain and suffering. The libelant there-

upon went to the said master, and protested against the treatment of the said mate, and requested the master's interference in his (the libelant's) behalf, and further requested that the master log the mate as evidence of the said unjustifiable assault. All of this the captain refused to do, but, on the contrary, and before the libelant had finished his complaint, the mate approached the libelant, and in the presence of the captain threatened the libelant with grievous bodily harm if he did not go forward at once.

"That later, on or about the 25th day of July, A. D. 1904, while the said vessel was off the Brazilian coast, at about 8 o'clock in the evening, the said first officer directed the libelant to repair to the poop deck, and, as a punishment, walk up and down the bridge during the night watches during the remainder of the voyage. The libelant thereupon requested to know why he should comply with such an unusual order. The first officer gave no response, but without further cause or provocation violently struck the libelant in the face with his fist, knocking him against the railing of the bridge, inflicting severe pain and suffering, and in a most violent manner continued his assault upon the libelant. During said assault the master of the said vessel was watching the assault from the chart room, and failed to interfere on behalf of the libelant. When requested so to do, and to again enter the facts of the assault in the log book, he refused to do so, but encouraged the mate in his unlawful assaults.

"That the libelant during the entire voyage, or the greater part thereof, was continuously threatened by the said first officer with violent assaults, of which the said master had knowledge, but he failed to suppress."

Assuming these averments of fact to be established by the evidence, the important question arises whether an action against the ship can be maintained for the master's breach of duty. That an action in personam would lie against the mate and also against the master cannot be denied, but this does not answer the question just stated. An action in rem for a similar neglect of duty was sustained in *The Marion Chilcott* (D. C.) 95 Fed. 688, and *The Lizzie Burrill* (D. C.) 115 Fed. 1015; but these cases were both decided before the appearance of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, and must, of course, give way to the ruling of the Supreme Court. After an elaborate consideration of the cases upon the subject of a seaman's rights if he falls sick or is injured in the service of the vessel, Mr. Justice Brown announced the court's conclusions in this language:

"Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

"1. That the vessel and her owners are liable, in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

"2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807.

"3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

Since the injuries received by the libelant were sustained in consequence of the master's neglect of duty, the question of the ship's liability seems to be answered by paragraph 4 from the opinion of the

Supreme Court. I am unable to draw a tenable distinction between the master's fault in giving a wrong order—which was the negligence complained of in *The Osceola*—and his fault in failing to maintain proper discipline on the ship and to protect members of the crew from abuse at the hands of subordinate officers. Neglect of duty is negligence, and for negligence on the part of the master it has now been authoritatively decided that the ship and her owners are not liable in an action of this kind.

The libel must be dismissed.

In re BOGEN.

(District Court, S. D. Ohio, W. D. June 4, 1904.)

No. 3,485.

BANKRUPTCY—PREFERENTIAL TRANSFER—NOTICE OF CREDITORS.

The owner of certain notes secured by chattel mortgage, duly filed, transferred them without intent to defraud his creditors, and the assignment was indorsed on the mortgage, and the mortgage and the assignment indorsed thereon were duly recorded. *Held*, that the failure of the bankrupt's creditors to ascertain the fact of such assignment was chargeable to their own negligence, and such transfer was insufficient ground for the filing of a petition in bankruptcy more than four months thereafter, under Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing for the filing of a petition against an insolvent who has committed an act of bankruptcy within four months of the commission of such act, which time shall not expire until four months after the date of the recording of such transfer, when the transfer was made with the intent of giving a preference, if by law such recording is required, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property; the possession required under the law being, as applied to intangible forms of personal property, such possession as is usual and ordinary.

In Bankruptcy. Submitted on the pleadings and the evidence.

Edwards Ritchie and Coffey, Mallon, Mills & Vordenberg, for petitioner.

Stephens, Lincoln & Stephens, for respondent.

THOMPSON, District Judge. October 2, 1903, Boden made a preferential transfer of three promissory notes to Field, a creditor, and March 9, 1904, other creditors filed a petition in bankruptcy against him, setting up this transfer as an act of bankruptcy, both as a preference and as a conveyance to defraud creditors.

The evidence fails to show that the transfer was fraudulent, but it is claimed that it does show that Field did not take notorious, exclusive, or continuous possession of the notes more than four months prior to the filing of the petition in bankruptcy. The evidence shows that the notes were made October 1, 1903, and were payable as follows: One, November 1, 1903; one, January 1, 1904; and one, February 15, 1904—and that a chattel mortgage was given to secure them, which was duly filed in compliance with the laws of Ohio; that Bogen assigned the chattel mortgage to Field; that the assignment was indorsed

upon the mortgage, and recited that the notes had been transferred to Field; that the first note was paid to Field at maturity; that the other notes were received by Field in Wisconsin, where he resided, October 6, 1903; and that he sold them to the Bank of Wassau, Wis., before maturity.

Section 3 of Bankr. Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], provides:

"That a petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property * * * for the purpose of giving a preference * * * if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property. * * *

Assuming that the words "takes notorious, exclusive or continuous possession" apply to the intangible forms of personal property, they must be construed to mean such possession as the property is susceptible of, and such as is usual and ordinary, unaccompanied by acts or conduct tending to conceal its ownership. In *re Woodward*, 2 Am. Bankr. R. 233. Any construction which would place such property on a plane with tangible property would lead to mischievous and serious interference with business and commercial transactions, which it cannot be assumed was contemplated by Congress. Here there was no attempt to conceal the true ownership of the property, and the exercise of reasonable diligence on the part of the petitioning creditors would have disclosed the fact that Field became the owner of these notes October 2, 1903. The creditors knew that Bogen had sold the Kolb Hotel and had taken the purchaser's promissory notes for a part of the purchase money, and through inquiry could have ascertained that these notes were secured by a chattel mortgage, and an examination of the files of the recorder's office would have shown the mortgage, and the assignment thereof indorsed upon it, reciting the transfer of the notes to Field. Their failure to ascertain the fact must be charged to their own negligence, and not to any conduct of Bogen violative of the bankrupt act.

There will be a finding that Bogen was not a bankrupt, and the petition will be dismissed, with costs.

MEMORANDUM DECISIONS.

BUROW et al. v. GRAND LODGE OF SONS OF HERMANN. (Circuit Court of Appeals, Fifth Circuit. January 3, 1905.) No. 1,369. Petition to Revise to the District Court of the United States for the Western District of Texas. Geo. E. Shelley and John T. Duncan, for petitioners. George Willrich, for respondent. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The same matters are involved on this petition as in the case on appeal between the same parties (just decided) 133 Fed. 708. The proceedings sought to be here revised involve questions of mixed law and fact, and it is doubtful whether any relief could be granted under the petition, even if its consideration were not rendered unnecessary by our disposition of the merits adversely to petitioner in the appeal case. The petition is denied.

GOLDENBERG BROS. & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 24, 1905.) No. 3,185. Application for Rehearing. James W. Purdy and Henry G. Ward, for petitioners. D. Frank Lloyd, Asst. U. S. Atty.

PER CURIAM. Application denied, as filed too late. For decision in question, see (C. C. A.) 130 Fed. 108. Note 195 U. S. 634, 25 Sup. Ct. 791, 49 L. Ed. 354, and (C. C.) 124 Fed. 1003.

MEIGS v. LONDON ASSUR. CO. (Circuit Court of Appeals, Third Circuit. February 3, 1905.) No. 15. In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. Samuel Dickson, for plaintiff in error. G. W. Pepper, for defendant in error. Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. The able argument which has been submitted on behalf of the plaintiff in error has had our careful attention, but it has failed to convince us that any error was committed by the Circuit Court in its decision of this case. The learned judge carefully considered it in an opinion which, we think, completely vindicated his conclusion. 126 Fed. 781. Upon that opinion, therefore, the judgment is affirmed.

RIEGELMAN v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. September 23, 1904.) No. 3,327. Appeal from the Circuit Court of the United States for the Southern District of New York. Howard T. Walden, for appellant. Charles Duane Baker, Asst. U. S. Atty.

PER CURIAM. Appeal discontinued. For decision below, see (C. C.) 127 Fed. 493.

SALT v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. November 1, 1904.) No. 3,138. Appeal from the Circuit Court of the United States for the Southern District of New York. Stephen G. Clarke, for appellant. Chas. D. Baker, for the United States. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decision of Circuit Court affirmed, on opinion below. 127 Fed. 890.

UNITED STATES v. ACKER, MERRALL & CONDIT (two cases). **SAME v. HOLTZ & FREYSTEDT**. (Circuit Court of Appeals, Second Circuit. January 16, 1905.) Nos. 3,571, 3,581, 3,602. Appeals from the Circuit Court of the United States for the Southern District of New York. Henry A. Wise, Asst. U. S. Atty. Edward Hartley, for appellees Ackers, Merrall & Condit. Comstock & Washburn, for appellees Holtz & Freystedt.

PER CURIAM. Dismissed on motion of appellant. For decision below, see (C. C.) 133 Fed. 842.

UNITED STATES v. HAGUE. (Circuit Court of Appeals, Second Circuit. October 14, 1904.) No. 3,214. Appeal from the Circuit Court of the United States for the Southern District of New York. Charles D. Baker, Asst. U. S. Atty. Albert Comstock, for appellee.

PER CURIAM. Appeal discontinued. See *In re Steinhardt*, G. A. 4,929, T. D. 23,073, and T. D. 25,466; also *Steinhardt v. U. S.* (C. C.) 121 Fed. 442.

UNITED STATES v. LORSCH. SAME v. LASSNER. (Circuit Court of Appeals, Second Circuit. October 14, 1904.) Appeals from the Circuit Court of the United States for the Southern District of New York. Nos. 3,353, 3,354. Charles Duane Baker, Asst. U. S. Atty. Albert Comstock, for appellees.

PER CURIAM. Appeals discontinued. See *In re Lorsch*, G. A. 5,289, T. D. 24,250, and T. D. 25,463; also *Lorsch v. United States* (C. C.) 119 Fed. 476.

UNITED STATES v. PAGE. (Circuit Court of Appeals, Ninth Circuit. May 2, 1904.) Appeal from the Circuit Court of the United States for the District of Washington. William J. Gibson, for appellee.

PER CURIAM. Dismissed on stipulation. For decision below, see 128 Fed. 317, reversing a decision of the Board of United States General Appraisers (*In re Page*, G. A. 5,247, T. D. 24,112), which affirmed the assessment of duty by the collector of customs at the port of Port Townsend.

ABRAHAM & STRAUS v. UNITED STATES. (Circuit Court, S. D. New York. November 3, 1904.) No. 3,220. On Application for Review of a Decision of the Board of United States General Appraisers. Hatch & Wickes, for the importers. Henry A. Wise, Asst. U. S. Atty.

HAZEL, District Judge. The evidence of the importers is not of sufficient weight to establish that the two pieces of statuary are the production of a professional statuary or sculptor only, and hence the conclusion of the Board of General Appraisers is sustained. In the circumstances, the burden of proof is upon the importers to show that the classification of the collector is improper. The opinion of the Board of General Appraisers states the facts upon which the duty was assessed, and as those facts are not successfully controverted here, nor that the articles come within paragraph 454 of the tariff act (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678]), no reason is apparent for disturbing the conclusion of the board. An order of affirmance may be entered.

GALLICE et al. v. CRILLY. (Circuit Court, E. D. Pennsylvania. January 24, 1905.) No. 21. Overruling Motion for Judgment for Want of a Sufficient Affidavit of Defense.

HOLLAND, District Judge. For the reasons stated in the opinion filed in *Gallice & Company v. Francis J. Crilly*, in the case in this court, April Sessions, 1904, No. 34, 134 Fed. 983, the motion for want of a sufficient affidavit of defense is overruled.

ISRAEL v. ISRAEL. (Circuit Court, E. D. Pennsylvania. February 6, 1905.) No. 24. Overruling Motion for Judgment for Want of a Sufficient Affidavit of Defense. See 130 Fed. 237. Beck & Robinson, for plaintiff. David Wallerstein, for defendant.

HOLLAND, District Judge. The motion for judgment for want of a sufficient affidavit of defense cannot be sustained. The defense set up in the affidavit raises issues of fact which should be submitted to a jury, and, if proven to the satisfaction of the jury, the defendant may be entitled to a verdict, and the questions of law which must be considered by the court can be passed upon more intelligently after a full discovery of all the facts. Motion for judgment for want of a sufficient affidavit of defense is overruled.

JOHN DONAT & CO. v. UNITED STATES. (Circuit Court, S. D. New York. June 4, 1903.) No. 3,180. On Application for Review of a Decision of the Board of United States General Appraisers. Howard T. Walden, for petitioners. Henry C. Platt, Asst. U. S. Atty.

HAZEL, District Judge. Decision reversed, without argument or written opinion. For decision under review, see G. A. 4,876, T. D. 22,843, which affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by John Donat & Company.

THE DORCHESTER. THE THORNHILL. (Circuit Court of Appeals, Fourth Circuit. November 15, 1904.) No. 509. Appeal from the District Court of the United States for the District of Maryland. Robert H. Smith and Daniel H. Hayne (Miles & Gorman, Isaac T. Parks, and S. F. Foutz, on the brief), for appellants. T. Wallis Blakistone and J. Parker Kirlin, for appellee. Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PER CURIAM. This is an appeal from a decree of the District Court of the United States for the District of Maryland, entered July 2, 1903 (121 Fed. 889), by which the American steamship *Dorchester* was held solely to blame for a collision with the British steamship *Thornhill*. The opinion of the court below, in which the facts are fully stated, is found in 121 Fed. 889. The decree complained of is without error, and the opinion of the court below, in reaching the conclusion that the *Dorchester* was wholly to blame, has our approval. Affirmed.

WERNER CO. et al. v. ENCYCLOPÆDIA BRITANNICA CO.

(Circuit Court of Appeals, Third Circuit. January 11, 1905.)

For majority opinion, see 134 Fed. 831.

ACHESON, Circuit Judge (dissenting). I am constrained to dissent from this affirming decree. In my judgment this was not a case for a preliminary injunction. The answers (which at the hearing below at least had the force of opposing affidavits) were fully responsive to the bill and positively negated all the allegations of the bill upon which the complainant's right to equitable relief depended. Moreover, the answers set up very serious matters of defense, which, I think, should have prevented summary relief. Upon well-settled principles prevailing in courts of equity the merits of the case, it seems to me, ought not to have been decided at a preliminary stage upon conflicting *ex parte* affidavits. If there was any infringement of copyright here, that infringement began as early as the year 1890 or 1891, and thereafter was continued uninterruptedly by a well-known publication, which was extensively advertised and was notoriously dealt in and sold throughout the United States. This bill was not filed until December 12, 1903. Under the principles declared by the Supreme Court, this extraordinary delay might well preclude equitable relief, even upon final hearing. *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836; *Godden v. Kimmell*, 99 U. S. 201, 212, 25 L. Ed. 431; *Abraham v. Ordway*, 158 U. S. 416, 15 Sup. Ct. 894, 39 L. Ed. 1036. But be that as it may, there was such apparent laches on the part of this complainant, and its predecessors in title, as should have prevented the summary interposition of a court of equity in awarding a preliminary injunction. I think that it is my duty to quote, in this connection, the following paragraph from the answer of the defendant the Werner Company:

"(33) This defendant, further answering, on information and belief alleges that the several articles contained in the books published by this defendant, which are alleged to infringe the pretended copyrights of the complainants, are new and original articles, especially prepared by competent writers for the Peale edition of the *Encyclopedia Britannica*, and that they have all been published continuously in said Peale edition and in said Werner edition, the successor thereof, about from the year 1890 to the present time, with the full knowledge and acquiescence of said Adam and C. Black and of other assignors to complainant, and through whom complainant claims the alleged copyright set up in the bill herein, and that by reason of said long delay of about thirteen years by complainant and its assignors in setting up the alleged rights mentioned in the complaint defendant has been unable to procure the evidence of the writers of the said Peale articles, and of a number of other witnesses acquainted with the facts necessary and material to the defendant for its defense herein; that some of said witnesses have removed to parts unknown, and others have died; that by reason of such delay defendant and its predecessors in business have been induced to believe and have constantly believed that the Peale and the said Werner editions of the *Encyclopedia Britannica* were in no way infringements of any rights of the said firm of A. and C. Black, or of any persons claiming under said firm, and have been led to expend and have expended great sums of money in improving the said editions; that by reason of such delay the said firm of A. and C. Black, if it ever had any such right as it set up in the bill of complaint, has lost the same, and could not, and legally did not, convey to complainant, or to any

person claiming under the said firm of A. and C. Black, any rights whatever, or any right to the relief, or any part thereof, set up in the complaint herein; and further denies that complainant ever acquired or now has any such rights."

The knowledge of the complainant's assignors is here sufficiently averred, I think, to open the way for and to require full proofs taken in the regular course of procedure before the court would undertake to pass upon the question of their knowledge and acquiescence. I would reverse the order granting a preliminary injunction, and remand the cause to the Circuit Court, to the end that full proofs should be taken touching the rights of the parties, before decree.

134 F.—65

END OF CASES IN VOL. 134.